

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI DISTRICT REGISTRY)
AT MOSHI**

MISC. CIVIL APPLICATION NO. 5 OF 2022

(From Misc. Civil Application No. 12 of 2021 before the Court of the Resident Magistrate for Moshi. Original matter Shauri la Ndoa Na. 6/2021 before the Primary Court for Siha District at Sanya Juu.)

**NELSON ELIFALET MMARI.....APPLICANT
VERSUS
VERYNICE JACKSON KIMAMBO.....RESPONDENT**

RULING

Last Order 22/12/2022
Date Ruling: 24/2/2023

MASABO, J:

Nelson Elifalet Mmari, the applicant herein, was the petitioner in *Shauri la Ndoa* Na. 6/2021 before the Primary Court for Siha District at Sanya Juu. As the petition was pending hearing, his wife, Verynice Jackson Kimambo, the respondent herein, who was also the respondent in the said petition, moved the Court of the Resident Magistrate for Moshi for transfer of the petition on grounds that she has secured services of an advocate. Further, she stated that the transfer was necessary because the primary court had no jurisdiction to entertain the petition as it emanated from a Christian marriage. Satisfied that there were good reasons for transfer, the Court granted the prayer and transferred the petition to its self.

The appellant is displeased. He thinks the transfer was wrong. He has thus moved this court by way of revision praying that it be pleaded to call,

examine and revise the proceedings and the transfer order for purposes of satisfying itself as to the correctness, legality and propriety and having done so, quash and set aside the proceedings and the transfer order. Bracing the application is an affidavit deposed by the applicant in which he narrated the background of the application and deposed that the transfer was not only based on wrong principles but it is prejudicial to him. The couple had a matrimonial home at Sanya Juu. Thus, it is geographically and economically convenient to have the petition entertained and determined at Sanya Juu by the primary court or the District Court for Siha also located at Sanya Juu. Both courts are situated in less than a kilometer from their matrimonial home compared to the RM's court which is situated approximately 45 kilometers from Sanya Juu. It was deposed further that, the transfer order disregarded the fact that he is domiciled at Boma Ng'ombe, Hai and that it will be costly for him to attend court proceedings in Moshi. He deposed further that, the procurement of his witnesses who are situated at Sanya Juu is also likely to be prejudiced. The respondent was opposed to the application. She filed a counter affidavit in which she disputed all the averments and put the applicant to strict proof.

Hearing of the application proceeded in writing. For the applicant who was represented by Mr. Elibariki Maeda, learned counsel, it was submitted that the transfer was unjustified as the procurement of the services of an advocate which was cited as one of the grounds for transfer does not constitute a good ground for transfer as stated in **Aboubakakar Mohamed Mlenda v Juma Mfume** (1989) TLR 145. Moreover, at the time of the

transfer the law on legal representation before primary courts had changed. Already, the Parliament had passed the Written Laws (Miscellaneous Amendments) Act (Act No. 5 of 2021) by which advocates were afforded audience before primary courts presided over by resident magistrates. Thus, it was not necessary to have the petition transferred to the RM's court as it could have been entertained and determined in the primary court. In the alternative, it was argued that, even if the transfer was necessary, the petition ought not to have been transferred to the RM's court as the District Court of Siha and District Court of Hai which are more proximate to their place of abode have jurisdiction over the petition. Thus, it would have been convenient and more appropriate to transfer the petition to any of these two district courts. In further amplification, it was argued that the transfer order ignored the costs likely to be involved in accessing the RM's court and in procuring witnesses.

Moreover, Mr. Maeda argued that section 18(1)(b) of the Magistrates' Courts Act [Cap 11 RE 2019] when read together with section 76 of the Law of Marriage Act [Cap 29 RE 2019] clothes primary courts with jurisdiction over matrimonial causes as held in **Leticia Mtani Ilonde v Adventina Valentina Masonyi** (as Administrator of the late Barltazari Kichinda) Civil Appeal no. 521, CAT. Thus, the RM's court acted with illegality when it held that primary courts are not clothed with jurisdiction over matrimonial proceedings arising from Christian marriages. Summing up his submission, Mr. Maeda prayed that the lower court record and the transfer order be quashed and set aside.

