



**Abdullahi v Mohamed (Miscellaneous Application E201 of 2024)
[2024] KEHC 13302 (KLR) (Family) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13302 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E201 OF 2024
H NAMISI, J
OCTOBER 30, 2024**

BETWEEN

ABDIKADIR ADOW ABDULLAHI APPLICANT

AND

RAHMA ABDULLAHI MOHAMED RESPONDENT

RULING

1. The Applicant has filed Notice of Motion dated 20 September 2024 seeking the following orders:-
 - i. (spent)
 - ii. That pending the hearing and determination of this application inter partes, this Honourable Court be pleased to issue an order of stay of proceedings in the matter Milimani Magistrate Children's Case Number E164/2024 (*Rahma Abdullahi Mohamed v Abdikadir Adow Abdullahi*);
 - iii. This Honourable Court be pleased to order transfer of Milimani Magistrate Children's Case Number E164/2024 (*Rahma Abdullahi Mohamed v Abdikadir Adow Abdullahi*) to Kericho Chief Magistrates Court for hearing and final determination;
 - iv. Costs of this application be in the cause;
2. The Application is brought under sections 1A, 1B, 3, 3A, 15, 17 and 18 of the *Civil Procedure Act*, Cap 21 and Order 51 Rule 1 of the *Civil Procedure Rules*. The Application is supported by an affidavit sworn by the Applicant and premised on the grounds on the face of it.
3. In the trial court, the Respondent has filed a suit seeking custody and maintenance of children. In her Complaint dated 29 August 2024, the Respondent averred that she and the Applicant are the biological



parents of nine (9) children. On 17 May 2023, the Applicant forcibly ejected her from their home in Litein, Kericho County, forcing the Respondent to move to Nairobi, where she currently resides. The Respondent was able to retain actual custody of the two youngest minors, who reside with her in Nairobi. The Plaintiff indicates that the other minors reside with their father, the Applicant.

4. The Respondent filed a Replying Affidavit sworn on 30 September 2024, in which she confirmed that she currently resides in Nairobi with the two youngest minors. The Respondent averred that two of the children are currently in Wajir and not in the Applicant's custody. She is apprehensive of the motives of the Applicant, claiming that the Applicant is a litigious person with several cases filed at the Kericho Law Courts. Further, in opposing the Application, the Respondent noted that this matter can be conducted virtually.
5. The Applicant filed two Reports by the Children's Officer in Embakasi and Bureti Sub Counties. The Reports confirm that the Respondent lives in Nairobi with 2 minors, while 5 minors are in the custody of the Applicant in Bureti, Kericho County.

Analysis and Determination

6. Section 12 of the *Civil Procedure Act*, Cap 21 provides as follows:

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

- (a) for the recovery of immovable property, with or without rent or profits;
- (b) for the partition of immovable property;
- (c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;
- (d) for the determination of any other right to or interest in immovable property;
- (e) for compensation for wrong to immovable property;
- (f) for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:

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.

7. Section 15 of the *Act* provides as follows:

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

- a. the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or



- b. any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or
 - c. the cause of action, wholly or in part, arises.
8. The law relating to transfer of suits is contained in Section 18 of the Act. Section 18(1)(b)(ii) which gives the Court discretionary powers as follows:

- “(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. ...
 - 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

9. While exercising its discretion set out in Section 18 of the Civil Procedure Act, the Court will be mindful of the balance of convenience, questions of expense, interests of justice and possibilities of undue hardship that may be occasioned to the parties. These principles were set out in the case of *Kageny v. Musiramo & Another* [1968] E. A. 43 as follows:

“It is a 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 a strong case to the satisfaction of the Court that the application ought to be granted. There are also authorities stating that the principle matters to be taken into consideration are balance of convenience, questions of expense, interests of justice and possibilities of undue hardship; and if the Court is left in doubt as to whether under all circumstances it is proper to order a transfer, the application must be refused.”

10. Mulla in the Code of Civil Procedure (2012) 18th ed. at p. 391 while expounding on Sections 20(a) and (b) of the *Indian Civil Procedure*, the equivalent of Section 15 of our Civil Procedure Act, observes:

“The principle underlying s 20(a) and s (20)(b) is that the suit is to be instituted at the place where the defendant can defend the suit without undue trouble.”

11. Since this suit involves children, the best interests of the said child are of paramount importance and supersede the rights and interests of the parties herein. The Court is bound by the paramountcy principle enshrined in The Constitution of Kenya and the Children Act. Article 45(3) of The Constitution provides:

“A child’s best interests are of paramount importance in every matter concerning the child.”



12. Section 4(2) and (3) of the *Children Act* provide:
- (2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
 - (3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration...”
13. There are 9 children involved in this suit. From the Plaintiff, 2 children are aged over 18 years. The rest fall between the ages of 14 years to 9 months. The two children who reside with the Respondent are aged 5 years and 9 months, respectively. In determining a question of custody, the Court takes into consideration the principles set out at section 103 (1) of the *Children Act*, which include ascertaining the wishes of the child taking into account the child’s evolving capacity. This means that based on the age and understanding of the child, the Court may want to interview the child in order to ascertain their wishes with regard to the issue of custody. In this instance, the Court may want to interview the 5 children who are in the custody of the Applicant, because of their ages and level of understanding. The two children in the custody of the Respondent may be too young to be interviewed by the Court.
14. In the premise, it would be more convenient and in the best interest of the children that this matter be transferred to the Kericho Law Courts, to facilitate easy movement of the children, if and when they will be required to attend Court. I, therefore, allow the Application and make the following orders:
- i. That the suit, being *Milimani Children Case No. E1649 of 2024* be and is hereby transferred from Nairobi Children’s Court to Kericho Children’s Court for hearing and determination;
 - ii. That in the interest of justice, this being a matter that involves children, the Deputy Registrar, High Court of Kenya at Nairobi, Family Division do facilitate the expeditious transfer of the said file to Kericho Children’s Court for necessary action;
 - iii. Costs to be in the cause

DATED AND DELIVERED AT NAIROBI THIS 30 DAY OF OCTOBER 2024

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

...N/A.....for the Applicant

....Mary Wanjiku.....for the Respondent

