



**SANK v BKK (Civil Appeal E115 of 2024)
[2024] KEHC 9457 (KLR) (Family) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9457 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E115 OF 2024
SN RIECHI, J
JULY 31, 2024**

BETWEEN

SANK APPLICANT

AND

BKK RESPONDENT

JUDGMENT

1. This matter relates to appellant and respondent who are the biological parents of the minor subjects. The parties are involved in a custody and maintenance dispute of the minors. The respondent filed a suit before the trial court in Kikuyu Children case No E001 of 2024 vide a Plaint dated 3rd January 2024.
2. The matter was partly heard and interim orders granted. Subsequently the applicant herein has filed this instant application dated 4th June 2024 seeking orders;
 - i. Spent
 - ii. That the suit Kikuyu Children Case Number E001 of 2024 be stayed pending the hearing and determination of this application inter partes.
 - iii. That the suit Kikuyu Children Case Number E001 of 2024 be withdrawn and transferred from Kikuyu Law Courts to Children’s Court at Nairobi for hearing and final determination.
 - iv. That in the interest of justice and this being a matter that involves children, the Court to issue directions as to facilitate the expeditious transfer of the said file to Nairobi Children’s Court for necessary action.



- v. That the court do issue such other orders and directions as expedient in the best interest of the children and interest of justice.
 - vi. That the costs of this application be provided for.
3. The Application is premised on the grounds on face of it and the supporting affidavit sworn by the applicant on even date.
 4. The applicant's case is that the Applicant and the Respondent celebrated their union under Kikuyu Customary Marriage which marriage they later registered at the Office of the Registrar of Marriages in Nairobi on 3rd October, 2019. The applicant stated that currently, the Applicant and the Respondent separated around July, 2023 and are in the process of dissolving their marriage, having filed divorce proceedings in Nairobi Milimani law courts Divorce Cause No E1444 of 2024.
 5. The applicant stated further the parties are the biological parents to the children: EKK-Female born 5th April, 2010-13 years old, FGK-Male born on 1st August, 2013 -10years 10 months and JKL male born 12th March, 2018- 5 years old. It is the applicant's case that the child EKK is currently attending school at (Particulars withheld) Girls School in Nakuru and is in Form 1, while the children FGK and JK are attending school at (Particulars withheld) Preparatory School which school is near where the Applicant resides in Nairobi and are in Grades 6 and 1 respectively. The applicant stated that she currently resides with the children at a rented apartment at (Particulars withheld) Gardens, along Kasuku Road within Nairobi County and from which place they attend their various schools. She averred that she has had the physical custody of the children prior to the filing of the current children case by the Respondent in Kikuyu Law Courts.
 6. It is the applicant's case that the law under section 15 of the [Civil Procedure Act](#), Laws of Kenya provide that every suit shall be instituted in a Court within the local limits of whose jurisdiction the Defendant resides and/ or cause of action arose. The applicant averred that having been the one in whose physical custody the children are in, and the children together with the Applicant having their residence in Nairobi the said case ought to have been filed in Nairobi where the Applicant and the children reside and also where the cause of action arose
 7. The applicant averred that in the circumstance, this Honourable Court is granted the powers to withdraw and transfer the Kikuyu children case E001 of 2024 from the said Court to Nairobi Children Court where the Applicant has been and continues to reside with the children.
 8. The applicant stated that in filing the children case at the Kikuyu law courts, the Respondent did the same in bad faith, as abuse of the court process and so that he can exercise undue influence over the matter since he is residing in Kikuyu and is very well known with connections therein to defeat justice in the current circumstance.
 9. The applicant averred that she is concerned about the manner in which the lower Court has conducted the matter so far. It is the Applicant's strong belief that the children and her stand to suffer bias and injustice if the matter proceeds in Kikuyu Law Courts and before the current lower court handling the same. That there is a likelihood of the children's constitutional rights being denied, violated and/ or infringed if the prayers sought herein are not granted to be allowed as prayed. The applicant stated that it is in the best interest of the children, their welfare and justice that the prayers in the application be granted.
 10. In response the respondent opposed the application and filed a replying affidavit sworn on 11.6.2024. The respondent's case is that Kikuyu Children Case No E001 of 2024 was filed on 3rd January 2024



not only on custody and access but also to prevent the Applicant herein from removing the Children from their home and their former schools in Kikuyu hence it's filing at Kikuyu.