Mrs. Elizabeth Minde for the respondent argued that the transfer violated no law as primary courts, district courts, courts of resident and High Courts have concurrent jurisdiction over matrimonial proceedings. As regards engagement of legal services, she submitted that the law affording advocates audience before primary courts came into being after the institution of the application for transfer. It came into force after the application had been filed in court. She added that as this law has no retrospective effect, it is inapplicable on matters filed before its enactment. The counsel argued further that good and sufficient reasons for transfer were demonstrated thus, the transfer order cannot be faulted. Regarding the alleged costs, it was argued that none of the parties reside at Sanya Juu. The applicant is currently domiciled in Tabora and the respondent is at Bomang'ombe. Hence, the issue of costs shall not arise. Lastly, it was argued that although the applicant is opposed to the transfer, he has not demonstrated how it will prejudice his right. Thus, the application should be dismissed.

I have carefully considered the submissions from the parties. In preface, further to the Civil Procedure [Cap 33 RE 2019] this court derives its revisional powers from sections 43 and 44 of the Magistrates' Courts Act [Cap 11 RE 2019]. Section 44(1)(b) which is more relevant to the application at hand provides that,

44.-(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court-

(a) n/a

(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, **if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit:** [Emphasis added].

Accordingly, a court entertaining an application for revision should, ultimately, decide whether an error material to the merit of the case occasioning injustice is manifested in the proceedings or the decision sought to be revised and if satisfied that the said error is manifested, revise the proceedings and make consequential orders as it seems appropriate. In the present application, the applicant has argued that the lower court proceedings and ruling are pregnant with material errors occasioning injustice to the applicant. His grievances are in four points. In the first point which I would like to start with, he has submitted that engagement of an advocate does not suffice as a good ground for transfer of a case from primary court whereas the respondent has argued that it suffices as a good ground.

Transfer of cases from primary courts to district courts or courts of the resident magistrates' is governed by section 47 (1) of the Magistrates Court Act which state thus:

47.-(1) Where any proceeding has been instituted in a primary court, it shall be lawful, at any time before judgment, for-

(a) n/a;

(b) the district court or a court of a resident magistrate within any part of the local jurisdiction of which the primary court is established, to order the transfer of the proceedings to itself or to another magistrates' court.

The exercise of these powers is within the discretion of the court preceding over the transfer application and, as any other judicial discretion, it need be exercised judiciously based on reasons. One of the reasons justifying the transfer order was legal representation. Mr. Maeda for the respondent had a different view. He opined that it is neither a good or a sufficient ground for transfer. I, respectfully, differ with Mr. Maeda. For a litigant, legal representation by a counsel is not a luxury. It is a fundamental right embedded in the right to a fair trial as provided under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977. Thus, it cannot be overstated that as correctly held by the lower court, it suffices as a good ground for transfer of the case.

As regard the authority cited in fortification of Mr. Maeda's submission, much as it is relevant it no longer represents the position of law as it currently stands. In more recent decisions, the Court of Appeal has underscored not only the importance of legal representation as a fundamental right but the duty of courts to have cases transferred from primary courts to facilitate the enjoyment of such right. One of those authorities is **Agness Simba Mbili Gabba vs. David Samson Gabba**, Civil Appeal No. 26 of 2008 (unreported). In this case, the Court of Appeal was invited to determine a question analogous to the one in the present

applicant. Just like in the present case the matter was instituted in a primary court. Before the commencement of hearing, one of the parties applied for transfer of the matter to the district court on a sole reason that he has secured an advocate to represent him. The reason was found unmerited and the application was refused. When the matter reached the Court of Appeal, it held that:

"It was highly irregular to order a return of the Probate Matter to the Primary court for it to proceed with the appointment of an administrator while knowing that the applicant had engaged the services of an advocate who was barred from appearing in the primary court. In effect, she denied the appellant her right to legal representation)".

From this authority and subsequent authorities, it is obvious that Mr. Maeda's argument is lucidly misconceived as it is vividly clear that the RM's court acted properly when it concluded that engagement of the counsel was a sufficient ground for transfer of the matter to itself.

