



RMM (Suing as Next Friend of AMP, a Minor) v ENW (Miscellaneous Application 9 of 2023) [2023] KEHC 3613 (KLR) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 9 OF 2023**

G MUTAI, J

APRIL 28, 2023

BETWEEN

RMM (SUING AS NEXT FRIEND OF AMP, A MINOR) APPLICANT

AND

ENW RESPONDENT

RULING

1. The application before the Court arises from a custody case presently pending before the Children Court at Tononoka Law Courts. The said case is between ENW, as the Plaintiff, and RMM, as the Defendant. The Applicant and the Respondent are fighting over the custody of Master AMP, a child of 9 years.
2. Vide a Notice of Motion application dated 22nd February 2023 filed on 27th February 2023 the Application sought five orders three of which are now spent. The two that remain are prayers 2 and 5 thereof that seek:-
 - (2) That this honourable Court be pleased to order the transfer of the Children Matter MCCHCC E467 of 2022 at Tononoka Magistrates Court between ENW and RMM to the Children's Court at Nairobi; and 5. That the costs of this application be in the cause.
3. The grounds upon which the application is brought are given in the body of the said application. The applicant avers that at the time the suit was filed before the subordinate Court the child was residing in Nairobi. It is therefore stated that there was an illegality. It is further stated the child does not wish to attend Court in Mombasa. Court attendance by the Applicant in Mombasa would be too costly for her as she works in Nairobi, the Applicant avers. In support of the Application the Applicant swore an affidavit on 22nd February 2023 unto which she annexed the following documents: -
 1. Letter of admission issued by Mainflow Preparatory School dated 27th January 2023. The said letter shows that the child's reporting date was 30th January 2023 at 8am;



2. Offer of employment letter dated 27th October 2022 made by Victory Homes Ltd to the Applicant;
 3. Official receipt No. 3049 in respect of payments made by the Applicant on 6th February 2023; and
 4. Receipts for school uniforms, stationery and books dated 12th February 2023, 7th January 2023, and 7th February, 2023 respectively.
4. The Application is opposed. The Respondent swore a Replying Affidavit on 13th March 2023 which was filed on 13th March 2023. In the said Replying Affidavit, the Respondent averred that the Applicant abandoned the child in August 2022 when she left the matrimonial home without notice. Prior to the departure the couple lived together in Mombasa. It was further averred that the child was at the time enrolled in Jeddys Academy, a school within the County of Mombasa, and thus the jurisdiction of the subordinate court. In support of the said contention, he annexed a letter dated 18th January 2023 from the said institution. The said letter gave the child's admission number as XXX and UPI: K69H7Y. The Respondent stated that the child had been taken away from the said school without his consent as the father and relocated, firstly to Kiambu and then to a school in Ngong Hills. He averred that the allegation that the child does not want to attend Court in Mombasa clever ruse by the Applicant to avoid complying with the orders of the subordinate court that required her to bring the child so that his wishes could be ascertained. He attached an application dated 27th February 2023 vide she sought to have the orders of Court requiring physical attendance by the child dispensed with and lieu thereof a report of the Children Officer be procured.
5. The Respondent states that the Applicant took the child during the short holiday between the 2nd and 3rd terms of the Kenyan 2023 CBC calendar on the understanding that she would return him. It is averred that she never did so hence the filing of the case before the subordinate court.
6. The Respondent filed the application before Subordinate Court through which he sought to have the child produced in Court so that his wishes could be ascertained. Although the Court directed the Applicant to produce the child at the time the application was heard before me that had not been done.
7. The Applicant filed a Supplementary Affidavit through which she denied what the Respondent had averred in his Replying Affidavit. The Applicant made a curious comment in paragraphs 8 and 16 to wit that: -
- “the decision to move the child came after inordinate court orders that gave access to the child to the Respondent for a whole month contrary to the law”
- and
- “the Respondent's plea that it gave consent for the transfer of the child is futile as he has never shown any interest in the child till recently in Court.”
8. Both parties agree that prior to the breakdown of the relationship they resided in Mombasa. The child is 8yrs old and is presently in Grade 3 as evidenced by the official receipt from Mainflow Preparatory School. That being the case the only logical conclusion that may be drawn is that the child was in a school in Mombasa until the time he was unilaterally relocated to Nairobi by the Applicant. The law of the land is that both parents have equal rights to the child (Article 53 of *the Constitution* of Kenya, 2010 and sections 31 and 32 of the *Children Act*, 2022). Equal rights extend to the determination of the school which the child is to attend. In this cause, and as already indicated, it does appear that the



