



**CNM v SKM (Miscellaneous Civil Application 146 of 2024)
[2024] KEHC 9367 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9367 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION 146 OF 2024**

**FR OLEL, J
JULY 30, 2024**

BETWEEN

CNM APPLICANT

AND

SKM RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 23rd May 2024 brought pursuant to provisions of Section 1A, 1B, 3, and 3A, of the *Civil Procedure Act*, Order 51 rules 1 and 3 of the *Civil Procedure Rules* and all other enabling provision of law. The applicant seeks for orders that;
 - a. The Honourable court be pleased to mark as withdrawn children’s case No E004/2024 Kangundo Law courts with no orders as to costs
 - b. Alternatively, this Honourable court be pleased to issue an order withdrawing children’s case No E004/2024 – Kangundo law courts and transfer it to Kandara law courts for hearing and determination.
 - c. Upon transfer of the children’s case No E004/2024 to Kandara law courts, the same be consolidated with children’s case No E002/2024 and be heard and determined together.
 - d. Costs of this Application be provided for.
2. The application is supported by the grounds on the face of the said application and the supporting affidavit of applicant, and the same is opposed by the respondent, who filed his replying affidavit dated 3rd June 2024.



B. The Application.

3. The applicant averred that they were a married couple, were blessed with three (3) children all of whom were still minors and their matrimonial home was at (Particulars Withheld) Estate. On 10.02.2024, the respondent physically assaulted her and as a result she had sustained grievous bodily injuries. She had reported this incident to the police and subsequently moved out of the matrimonial home and relocated to her mother's house at Kandara. The respondent had lodged a children's case at Kangundo law court, which he later intimated to her that he had withdrawn the same. Based on this assumption, she had filed a new children's case at Kandara court, being Kandara children's case No E002/2024. Under the circumstances, it was imperative to have the Kangundo children's case to be withdrawn or alternatively, the cases be consolidated and be heard at Kandara law courts.
4. This application is opposed by the Respondent, through his replying affidavit dated 3rd June, 2024. He averred that this application was made in bad faith and was founded on falsehood. The high court did not have the power to compel him to withdraw his suit as it was his right to litigate where he resided at Joska, which was within the said court's jurisdiction. Upon filing his suit, the respondent never filed her response and when the suit was set down for hearing on 13.03.2024, the respondent instructed an advocate one Mr T.M Njoroge Advocate, who appeared in court on the sought for time to file her response. The court did give her time to respond to pleadings filed but eventually she did not file any response. At no time had he intimated to the respondent that he would withdraw his suit, and that the 2nd suit filed Kandara was filed in bad faith as the applicant knew of the existence of the 1st suit filed in Kangundo.
5. The respondent urged the court to find that the proper court which had geographical jurisdiction to hear and determine the issues in question was Kangundo law court and no justifiable reason had been proffered to transfer the said suit to Kandara. The respondent therefore urged this court to dismiss the said Application.

B. Analysis & Determination

6. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the only issue which arise for determination is whether Kangundo children's case No E004 of 2024 should be withdrawn and be transferred to Kandara law courts for hearing and determination.
7. Section 17 of the [Civil procedure Act](#) further provides that;

“where a suit maybe 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 objections, if any shall determine in which of the several courts having jurisdiction, the suit shall proceed.”
8. Further Section 18 of the [Civil procedure Act](#) provides that;

“(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired 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 proceedings 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 proceedings 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 withdrawn.

(2) Where any suit or proceedings 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,

9. From the pleadings filed, it is common ground that the “Kangundo children’s case” was filed prior to the “Kandara children’s case.” The suits filed involve the same parties whose matrimonial home is/was at Joska before their separation in February 2024. Section 15 of the *Civil Procedure Act*, provides that suits maybe instituted where the defendant resides or cause of action arises. Under the said section; Explanation (1) provides;

“where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place he has such temporary residence.”

10. The respondent therefore cannot be faulted for filing the children’s case at Kangundo law courts, as their matrimonial home is at Joska, which falls under the jurisdiction of the said court and by virtue of Section 15 of the *Civil Procedure Act*, the applicant is deemed to reside in both places and the same provision gives the respondent room to sue where the applicant’s permanent residence is situated. Secondly it is admitted that the applicant had knowledge of and participated in proceedings of the “Kangundo children’s case” through her counsel and in good conscious cannot be heard to prioritize the second suit filed “the Kandara children’s case” to be considered as the primary suit. The application as filed therefore lacks merit and should be dismissed.

C. Disposition

11. Be that as it may In the best interest of the minors who are subject of both suits, and since the issue raised involves this courts supervisory duties, this court falls back on provisions of Section 1A, 1B & 3A of the *civil procedure Act*, which grants the court inherent powers to grant such orders as it may deem necessary and further enjoined court to have disputes determine in a just and expeditious manner while considering the lower rather than higher risk of injustice. In light of the above, I do order suo moto as follows;

- a. Kandara children’s case No E002 of 2024 be and is hereby transferred to Kangundo chief Magistrate court for hearing and determination.



- b. The said suit upon transfer will be consolidated with Kangundo children's case No E004 of 2024 and it will be deemed to be the counter claim.
- c. That the notice of motion herein dated 23rd May 2024 lacks merit and is dismissed with no orders as to costs.
- d. This Misc Application file is marked as determined/closed.

12. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 30th day of July, 2024

In the presence of: -

Mrs Waithera Mwangi for Applicant

No appearance for Respondent

Susan/Sam Court Assistant