Turning to the alternative argument, it is the learned counsel's submission that, even if the engagement of an advocate sufficed as a good ground for transfer, the petition ought not to have been transferred as advocates gained audience in primary courts before the pronouncement of the transfer order. The parties appear to have a consensus that the bar for advocates appearance before primary courts as contained under section 33(1) of the Magistrates' Courts Act is no longer in place as it was lifted by the Written Laws (Miscellaneous Amendments) No. 5 of 2021. Their point of contention is on the applicability of the new law to the present case. For the appellant

it has been argued that the changes came before the pronouncement of the transfer order and were brought to the attention of the court while on the other hand the respondent's counsel has argued that the new law was inapplicable to the present case as it had no retrospective application to matters which were already in court at its enactment.

In my scrutiny of the records, I have observed the following. The original matter, Matrimonial Cause No. 6 of 2021 landed in the primary court on 10/6/2021. The application for transfer whose decision is the subject of this appeal was instituted on 30th June 2021 and its ruling was delivered on 30/8/2021. Further research shows that Miscellaneous Amendment Act No. 5 of 2021 which lifted the bar came into being on 11/10/2021, the date it was assented by the President, which was about two months after the transfer order. Thus, the applicability of the new law let alone its retrospective effect to Misc. Civil Application No. 9 of 2021 does not arise as the application was finally determined before it came into force. This is perhaps the reason why, contrary to Mr. Maeda's submission that the application of the new law was raised before the RM's court but ignored, the record from the RM's court is silent on this issue. The silence presupposes that this point has been introduced for the first time in this appeal. In the foregoing, the argument that the resident magistrate's decision was offensive of the law affording advocates audience before primary courts, attracts no weight and is dismissed.

The next point I will now turn to is the finding by the trial court that primary courts do not have jurisdiction on matrimonial causes emanating from Christian marriage. I will not belabour much on this point as it is straight forward. As correctly submitted by Mr. Maeda and conceded by Mrs. Minde, primary courts enjoy concurrent jurisdiction with district courts, RMs' courts and the High Court in all matrimonial causes as per section 18(1) b) of the Magistrate Courts Act read together with section 76 of the Law of Marriage Act. Accordingly, I agree with Mr. Maeda that the RM's court materially erred in law when it cited this point as one of the justifications for transfer.

The last point for determination is on the rest of the grounds adduced by the respondent in support of his application for transfer and the prejudice he is likely suffer if the transfer order is sustained. The applicant has argued that in support of her application for transfer the respondent mentioned lack of confidence in the courts at Siha as one of the grounds for transfer and she amplified that the applicant herein and his family are affluent in their locality hence the apprehension that justice may not be served. This ground is baseless and devoid of merit. It was a mere conjuncture and an unwarranted attack on the justice system which cannot be condoned. In fact, had there been no other reasons in support of the application, it would not have escaped being labeled a forum shopping hence unwelcome. As to the prejudice likely to be occasioned to the applicant in terms of costs in pursuit of the suit at Moshi and the limitation in procuring witnesses, I find the argument logic and valid. However, they do not outweigh the right to legal representation which as forestated is embedded in a constitutional

right to a fair hearing. It should also be noted that, a court exercising powers of transfer under section 47(b) of the Magistrates' Courts Act is at liberty to transfer the proceedings to itself or to another magistrate court within the jurisdiction. The RM's court was, therefore, not obligated to transfer the petition to Siha District Court. Hence, by transferring the petition to itself it offended no law.

In the view of the foregoing, the application partially succeeds to the extent that the lower court erred in holding that primary courts have no jurisdiction over matrimonial causes arising out of Christian marriage. The application is to that extent dismissed as for this error, the proceedings and the ruling being challenged has not manifested a material error to justify the exercise of revisionary powers. The application having emanated from a matrimonial proceeding shall not attract costs.

DELIVERED and **DATED** at **MOSHI** this 24th day of February 2023.

X



Signed by: J.L.MASABO

J.L. MASABO
JUDGE

