



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**

**Misc Civ Appli 137 of 2005**

**JEREMIAH MUNYA ITURUKI ..... APPLICANT**

**VERSUS**

**LOISE WAMBUI KANGETHE ..... RESPONDENT**

***(Being an application for transfer of suit under section 18(1) (b) (ii) of the Civil Procedure Act, Cap 21 Laws of Kenya)***

**RULING OF THE COURT**

The application before me is an Notice of Motion dated 18.7.2005 brought under section 18(1) (b) (ii) of the Civil Procedure Act, Cap 21 Laws of Kenya. The applicant prays for ORDERS:-

1. That this application be certified urgent and be heard on priority basis.
2. That the honourable court be pleased to withdraw Limuru Senior Resident Magistrate's civil suit No. 262 of 2005 and transfer it for trial and disposal in the Isiolo Resident Magistrate's court.
3. That the honourable court do make such further or better orders to meet the ends of justice.
4. That costs be provided for.

The application is premised on five brief grounds on the face thereof:-

1. That the applicant neither resides nor works for gain in Limuru.
2. That the cause of action arose in Isiolo
3. That the respondent has filed another suit involving the same parties which is SRMCC No. 27 of 2005 at Isiolo.
4. That the Isiolo court is competent to try this suit and the issues raised in both matters are similar.
5. That the respondent is only out to punish the applicant by filing the said suit in Limuru.

The application is also supported by the applicant's affidavit made and sworn on 18.7.2005. He has deponed that the respondent has sued him in Isiolo SRMCC No. 27 of 2005 and that the said Isiolo suit is still pending. A copy of the certificate of urgency, chamber summons, supporting affidavit and plaint are annexed to the affidavit and marked "JMII". In the plaint dated 16.6.2005, the respondent herein describes herself as an adult male of sound mind residing and working for gain in Limuru while she avers that the applicant herein is an adult male of sound mind residing and working for gain at Isiolo. The respondent also avers at paragraph five of the plaint that her marriage to the applicant herein was formalized under Meru customary law on diverse dates in the year 2001 and in particular the 11<sup>th</sup> November 2001.

The applicant also avers in his supporting affidavit to this application that the respondent herein only

rushed to file the Limuru suit after she had failed to stop the marriage between the applicant and one **Rebecca Mwonjiru**, as was her intention in filing Isiolo SRMCC No. 27 of 2005. The applicant also avers that the relationship that existed between him and the respondent was that of friendship and not marriage as alleged by the respondent in Isiolo SRMCC No. 27 of 2005. Further that if there was any cause of action for the Limuru case, the cause of action arose in Meru where the applicant used to visit him. The applicant contends that the respondent having filed the first suit against him in Isiolo, she had no basis for filing the second suit, and within a short space of time, in Limuru.

In the Limuru case no. 262 of 2005, which was annexed to the applicant's supporting affidavit and marked "JMI2", the respondent herein does not give a description of herself, like she did in Isiolo SRMCC No. 27 of 2005, but only gives her address of service. She describes the applicant herein as an adult male of sound mind residing in Isiolo. The respondent avers at paragraph 2 of the plaint that she was married to the applicant under Kikuyu customary law in or about 1990 and that since 1990, they have lived as man and wife at Naivasha town, Meru, Nairobi and finally at Kabuku farm Limuru between 1998 and 2004.

The application is opposed. The respondent filed her replying affidavit dated 7.10.2005 on 11.10.2005. She admits filing Isiolo SRMCC No. 27 of 2005 in which she sought to stop the applicant's wedding ceremony, but that the suit was overtaken by events. She avers that she has abandoned the suit though there is no evidence of how the suit has been abandoned.

The respondent also avers that she filed civil suit 262 of 2005 in Limuru because that is where the "couple's" last matrimonial home was. She states further that the applicant has always paid her house rent in Limuru as per annexures marked "LWKI" pages 1 – 3 being copies of what she says are rent receipts. The receipts are issued by MASTERWAYS PROPERTIES LTD of Old Mutual building, 2<sup>nd</sup> floor, Kimathi Street and of Box No. 38715 – 00600 Nairobi. The receipts are dated 11.5.2003, 22.9.2003 and 10.11.2004. There is also a Rent Demand Notice by the same Masterways Properties Ltd, calling upon the applicant to pay up the arrears of rent amounting to Kshs. 2,300/= by 13.11.2003. The notice is dated 12.11.2003. It is to be noted that neither the receipts nor the Rent Demand Notice give details of the premises in respect of which the rent is paid and/or demanded.

The respondent has also annexed to her affidavit school fees payment receipts in respect of the issue of the relationship between the applicant and the respondent, namely Faith Karimi Munya. The receipts are issued by Limuru Model Primary Academy as well as The Red Hill Academy in the years 2002 and 2003. The respondent avers that these receipts are proof of the fact that her matrimonial home is in Limuru hence her decision to file the Limuru case at Limuru. The respondent also states that she has been living with the applicant's children from his deceased first wife. She also annexed copies of letters written to her by the applicant and also by some of the applicant's children by the first wife. Finally, the respondent contends that the witnesses she intends to call for her Limuru case all live in Limuru and that it would be a great burden to her if the said case were to be transferred to Isiolo for hearing and final determination.

