



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**CIVIL APPLICATION NO.98 OF 2019**

**BJRW.....APPLICANT**

**VERSUS**

**JAN.....RESPONDENT**

**RULING**

The applicant filed an application dated 23<sup>rd</sup> October 2019 seeking the following orders;

***a) Spent.***

***b) This court be pleased to transfer to this court or any court having territorial and pecuniary jurisdiction with regard to the subject matter of the matrimonial cause filed in Busia Divorce Petition Number 11 of 2019.***

***c) Costs be in this Cause.***

The application is premised on the ground that the subject matter of the matrimonial property is situate in Bungoma, Kakamega and Webuye outside the territorial jurisdiction of the subordinate court in Busia. That the petitioner and the applicant had established their matrimonial home in Webuye Sub County outside the territorial jurisdiction of the subordinate court in Busia. That both the applicant and the respondent who has petitioned for divorce in the subordinate court Busia, reside and work for gain within Bungoma County well outside the territorial jurisdiction of the subordinate court in Busia. That it is in the keeping with the procedural imperative directed by article **232(1) (b)** of the **CoK 2010**, that suit herein be heard and determined within Bungoma county.

The application is supported by affidavit of BJW sworn on 22<sup>nd</sup> October 2019. He stated that the matrimonial home is in Matulo within Bungoma County. He stated that they have matrimonial property in Kakamega and a family company [particulars withheld] Limited that operates a bank Account with branch at Webuye. He stated that subject matter of the matrimonial properties are situated in Bungoma, Kakamega and Webuye outside territorial jurisdiction of Busia Court.

The Respondent/Petitioner filed a grounds of opposition to the application on the following grounds;

***i. That the applicant has not filed a Response to Busia divorce petition number 11 of 2019 and/or attached a draft response to the petition to substantiate the issues of territorial and pecuniary jurisdiction raised in the application.***

***ii. That the Respondent is a resident of Busia town as properly captured in the petition hence the decision to file the petition at Busia Law Courts.***

***iii. That issues of sharing and distribution of matrimonial property can only be canvassed through a matrimonial cause filed through an originating summon as opposed to a cross petition in the manner and style purported by the Applicant.***

***iv. That the main issue in Busia divorce petition number 11 of 2019 is the dissolution of the marriage between the applicant and the Respondent.***

***v. That the court in Busia therefore has jurisdiction to here and determine Busia Divorce Petition number 11 of 2019.***

***vi. That there is therefore no basis for granting the orders sought as the applicant has not established that the court lacks jurisdiction to determine the divorce petition which fact would form the basis for granting the orders sought.***

***vii. That the application herein is therefore scandalous, vexatious and otherwise an abuse of court process and the same ought to be dismissed with costs.***

By court direction on the 26.11.2019, the parties were directed to file written submissions to the application and the matter herein was disposed of by way of written submissions.

The applicant filed submissions through Advocate Kapten while the respondent did not file submissions.

Mr. Kapten submitted the respondent to the petition does not reside and or work for gain in Busia where the Divorce Petition was filed and the cause of action did not arise in Busia. He submitted that the matrimonial properties subject to the divorce cause are not situated in Busia where the petition was filed.

Having analyzed the application herein, the Petition and the grounds of opposition and submissions by the parties the issue for determination is whether this court should transfer to this court or any other court having territorial and peculiar jurisdiction with regard to the subject matter of Divorce Petition Number 11 of 2019 filed in Busia.

The question whether or not to grant the application before me seeking orders for transfer of a cause from one court to another is a question of both law and fact. The application herein is brought under the provisions of Section 18 of the Civil Procedure Act as read with Order 50 Rule 1 of the Civil Procedure Rules Section 18 (1) provides that 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. Try or dispose of the same or***

***ii. Transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same***

Subsection (2) therefore provides that where any suit or proceeding has been transferred or withdrawn as aforesaid, the Court which thereafter trying such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

Further, Section 17 of the Civil Procedure Act provides: -

**“17. that where a suit may be instituted in any one of two or more Subordinate Courts, and is instituted in one of those courts, any defendant after notice to the other parties or the Court of its own motion, may, at the earliest possible opportunity apply to the High Court to have the suit transferred to another Court and the High Court after considering the objection, if any, shall determine in which of the several Courts having jurisdiction the suit shall proceed.”**

In addition, Section 15 of the Civil Procedure Act provides that subject to the limitations aforesaid – in Sections 12, 13 & 14, every suit shall be instituted in a Court within the local limits of whose jurisdiction:-

**a. The defendant or each of the defendants at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or**

**b. .... Or**

**c. The cause of action wholly, or in part, arises under Section 12 of the Civil Procedure Act, subject to the pecuniary or other limitations prescribed by any law, (a) for the recovery of immovable property, with, or without rent or profits;**

**b) for the partition of immovable property;**

**c) ...**

**d) ...for the determination of any other right or interest in immovable property where the property is situated in Kenya, shall be instituted in the Court within the local limits of whose jurisdiction the property is situated.**

During the hearing of this application, the Court has considered the submission of the applicant to ascertain information which it considered necessary to guide in the determination of the application. This included looking at annexed petition filed before Busia High Court.

The petitioner in his Petition does not disclose where the respondent herein works or resides. However, the respondent/applicant has stated that he lives and works in Bungoma County.

The matrimonial home is within Bungoma County and some properties are in Kakamega. As this is a divorce or matrimonial cause and the matrimonial home is in Bungoma. I find that the cause ought to have been filed in Bungoma. I, therefore, allow the application and order that Busia Divorce petition No. 11 of 2019 be transferred to Chief magistrate’s Court Bungoma for hearing and determination.

Dated, signed and Delivered at Bungoma this 5<sup>th</sup> day of June, 2020.

**S N RIECHI**

**JUDGE**