



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Suit 38 of 2008

ADAN ISAAK ALIPLAINTIFF

VERSUS

ISMAIL ISSACKOW HASSANOY 1ST DEFENDANT
ADOY MOHAMUD HUKA2ND DEFENDANT

R U L I N G

By a Notice of Motion dated 12th June 2009 made under Order L Rule 1 of the Civil Procedure Act, the defendant pray that this suit be struck out with costs. There is an alternative prayer, that it be transferred to Mandera Magistrate's Court for trial and determination.

It is based on grounds that:-

- (1) The suit was instituted contrary to the provisions of section 12 of the Civil Procedure Act and is therefore an abuse of the court process.
- (2) The Defendants have been deprived of a benefit conferred by law and stand to suffer serious prejudice.
- (3) The immovable property is situate within the local limits of Mandera Magistrate's Court.

In the supporting affidavit sworn by Ismail Isaackow Hassanoy, it is deponed that the immovable property is situate in Takaba District and was purchased at a sum of Kshs. 40,000/- in the year 2003 – so it falls within the jurisdiction of the subordinate court at Mandera.

It is his contention that plaintiff has chosen a forum convenient to him, yet in terms of territorial jurisdiction this suit ought to have been filed in Mandera. It is also pointed out that 2nd defendant is an old woman who rarely travels, and a journey from Takaba to Malindi takes at least five days, and given the health condition of the 2nd defendant, such travel would affect her adversely.

Furthermore, it is expensive – especially bearing in mind that defendant/applicant witnesses are drawn from Takaba and Mandera and they cannot afford the expense of transporting witnesses to Malindi. He urges the court to consider the provisions of section 12 Civil Procedure Rules and transfer the suit as sought bearing in mind that from Takaba to Malindi is about 500kms away.

The application is opposed in the replying affidavit sworn by Adan Isaak Ali (Plaintiff/respondent) he confirms that the immovable property is situated in Takaba, Mandera, but that its value has appreciated to about Kshs. 1.1million, hence the lower court in Mandera cannot deal with it since its pecuniary jurisdiction is limited to Kshs. 500,000/-. He insists that Takaba is nearer to Malindi than to Meru and a journey merely takes a few hours through the Malindi –

Lamu Road as opposed to the Nairobi- Garissa Road which can take about 2-3 days. As for witnesses' expenses, he states that he is in the same boat, since he too has witnesses how will travel from Takaba.

Further that defendants/applicants have threatened his life including an incident on 6th April 2008 when he went to visit the plot and was

accosted by three hooded people and he has reported the incident to Takaba vide OB No. 20 of 06-04-08 whose copy is not annexed.

In any event respondent states that he is guided by legal notice No. 1756 of 19th February 2009, published in the Kenya Gazette issue of 27-2-09 where the Chief Justice gave directions on filing and prosecution of suits generally and allowed for matters emanating from North Eastern Province whose lower courts include Garissa, Mandera and Wajir, there being no specific High Court attached thereto to exercise the supervising role, left a leeway to parties to see how to go about the matter, and it was in that spirit that the High Court in Meru directed that the matter be dealt with by the High Court Malindi – a copy of the gazette notice is annexed as AIA -4.

In arguing the application on behalf of the applicants, Mr. Mabeya submits that the Civil Procedure Act is very clear as to where suits should be filed, and although the High Court has unlimited jurisdiction, there would be no point in overloading the High court with suits which can be handled by the lower court. He pokes holes at the respondent's replying affidavit about the appreciation in the value of the property saying there is no valuation report annexed and what is deposed in that affidavit is speculative as there is nothing showing the current market rates of the property.

As to the allegations about threats to respondent's life – he points out that applicant has not been charged in court and **an OB number proves nothing. Mr. Shujaa submits that** there is no need to strike out the plaint and in any event the application was made under wrong procedure – it ought to have been by way of chamber summons under Order VI Rule 13(d) and not Order L Rule 1 or section 3A.

I agree with Mr. Shujaa on that part – I need not belabour it. In any event striking out for the reasons given would only lead to delaying the matter and causing parties to incur expenses in terms of filing fees.

With regard to transfer, Mr. Shujaa submits that section 2 of the Civil Procedure Act is subject to the pecuniary jurisdiction and other limitations prescribed by law. He urges this court to take judicial notice that land value in

Kenya has increased and this court should hold that Mandera court does not have pecuniary jurisdiction.

It is not in dispute that the subject matter and cause of action arises in Mandera. It is also not in dispute that the defendant, defence witnesses and some of the plaintiff's witnesses live in Mandera. Under section 11 of the Civil Procedure Act, it is provided as follows:

“Every suit shall be instituted in the court of the lowest grade competent to try it”

Section 12 (a) states;

“Subject to the pecuniary or other limitations prescribed by any law, suits for the recovery of immovable property...where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business or personally works for gain”

This provision bends over backward to the convenience of the defendant and not as plaintiff would wish to have it. However his argument is that the court in Mandera lacks pecuniary jurisdiction.

This is property which was purchased in the year 2003 at Kshs. 40,000/- and while I acknowledge that the value of land has risen in Kenya – this cannot be a reason to assume that within seven years, the value has shot to over Kshs. 1million – if that was respondent's contention, then he ought to have presented to this court a valuation report to confirm what he states – in the absence of that then, section 12 comes into application.

As for the threats to his life – he has not annexed a copy of the

OB report nor is there any evidence that police investigations linked the applicants to the three hooded individuals, nor is there any demonstration that applicants have been arrested and charged in relation to that incident, and it remains mere speculation and/or suspicion. The order purportedly made by High Court Meru to transfer this matter to High Court Malindi is not annexed, but even if that was the position, it would not defeat this application, for the simple reason that the initial transfer was on account of convenience NOT jurisdiction,

which was not addressed/argued before the Meru High Court.

Under the circumstances then, I direct that the Deputy Registrar do immediately take steps to transfer this file to Mandera Magistrate's Court for hearing and determination.

Costs of this application shall be borne by the respondent/plaintiff.

Delivered and dated this 24th day of **June 2010** at Malindi.

H. A. Omondi

JUDGE

Mr. Mrima for Respondent

Mr. Mayaka holding brief for Oriaro for applicant