By leave of the court granted on 18.10.2005, the applicant filed a further supporting affidavit on 1.11.2005. He avers therein that the only reason why the respondent decided to file the suit in Limuru is to frustrate him. He denies ever having worked in Limuru. He contends that if indeed the marriage between her and the respondent took place in Meru where even the only issue of that relationship was born, then the divorce suit ought to be filed where the cause of action arose.

What does the law say regarding the transfer of suits?

Section 18(1) (b) (ii) of the Civil Procedure Act (the Act) under which this application is brought stipulates as follows:-

*"18. (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage –*

(a) .....

(b) *Withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter –*

(i) .....

(ii) *Transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or*

(iii) .....

The place of suing in suits of this kind is provided for under the provisions of sections 11, 12 and 14 of the Act. Section 11 provides for filing of suits in a court of the lowest grade competent to try it. Under section 14 of the Act, a suit for compensation for wrong to the person or movables may be filed within the local limits of the jurisdiction of any court where either the cause of action arises or the defendant resides.

The parties in this case hold parallel views as to why or why not the Limuru suit should be withdrawn and transferred to Isiolo for final hearing and determination. As I set out to determine this issue, I must point out the discrepancy in the respondent's pleadings regarding the fact of whether she and the applicant were married under Meru or Kikuyu customary law. In the Isiolo case, she avers that she and the applicant got married under Meru customary law in the year 2001 while in the Limuru case, she avers that she and the applicant got married under Kikuyu customary law in 1990. In the chamber summons supporting the Isiolo case, the respondent also says that she and the applicant have been legally married since the year 1990. From those pleadings therefore, the court is unable to determine when the respondent and the applicant got married and whether they were married under Meru or Kikuyu customary law.

This anomaly in the pleadings has a great bearing on why the two suits were filed in different courts and within a short space of time of each other.

Now turning to the application itself, I am persuaded that the applicant has made out a case for the withdrawal and subsequent transfer of Limuru SRMCC No. 262 of 2005 and subsequent transfer to Isiolo SRM's court for hearing and determination. First and foremost, it is clear to me that the respondent decided to file the Limuru case after she was overtaken by events in the Isiolo case in which she failed to stop the marriage between the applicant and one Rebecca Mwonjiru. Though she contends that the reason why she filed the subsequent suit in Limuru is because of the convenience it would offer her, I am not satisfied that this is the case. It is not in doubt that she would have required those same witnesses for the Isiolo case. In any event, since it is not clear as to whether the respondent got married to the applicant under Meru or Kikuyu customary law, and since it is also not clear when the marriage was solemnized, I am inclined to conclude that the cause of action arose in Isiolo where the applicant resides and also where the marriage that the respondent had sought to stop was solemnized.

In the case of *Yolamu Kaluba V. Kerementi Kajaya* (1957) EA 312, a case that was cited with approval by Nyamu J. in *Ngoru Enterprises Ltd. Vs. Charles Mwangi Gitondu t/a Rural Technology Enterprises - Misc. Application No. 826 of 2003*, it was held by the High Court in Uganda that the discretion to transfer suits:-

*“should not be exercised without some reason stronger than the mere balance of convenience.....”*

In the present case, the respondent is relying only on balance of convenience to her without considering other factors and the provisions of the law.

Applying other principles such as those enunciated in the case of *Kagenyi V. Musiramo & Another* (1968) EA 43, which principles were applied in the case of *Kirinyaga County Council v. Kenya Nut Co. Ltd & Another – Misc. 297 of 2000*, I find that since the Limuru case was filed in a court which has jurisdiction to try it, and since I have also found that there are no good grounds put forward by the respondent as to why she did not file the suit where the cause of action arose and where the

applicant/defendant resides, then it is only fair that the Limuru suit be withdrawn and transferred to Isiolo for trial and determination.

I am aware of the provisions of section 3(2) of the Magistrate's Courts Act which provides that a court of the Resident Magistrate (which is defined to include a Senior Principal Magistrate's Court) has jurisdiction throughout Kenya. The reason why I have made a finding in favour of the applicant in this case is because it is evident that the respondent filed the Limuru case in an effort to get even with the applicant against whom she had failed to obtain injunctive orders in the Isiolo` case. She has only used the convenience of the witnesses as an excuse.

I have also found that the Isiolo case is still very much alive. Although the respondent averred in her affidavit that she has abandoned that suit, there is no evidence to that effect. I am of the view therefore that it would not cost the respondent any more by having the Limuru case heard and determined in Isiolo since there is still a pending case in Isiolo.

For the reasons given above, the application dated 18.7.2005 is allowed and accordingly:-

1. Limuru Senior Resident Magistrate's Civil Suit No. 262 of 2005 is withdrawn.
2. The same is to be transferred for trial and disposal in the Isiolo Senior Resident Magistrate's Court.
3. Costs of this application shall be in the cause.

Orders accordingly.

Dated and delivered at Meru this .....day of ..... 2006.

RUTH N. SITATI

J U D G E