- Applicant made her decisions regarding the said child and does not want to put the minor in a situation where her unilateral decision may be reversed.
9. This matter came before me on 27th February 2023. Due to the nature of the matter, I declined to issue *ex parte* orders. I directed instead that the same be served for hearing *inter partes* on 13th March 2023. The application could not proceed on the 13th day of March 2023, and was adjourned to the 20th day of March, 2023 the matter was heard. Mr. Mairura, counsel for the Applicant, relied on the Written Submissions and argued that at the point of the filing of the suit in the subordinate court the Applicant and the child the subject of these proceedings were both resident in Nairobi. It was thus averred that the suit before the Subordinate Court offended sections 15 and 18 of the *Civil Procedure Act*.
 10. In support of his contention Mr. Mairura referred to the following cases: *Kitbita Ngeana v Mwaniki Kisume* [2018]eKLR delivered by Mutende, J in Kitui and *SMM v AM* [2020]eKLR delivered by Onyiego, J in Mombasa for the proposition that the determinant of the locus of filing a suit is the place the Defendant has residence and also the location of the subject matter.
 11. Ms. Osino, for the Respondent, opposed the application. She argued that up to August 2022 both parties had been residents of Mombasa. She argued that at some point the Applicant took the child away with her to Nairobi on the understanding that he would be returned. It is when she failed to do so that the Respondent filed the suit before the Subordinate Court seeking to have the child be returned as he had been removed from his school contrary to section 104 of the *Children Act*, 2022. It was urged that what the Applicant was seeking to do was to sanitize the illegalities she had authored.
 12. It was submitted that no evidence was produced in support of the averment that the child would be traumatized by a Court appearance. The Respondent denied that a Court appearance on 27th March, 2023 would affect the child's school. In the submission of the Respondent's counsel, the child would be on recess during the said time.
 13. The Court was referred to Article 53 of *the Constitution* and section 8 of the *Children Act*, 2022 which defines what the best interest of the child is. I was also informed that the child was required to attend Court on 27th March, 2023, and that there was before the Subordinate Court, an application made for and on behalf of the child which would require that the said child attends Court so that his wishes can be ascertained.
 14. Counsel for the Respondent referred me to the cases of *GKK v ANK & Another* [2021] eKLR and *SNM v AM* [2020] eKLR in support of her contention.
 15. The Applicant's counsel in response reiterated his submissions. He urged that having the Applicant attend Court in Mombasa would put her job at risk. Regarding the presence of the child on 27th March, 2023 it was argued that the child would not be on mid-term recess during the said time. I was asked to consider the place of residence of the Applicant and to allow the application accordingly.
 16. I must now consider the application and make my determination taking the facts and the law into consideration. I must remind myself that the best interest of the child is at the heart of this matter. I must determine whether allowing the application will serve the best interest of the child.
 17. As I do so I note the conduct of the Applicant. She appears to have transferred the child from a school in Mombasa to Nairobi without first agreeing with the child's father or obtaining a Court order permitting her to do so. From her own averments, she appears very keen to disregard Court orders if they do not suit her or are otherwise inconvenient. Thirdly the application before me appears to have been made after her previous application before the Subordinate Court for the presence of the child to be dispensed with failed. From my observation, she hasn't come to this Court with clean hands.



18. The jurisdiction I have under section 18 of the *Civil Procedure Act* is a discretionary one. When exercising discretionary power, I must do so judiciously and not capriciously or whimsically. I must be guided by settled principles. In this case, the conduct of a party and her apparent motive in bringing these proceedings is something I must bear in mind.
19. In addition to the foregoing, I will also take into consideration the period the Applicant took prior to filing an application for transfer of the case. In my view applications challenging the jurisdiction of a court must be taken at the earliest opportunity so court's valuable time isn't frittered away in proceedings that may ultimately become futile.
20. I have considered the application, the responses therein and the rival submissions for both counsels and the issue that to me call for my decision is one; whether Tononoka Children's Case No. E467 of 2022 should be transferred to Nairobi Children's Court.
21. On whether Tononoka Children's Case No. E467 of 2022 should be transferred to Nairobi Children's Court, the *Civil Procedure Act* Cap 21 Section 18 provides: -

- “ 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 withdrawn.
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.”

