



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT BUSIA**

**Divorce Cause 4 of 2004**

**A O S .....PETITIONER**

**VS**

**L O S .....RESPONDENT**

**R U L I N G**

The matter before this court is a summons filed pursuant to Order XXXIX rules 1,2 and 3 of the Civil Procedure rules and sections 3 and 3A of the Civil Procedure Act. In brief the petitioner who is the husband to the Respondent seeks to bar the respondent by way of an interim order of injunction from alienating, leasing, mortgaging and or dealing in any manner with L.R. No. 214/375 pending the hearing and determination of this petition. The Respondent resisted the summons by filing a replying affidavit. She also filed a notice of preliminary objection dated 15th December 2004.

When this summons came up for interpartes hearing the Respondent's advocate sought to have the preliminary objection disposed of first. I allowed the parties to address me on the issues raised in the preliminary objection.

The Respondent was of the view that this court was not seised with jurisdiction to hear the matter in view of section 12 of the civil procedure Act. It was pointed out that the property in dispute is situate in Nairobi and the parties also reside in Nairobi. It was also said that it was convenient for the parties if the matter was heard in Nairobi. The Respondent also averred that the orders sought if issued would serve no useful purpose because the property in dispute is registered in the joint names of the combatants.

It was finally argued that the summons is not compatible with the petition. The Respondent also saw the summons as a misjoinder in matrimonial causes. She was of the view that the petitioner should have filed a separate suit.

On the other hand the petitioner opposed the preliminary objection on several fronts. The petitioner was of the view that the objection lacked merit because the provisions of section 12 of the civil procedure Act did not apply to these proceedings. He maintained that the High Court had unlimited geographical jurisdiction. The petitioner cited the provisions of section 3 of the matrimonial causes Act Cap. 152 laws of Kenya to show that this court had jurisdiction to issue the orders prayed for.

Finally the petitioner also pointed out that misjoinder of actions cannot render the whole proceedings null and void.

I wish to begin with by thanking both the advocates of the parties for their able submissions and their extensive research over the matters raised at this preliminary stage. The High court has unlimited territorial and pecuniary jurisdiction to hear and determine all disputes filed before it. However it has the discretion to determine where to hear the disputes depending on circumstances of each case.

I will repeat once more that the definition of a preliminary objection was given in the case of **MUKISA BISCUITS CO. LTD VS WEST END DISTRIBUTORS (1969) P. 701** by the court of Appeal for East Africa as follows:

*“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any of the fact has to be ascertained or if what is sought is the exercise of judicial discretion.”*

As far as I can discern the serious points of law raised by the Respondent concerns the territorial or geographical jurisdiction of this court. I have already stated that this court’s jurisdiction is unlimited hence that objection must fail. Even if I was to entertain, it cannot qualify to be dealt with as a preliminary point of law because facts must be ascertained from the affidavits filed in support or against the summons. But at the end of the day the objection will not dispose of the whole matter.

The other issues raised relate to misjoinder of causes of action the fact that the order sought for would be of no useful purpose because the property in dispute is registered in the joint names of the parties.

To be fair to the parties, these are issues which are not purely legal. The facts must be sourced elsewhere. In a nutshell, the same issue can be argued and determined when the summons is argued.

My final decision over this issue is that the preliminary objection though it has some merit must be rejected because it was improperly raised. The issues put forward can safely be argued when the summons comes up for interpartes hearing. Consequently the preliminary objection is dismissed with costs to the applicant.

**DATED AND DELIVERED THIS 4th DAY OF March 2005**

**J.K. SERGON**

**JUDGE**