



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NUMBER 3 OF 2019

BSO.....PETITIONER

VERSUS

DOO.....RESPONDENT

RULING

Before me is the Notice of Motion dated 16th July, 2019 brought by **DOO** defendant/applicant and supported by his affidavit sworn on even date, and annexures thereto. It is brought under **Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act Cap 21** of the **Laws of Kenya, Order 47 Rule 6(2)** of the **Civil Procedure Rules 2010** and **all enabling provisions of the law** and seeks the orders:-

- 1. THAT this Honorable Court be pleased to order that this suit be tried at Narok.**
- 2. THAT the costs of this application be borne by the Plaintiff/Respondent.**

The main reason for the application is that properties subject to this suit are situate in Narok, except one which is situate in Nyamira County which neighbours Narok County.

The applicant has annexed exhibits **DOO 2, 3, 4 and 5** – documents to demonstrate that locus of the properties.

In response the petitioner/respondent **BSO** through her counsel Hari Gakinya has filed grounds of apposition dated 16th October, 2019;

- 1. THAT it is not fair and just to transfer the suit to Narok.**
- 2. THAT the transfer will only be convenient to one party and not to the other nor to any of the advocates.**
- 3. THAT this court has the necessarily jurisdiction to hear this suit.**

I have carefully considered the affidavit evidence and the grounds of opposition. The respondent has not controverted any of the factual averments made by the applicant regarding the *locii* of the properties.

The issue here is whether this suit ought to be transferred to Narok.

Order 47 rule 6(2) of the **Civil Procedure Rules** provides;

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.”

However the applicable law is **Section 12** of the **Civil Procedure Act – Cap 75 Laws of Kenya** in particular **12 (d)**. It states:

“Subject to the pecuniary or other limitations prescribed by any law, suits –

(a)...

(b)...

(c) ...

(d) for the determination of any other right to or interest in immovable property;

(e) ...

(f)....

Where the property is situate in Kenya, **shall be instituted in the court within the local limits of whose jurisdiction the property is situate**: (emphasis mine)

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or 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 cause was filed vide amended plaint filed on 20th March, 2019. At paragraph 5 – the plaintiff avers that the properties in issue are:-

(a) Plot No. xxxBlock xxx (Residential) in Narok town,

(b) One acre shamba without title at xxxx village.

(c) A family car, station wagon xxxxxxx

(d) Plot No. xxxL.D. BLK xxx

(e) Plot No. xxxL.D BLK xxx

(f) Plot No. xxx Location

(g) Plot No. xxx BLK xxx

All of which the applicant has demonstrated are within the jurisdiction of the High Court of Kenya at Narok. Clearly if we are to consider the provisions of **Order 47 rule 6 (2)** then the applicant has reason to seek the order of transfer.

In the grounds of opposition filed by the Counsel for the respondent he states that any transfer of this matter to Narok will not be fair for the plaintiff and it will favour one party. That it will also inconvenience advocates. However the law speaks for itself.

In addition, I find guidance in *the Hon. Chief Justice’s PRACTICE DIRECTIONS RELATING TO THE FILING OF SUITS, APPLICATIONS AND REFERENCES IN PROPER COURTS, 2009[G.N. 1756/2009.]* Although made under the repealed Constitution, they refer to the application of the Civil Procedure Act as it is.

EXERCISE of the powers conferred by section 65(3) of the Constitution and in pursuance of sections 11 to 18 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya which make provisions for the place of suing according to (a) the pecuniary jurisdiction of the court; (b) the place where the subject matter or property is situate; (c) the place where the cause of action arose; and (d) where the defendants or any of them resides or works for gain, the Chief Justice makes the following practice directions:

1. The place of suing is to be determined in accordance with the provisions of sections 11 to 18 of the Civil Procedure Act and not according to the preference or convenience of the plaintiff. The Courts and the filing registries must strictly observe the provisions as to the place of suing by allowing only those that comply with the law and rejecting those that do not.

Clearly the place for suing is not to be determined by the plaintiff’s convenience, but mainly by the location of the property in issue.

Although this is a matrimonial cause, the bulk of properties are in Narok County. It is also where the defendant resides. It is also where the defendant resides and where the parties had set up their matrimonial home before their marriage broke up. It is from there that the bulk of witnesses mat emanate from. Hence, the law is on the defendant’s side.

Practice Guideline no 2 above provides the way forward:

Where suits have already been filed in the wrong Court, the Court should exercise its authority under Order VII rule 9 of the Civil Procedure Rules to return the plaint to be presented to the court in which the suit should have been instituted, without prejudice to any other powers that it may possess under the law to strike out the pleadings as an abuse of the process of the

Court.

The provisions of Order VII rule 9 are now found in Order 4 rule 9 viz:

Return of plaint [Order 4, rule 9.]

(1) The plaint may at any stage of the suit be returned to be presented to the court in which the suit should have been instituted.

(2) On returning a plaint the judge shall endorse thereon the date of its presentation and return, the name of the party presenting it and a brief statement of the reasons for returning it.

I am therefore moved to allow the application in the following terms:

1. The matter is transferred to the High Court of Kenya at Narok for hearing and determination.

2. The reason is to comply with s. 12 (d) of the Civil Procedure Act Cap 21 LOK as the properties in issue are within that court's jurisdiction.

3. The matter be placed before the Deputy Registrar Narok on the 2nd December 2019 to confirm receipt and for a mention date before the Judge for directions

4. The Respondent to bear the Costs of the application.

Dated, delivered and signed at Nakuru this 14th day of November, 2019.

Mumbua T. Matheka

Judge

In the presence of

Court Assistants Edna and Martin

Ms Karuga holding brief for Ooga for the Applicant

N/A for respondent