22. The court in the case of *GKK v ANK & Another* [2021] eKLR quoted the Ugandan case of *David Kabungu Vs Zikarenga* HCCC NO. 36 OF 1995 where it was held 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...”

In the case of *Hangzhou Agrochemicals Industries Ltd. Vs Panda flowers Ltd* [2012] eKLR the court held: -

“ ..In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and preparing witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. 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. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case”.

23. From the above citation it is evident that in making a decision on whether to transfer a suit or not the court has to consider the balance of convenience; questions of expense; interest of justice possibilities of undue hardship and the conduct of the parties.
24. The applicant’s reasons for seeking the transfer are that she presently resides in Nairobi, as does the child and thus the cause of action thus arose in Nairobi.
25. On the issue of the applicant residing in Nairobi and the children’s case being instituted where the defendant resides, Section 15 of the *Civil Procedure Act* provides: -

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

1. 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
 2. 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
 3. the cause of action, wholly or in part, arises.
26. At the time of filing of the children case in Tononoka Law Courts the child was still lawfully a student at Jeddys Academy in Mombasa. The cause of action in this case is the custody of the named child. Thus, it is my view that the cause of action arose in Mombasa. The Respondent was therefore right to file the matter in Tononoka.
 27. Although the Milimani Children Court might be said to have concurrent jurisdiction with Tononoka over this matter, since the Applicant now resides in Nairobi, the Respondent in this cause moved



the Court first in Mombasa regarding a child who was lawfully enrolled as a student in a school in Mombasa. The applicant cannot therefore be heard to say that Milimani Children’s Court is superior to Tononoka.

28. The Applicant’s conduct, as has been stated above is not without blemish. She has shown little regard for the subordinate court. I am in agreement with the Counsel for the Respondent that this application was filed with a view to sanitizing the unfortunate acts of the Applicant.
29. On the issue of expenses, it’s my view that if this matter is transferred to Milimani Law Courts, the respondents will incur expenses similar, or even more than that that Applicant would incur, in traveling to Nairobi and or transporting witnesses to Nairobi. THis court has to strike a balance.

Accordingly, it’s my finding that the applicant has not made out a case to warrant the transfer of the subordinate court case from Tononoka to Nairobi. I am guided by the case of SMM v AM (supra) where the court stated that: -

“Regarding the place of residence of the defendant/applicant, the same is in Nairobi a fact which is not disputed implying that Milimani law courts would also exercise jurisdiction. Where two courts have concurrent jurisdiction over a matter, either party can choose the court in which to institute the suit. Since the plaintiff/respondent first moved to court and filed the suit in one of the courts with territorial jurisdiction, it will not be right for the applicant/defendant to claim Milimani court has superior right over jurisdiction as opposed to Tononoka law courts...These are issues which can be determined even in the absence of the children unless under exceptional circumstances the court decides to interview them. The case can be conducted without necessarily calling children to attend court. Further still, with the electronic case management directions in place, witnesses, if necessary, can testify virtually. The claim that it will be costly for the applicant and witnesses to travel to Mombasa, the same will be the position for the plaintiff if she were to travel to Milimani in Nairobi. Litigation is all about inevitable expenditure. In my view, the case has been pending for over one year now. Parties should fast track the hearing and have the matter concluded.”

30. The upshot of the above is that the Notice of Motion application dated 22nd February 2023 lacks merit and is hereby dismissed. Since this is a children matter, I shall not issue orders as to costs.
31. In the interest of justice, I direct that Tononoka Children’s Court Case No. E.467 of 2022; Ernest Nakhasokho Wabwire versus Rose Mugeci Mwangi be heard and determined without delay.
32. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2023

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GREGORY MUTAI

JUDGE

In the presence: -

Winnie Migot – Court Assistant

for the Applicant

for the Respondent

