CIV/APN/139/89

IN THE HIGH COURT OF LESOTHO

In the Application of:

'MAMAHASE MAHASE (nee Mosoang) Applicant

and

THABISO VICTOR MAHASE ..... 1st Respondent
PRESIDENT - MAJARA LOCAL COURT... 2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 27th day of February, 1990.

On 19th June, 1989, the applicant herein filed with the Registrar of the High Court a notice of motion in which she moved the court for an order framed in the following terms :

"(a) That the case No. CC 68/89 of Majara Local Court to be heard on 21st June, 1989 be removed to the above Hon. Court where it shall be heard and dealt with;

(b) Further and or alternative relief.

(c) Costs of suit."

Although they were duly served with the motion papers the Respondents have not intimated intention to oppose this application. It may, therefore, be savely assumed that they are prepared to abide by whatever decision the court will arrive at.

The facts that emerge from the founding affidavit are that in April, 1980 the applicant and the first respondent who are the residents of Khubetsoana in the district of Maseru got married to

2/ each other .....

each other in accordance with Sesotho Law and Custom. The marriage still subsists and three (3) children were born of the marriage.

In 1986 the first Respondent developed a habit of drinking excessively, assaulting the applicant and sleeping away from the matrimonial home. Consequently on 2nd October, 1988, the applicant left the matrimonial home and went to live at her maiden home. She took with her the minor children of the marriage. Wherefor, the first Respondent sued her (under CC 68/89) before the Majara Local Court for the dissolution of the marriage concluded between them.

The applicant then instituted the present application for the relief set out in the notice of motion. The grounds upon which the applicant relies for the relief sought in the notice of motion are that she intends to defend the action and counter claim against the first Respondent. In addition the applicant avers that ever since she left the matrimonial home the first Respondent, who is a business man and, therefore, able to maintain her and the minor children of the marriage, has failed to afford her and the children adequate support. She intends, therefore, to ask, in her counter claim against the first Respondent, for an order of maintenance for herself and the minor children, as well as for the custody of the children, all of which reliefs the local court has no jurisdiction to grant.

It cannot be seriously argued that a civil action for the dissolution of a marriage concluded in accordance with Sesotho Law and Custom is within the jurisdiction of the local and central courts. That being so, S.6 of the High Court Act, 1978 clearly provides:

"6. No civil cause or action within the jurisdiction of a subordinate court (which expression includes a local or central court) shall be instituted in or removed into the High Court save .- (a) by a Judge of the High Court acting by his own motion.

or

(b) with the leave of a judge upon application made to him in chambers and after notice to the other party."

(My underlining)

By the use of the word "shall", it seems to me that the provisions of the above cited section are imperative. Granted that an action to dissolve a customary law marriage is within the jurisdiction of the Local and Central Court, it necessarily follows that it cannot be instituted in or removed into the High Court subject, of course, to the provisions stipulated under paragraphs (a) and (b) of section 6 of the High Court Act, 1978.

On the papers before me, it is clear that the applicant seeks the removal of Civil case No. CC 68/89 from Majana Local Court to the High Court and makes reliance on the provisions of S.6(b) of the High Court Act, 1978 which empowers this court with the discretion to do so. Such discretion must, however, be always exercised judicially and not whimsically.

As it has already been pointed out earlier, the grounds upon which relief, in terms of S.6(b) of the High Court Act, supra, is sought is firstly that the applicant intends to defend the divorce action instituted against her by the first Respondent and counter-claim, secondly the applicant intends applying for an order compelling the first Respondent to maintain her and the minor children of the marriage as well as for the custody of the children.

4/ As regards .....

As regards the first ground there is no doubt in my mind that if she intended to defend the divorce action (CC 68/89) instituted against her by the first Respondent, the Majara Local court, which is a court of law, would afford her the opportunity to do so. Assuming the correctness of her averment that she intends counter claiming in CC.68/89 it seems to me what the applicant really wants to do is to contend that she, and not the first Respondent has ground for divorce. The relief sought by the latter in the above mentioned case (CC.68/89) should, therefore be granted to her.

In her counter claim the applicant will, in effect be instituting, against the first defendant, another civil action for the dissolution of their customary law marriage which action, as it has already been stated, is within the jurisdiction of the local and central courts. The removal of CC.68/89 from the Majara Local to the High Court cannot in my opinion be justified on the first grounds relied upon by the applicant.

Coming now to the second grounds viz. custody of the children and maintenance, it is significant that Section 34(5) of Part II of the Laws of Lerotholi provides in part :

> "(5) A court granting dissolution of such a marriage shall make an order regarding the retention or return of "bohali", cattle, and to whom the children, if any, shall belong ....."
>
> (My underlining)

I have underscored the word "shall" in the above cited Section 34 (5) of Part II of the Laws of Lerotholi to indicate my view that upon the dissolution of a customary law marriage the court must decide, inter alia, with which of the two parents the children will remain. Where a local court is already seized with

a civil action for the dissolution of a customary law marriage I do not, therefore, consider it proper for the High Court to exercise its powers under section 6 of the High Court Act, 1978 simply to pre-empt the decision which the former court is, in law, bound to make.

As regards the question of maintenance of the applicant I fail to understand how the first Respondent can be legally liable to pay maintenance fee for her after the dissolution of the marriage. He will, of course, always have a duty to maintain the minor children of the marriage. However, action for such maintenance is triable before the magistrate courts which the applicant is free to approach at any time. It seems to me, therefore, there is no need for the applicant to have CC.68/89 transferred to the High Court simply to obtain an order compelling the first Respondent to maintain the minor children of the marriage.

From the foregoing, it is obvious that I am not convinced that, on the papers before me, the applicant has established a case for the removal of CC.68/89 from Majara Local to the High Court.

I would, in the circumstances dismiss this application.

B.K. MOLAI
JUDGE.

27th February, 1990.

For Applicant : Mr. Monaphathi

For Respondent : -