



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 303 of 2003

CECILIA WAIRIMU NJAGI

2. MARGARET NJERI NJAGI (Both Suing as Administrator of the estate of Josephat Njagi Ndiga)PLAINTIFFS

VERSUS

1. JACKSON MURITHI KATHONGO (sued as the legal representative of MICERE KATHONGO)

2. BENARD MURAGE GERALDDEFENDANT

RULING

The 3rd defendant namely Bernard Murage Gerald has moved to this court under Order XLVI Rule 5 of the Civil Procedure Rules seeking an order that the honourable court be pleased to order that the suit herein be heard and tried in the High Court at Embu and that costs be provided for.

The grounds in support are set out in the body of the application, supporting affidavit and oral submissions in court. The major ones are:-

- (1)** The subject matter of the suit as well as the litigants are all from Kirinyaga District.
- (2)** Kirinyaga District falls under the supremacy jurisdiction of the High Court at Embu.
- (3)** That if the matter is directed to be heard and determined at Embu High court, it will help in wilting down costs of travelling and inconvenience to all the parties concerned.
- (4)** No prejudice will be suffered by either party if the matter is directed to be heard and determined at Embu High court.
- (5)** Even the plaintiffs amended plaint pleads that all the parties reside in Kirinyaga District.
- (6)** The distance from the parties residence to Embu High Court is 30 km as opposed to 120 kms to Nairobi.

The first defendant Jackson Muriithi Kathogo supports the application because:-

- (1) It will be convenient for him to be heard in Embu.
- (2) Cost of transport from their home to Embu will be only Kshs.50/= as opposed to 250/= to Nairobi.
- (3) Additional expenses involve costs of accommodation in Nairobi and expenses for a guide as he himself is illiterate.

The plaintiff/respondent put in a replying affidavit in opposition to the application. The major grounds are:-

- (1) She has authority from the co-wife to swear the replying affidavit which authority was not annexed as such the co-wife is to be taken not to have opposed the application.
- (2) That the applicants move is calculated to serve the applicants own personal and selfish interests which were not disclosed, save that it is indicated that the applicants work station is not Embu and on that account there is no doubt that he wants the matter taken to Embu for his own personal convenience.
- (3) That the case was filed in this High court in 2003. Since then several appearances have been made and at no time has any party ever missed to attend.
- (4) They agree the parcels of land subject to this suit are situated in Kagio under the supremacy jurisdiction of Embu High Court, but to her it is more convenient to get to Nairobi from Kagio than it is to get to Embu.
- (5) That here and the family will not be conformable if the matter is taken to Embu.
- (6) That the court has jurisdiction to deal and determine the matter in question.
- (7) That the suit has matured and what is pending is simply hearing of the same. The fear is that if it is relocated to Embu it might take long and thus prevent it from being heard expeditiously contrary to the wishes of the parties.
- (8) The legal notice referred to namely 299 of 2007 where by direction is given that suits be heard in courts nearest to them operate to affect new matters to be filed and not the cases that are already filed in court.
- (9) The court is urged not to pay attention to issues involving the distance involved but pay attention to issues of speedy disposal of the matter.
- (10) Reiterates that continuance of the trial here will not cause any inconvenience as the court attendance on the part of all the parties has been up to date and thus no party has complained of any inconvenience.

In reply counsel for the applicant reiterated that it is not yet too late to redirect the file to Embu because pre trials have not been completed. They still maintain that no prejudice will be suffered by either party and the Embu High Court has jurisdiction.

This court, has given due consideration to the rival arguments herein, perused the documents, relied upon by either side and proceeds to make the following findings on the matter:-

- (1) It is agreed by both sides and it is common ground that the subject matter is situate, and the litigants all reside within the jurisdiction of Embu High Court.
- (2) That the High Court as established by Section 60 of the Kenyan Constitution has unlimited countrywide jurisdiction in both civil and criminal. It therefore follows that by virtue of this power, any High Court is competent to hear and dispose of any matter from whichever part of the country.

(3) It is trite law, and this court has judicial notice of the same that the Civil Procedure Act provisions empowering the High Court, to exercise supervisory powers over the subordinate courts whereby the High Court has power to transfer a matter from itself to the subordinate court and from the subordinate court to itself and from one subordinate court to another does not apply to the High Court. There is no provision whereby one High Court can transfer a matter from itself to another High Court as a transfer.

(4) The applicant no doubt was alive to this position and that is why he chose not to cite any of the Civil Procedure Act provisions and chose to seek a venue through Order 46 Rule 5 Civil Procedure Rules. These provide:-

“5(1) Every suit whether instituted in the central office or in a district registry of the High Court shall be tried in such a place as the court may direct and in the absence of such direction, a suit instituted in the central office shall be tried by the High Court, sitting in the area of such central office and a suit instituted in a district registry shall be tried by the High Court sitting in the area of such district registry.