11. It is respondent's case that on 23rd January 2024, the Kikuyu Court on an Interim basis granted the Applicant custody during week days and the respondent on all weekends. It subsequently issued both parents with joint custody over half of school holidays as such, the Minors live partly in Kikuyu which is within the jurisdiction of that Court.
12. The respondent stated that in granting Access Orders, the Court tasked the parties to agree on timelines and location which they agreed as from Saturday 8:00 AM to Sunday 5:00PM at the (Particulars withheld) . The agreement stood in place till early June 2024.
13. The respondent stated further that the Applicant herein sought for maintenance of Kshs 205 000/= per month as well as an Order compelling the respondent to singularly pay school fees in full. That whereas the Court in the interim declined to Order the respondent to maintain the applicant at Kshs 205,000/= per month it Order the respondent to singularly pay School Fees and School related.
14. The respondent stated no Appeal has been preferred as against any of the Orders issued by the Court nor is the Application before this Court an Appeal against the said Orders. The respondent averred that as opposed to appealing, the Applicant has resulted to accusing and maligning the names and image of all judicial officers who have given adverse Orders or failed to give her choice of Orders with the sole intention of intimidating them.
15. The respondent stated that the issues of alleged bias and the Applicant's grievances against the Orders issued by the Court in Kikuyu can only be grounds of Appeal or an Application for recusal and not grounds for transfer.
16. By consent of parties this application was canvassed by way of written submissions. The parties submitted through their respective Advocates on record. The appellant filed written submissions dated 24th June 2024 while the respondent file the submission 2nd July 2024. I have carefully analyzed and considered the submissions and case law relied upon by the parties.
17. On perusal of the Application, the affidavits and the submissions, the main issue for determination are identified as follows:-
 - a. Whether the application herein is competent.
 - b. Whether the application is merited.
18. On the merits of the application, the court will refer to the relevant law. Section 18 of the [*Civil Procedure Act*](#) provides as follows:-

“Power of High Court to withdraw and transfer case instituted in subordinate court

- (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) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (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; or
- (iii) retransfer the same for trial or disposal to the court from which it was

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries 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.”

34. This dispute revolves around the rights of a child. Under Article 53(2) of *the Constitution* and section 8 of the *Children Act*, 2022 this court in making a decision should consider the paramount principle of what is in the best interest of the children.
35. The applicant states in her affidavit that she stays in Nairobi with the children of the marriage. She states further because of that reason the matter should have been filed in Nairobi.
36. The applicant submitted that that the children and her stand to suffer bias and injustice if the matter proceeds in Kikuyu Law Courts and before the current lower court handling the same. That there is a likelihood of the children's constitutional rights being denied, violated and/ or infringed if the prayers sought herein are not granted to be allowed as prayed. The applicant stated that it is in the best interest of the children, their welfare and justice that the prayers in the application be granted.
37. The respondent on his part has submitted that Kikuyu Children Case No E001 of 2024 was filed on 3rd January 2024 not only on custody and access but also to prevent the Applicant herein from removing the Children from their home and their former schools in Kikuyu hence it's filing at Kikuyu.
38. The respondent submitted that the issues of alleged bias and the Applicant's grievances against the Orders issued by the Court in Kikuyu can only be grounds of Appeal or an Application for recusal and not grounds for transfer.
39. This court has perused the court record and I note that the case before Kikuyu court is for custody of the children of the parties. In my view, the children will not be required to travel for the hearing of the case to Kikuyu since they are not parties to the case. It is the applicant who will be travelling for the hearing. If the court requires the opinion of the children as to custody, as required by the law, the court may call for the children to appear before it once considering the distance, the inconvenience and the expenses that may be involved.
40. The applicant has also raised concerned on trial court been biased if the matter is heard in Kikuyu. The applicant has not proved bias on the part of trial court or respondent interfering with the trial as raised. It is my considered view that if the applicant is dissatisfied with any orders granted during the trial before the lower court she has a right to appeal on the same.
41. It was held in the Ugandan case of *David Kabungu v Zikarenga* HCCC No 36 of 1995 that;

Section 18 (1) (b) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings



in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused... Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused...”

42. Taking into consideration the provisions of Section 18 and the principles and placing reliance on the above stated case law, I find that the applicant has failed to present any tangible grounds to justify orders to transfer of this case from Kikuyu to Nairobi.
43. Consequently, I find no reason to grant Orders of stay of proceedings at the Kikuyu Children’s Court or transfer the same to any other court. I direct that the Kikuyu Children’s Case No E001 of 2024 be heard by the Kikuyu Children’s Court on priority basis. I find no merit in this application and I hereby dismiss it with costs.

DATED AT NAIROBI THIS 31ST JULY, 2024.

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S. N. RIECHI

JUDGE