(2) The court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties, and of their witnesses, and to the date on which such trial is to take place, and all the other circumstances of the case.

5A Notwithstanding anything in Rule 5 or in any other provisions of the rules, civil proceedings by or against the Government in the High Court shall not except with the consent of the Government be directed to be tried elsewhere than at the High Court sitting in the area of the central office.”

A reading of the afore set out provision reveals that, in order to avail oneself of this provision such a party has to satisfy certain ingredients namely:-

(i). The suit must have been instituted either in the Central Registry or in the District Registry. The suit herein was instituted in Nairobi. This court, has judicial notice of the fact that Nairobi is usually known as the central registry. It also has judicial notice of the fact that outposts are called District Registries. For this reasons Embu High Court would qualify to be known as a District Registry.

(ii). The trial of such a suit, may be tried in such a place as the court may direct. The exercise of this power is discretionary. This court has no doubt that like all other judicial discretions, this one too is required to be exercised judiciously. The word used is “direct” and not transfer. Herein the High Court has not directed as to which place the suit is to be heard. Hence the applicant’s request that the suit be heard at Embu Registry.

(iii). If no direction is given, then the suit will be tried where the same has been instituted.

(iv). There is jurisdiction for the court, either on its own motion or upon the application of any party to order that a case be tried in a particular place. This jurisdiction has however a fetter attached to it. The fetter is that, good cause, has to be shown. Herein the court has not acted on its own motion. It is a party who has applied and as such he has to show good cause. The second fetter is that if the court decides to direct that the suit be heard in any other place other than the place where it was instituted, the court, has to have regard to the convenience of the parties and their witnesses and to the date when the trial is to take place.

This court has applied these two fetters to the rival arguments on record and makes a finding that the cause demonstrated by the applicant is that:-

(a) Embu High Court has jurisdiction to determine the matter. The respondent does not dispute this fact.

(b) That the subject matter as well as all the litigants come from Kagio village in Kirinyaga which is 30

kms from Embu. The respondent does not dispute this.

(c) That costs on transport and witness expenses will be lessened if the trial is moved to Embu. The respondent did not comment on the issue of the travelling and witness expenses being lessened if the trial is shifted to Embu.

(d) That the new location will be convenient to all the parties. The respondents response to this is that the move will only serve the convenience and personal reasons of the applicant but did not disclose what she meant by the applicants own convenience and comfort. She however did not herself demonstrate the inconvenience that either the plaintiffs and or the defendants would suffer if the trial is shifted.

(e) The date of the trial too is to be considered. The applicants stand is, that pre trials have not been complied with, and as such the suit is not ripe for trial and so no inconvenience will be caused. The respondent's response to this is that relocation will cause a delay.

Due consideration has been given to all the afore mentioned matters for and against the application and the court, is of the opinion that the applicants good cause demonstrated herein has not been ousted by the respondents opposition. More so when the now 2nd defendant has been supported by the first defendant. The second plaintiff is also to be taken not to be in opposition as the authority to depone on her behalf is not annexed. The court therefore takes it that 3 litigants are in favour of the redirection and its only one who is not in such a favour whose reasons for opposition have been ousted.

In addition to the above reasoning, this court, takes judicial notice of the fact that the idea of opening out posts though not mentioned in Order 46 Civil Procedure Rules was for purposes of bringing delivery of judicial services closer to the litigants, and in doing so cut down on travel expenses and minimize costs. This is one of the reasons put forward by the applicant and this court, makes a finding that justice will be best served by the parties seeking justice from the High Court nearest to them, to save on travel costs and witness expenses. The court, also makes findings that it will be convenient and less expensive to ferry witnesses to Embu High Court than Nairobi. This may also cut down on accommodation costs both for parties and their witnesses as they can operate from home.

As for hearing dates, this court is not in a position to comment about the condition of the diary in Embu. However, that notwithstanding this court can include a clause in the directives, to the effect that, in view of the age of the suit, the same be handled on priority basis both at the pre trial and trial stages.

For the reasons given, this court, finds merit in the applicants' application dated 26th November 2007 and filed the same date. The same is allowed on the following terms:-

- (1) Directions be and is hereby given that the trial of this matter be held at Embu High Court.
- (2) In view of its age, the same be accorded priority basis both at the pre trials and the main trial.
- (3) Due to the countrywide jurisdiction vested in the High Court, no party will be penalized to pay costs for the application. Each party will bear own costs.

DATED, READ AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2008

R. N. NAMBUYE

JUDGE