



**IMN v IMK (Miscellaneous Application E012 of 2023)
[2023] KEHC 18538 (KLR) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E012 OF 2023**

**G MUTAI, J
MAY 29, 2023**

BETWEEN

IMN APPLICANT

AND

IMK RESPONDENT

RULING

Introduction

1. Before me is a Notice of Motion application dated 23rd March 2023. The said application is brought under order 51 rule 1 of the Civil Procedure Rules, 2010 and sections 1A, 1B, 15 and 18 of the Civil Procedure Act and all other enabling provisions of the law. The application is supported by an affidavit sworn by the Applicant. The Applicant seeks 3 orders to wit:-
 1. Spent;
 2. That this honourable court be pleased to transfer Tononoka Children Court case No E268 of 2022 filed at Tononoka Children Court to Milimani Children Court for hearing and disposal; and
 3. That the costs of this application be provided for.
2. The Applicant states in her grounds that the Respondent filed the case before the Children Court at Tononoka on 10th June 2022 despite being aware that at that time the subject child and the Applicant were both residing in Nairobi. She avers that notwithstanding the fact that a period of around 11 months has lapsed since the suit was instituted the same has never been heard on merit. In her view, the matter is still fresh. Due to the fact that the Defendant (who is the Applicant in this Miscellaneous Application) and the child reside in Nairobi, it is urged that it is the Children Court in Milimani that has the geographical jurisdiction to hear and determine the matter. She urges that no party will suffer



prejudice if the orders sought are granted and that it is in fact in the best interest of the child that the orders that are sought are granted.

3. The Applicant annexed to her application the plaint filed in the Subordinate Court. Her affidavit restates what has been adverted to in the grounds. I see no need to rehash the same here.
4. The Application is opposed. The Respondent filed Replying Affidavit sworn on 25th April 2023. Vide the said affidavit he deposed that the Applicant was engaged in a window shopping exercise, presumably in search of courts that would be favourable to her. He stated that the matter before the court below had been filed before the right court and that there had been no impediment whatsoever to the hearing of the case due to distance or otherwise. In any case the Respondent, deposed, courts hear matters virtually nowadays. Where virtual hearing is used distances do not amount to barriers. The Respondent stated that he had been denied access to the children. Due to the denial of access, the Respondent deposed, he was in the process of citing the Applicant for contempt of Court, something which in his view precipitated the application. The Respondent thus argued that the cause before me was devoid of merit and urged me to dismiss the same with costs.
5. The Applicant filed a further Affidavit. The Further Affidavit denied the averments the Respondent made in his Replying Affidavit. She urged that at the time the suit was filed the Respondent was aware that the Applicant lived in Nairobi. She blamed the delay on her part to filing this application, challenging the territorial jurisdiction of the trial court and seeking transfer of the case, on her previous advocates and also on the need to deal with preliminary issues that had arisen regarding the maintenance of the child. She denied that she had not complied with the court orders and stated that it was in fact the Respondent who had refused to pay school fees hence making the child miss school. She averred that she had granted the Respondent access to the child whenever he was in Nairobi but that he wasn't keen on seeing the child.
6. When the matter came before me I certified it urgent. My subsequent directions were that the matter be canvassed by way of Written Submissions. On 16th May 2023 the submissions were highlighted by Mr. Rukwaro, learned counsel for the Applicant, and Mr. Birir, learned counsel for the Respondent. The submissions restated the contents of the parties affidavits on record. I do not think that it shall be useful to restate the same here.

The Applicable Law

7. The Constitution and the Children Act, 2022 both require courts, when considering matters relating to children, to have the best interest of the child. Article 53(2) of the [Constitution](#) of Kenya, 2010 provides that:-

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

The Constitutional edict is given effect by section 8(1) (2) & (3) of the [Children Act](#), 2022 which provides that: -

- “(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
 - (a) the best interests of the child shall be the primary consideration;



(b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule. 19 No. 29 of 2022 Children

(2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child; and

(c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

(3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity.”

8. I understand the above constitutional and statutory provisions as requiring me, when deciding children matters, to give a ruling that is predicated on what is in the best for the child the subject of these proceedings. The interests of the parents are secondary. In this case the determination of the appropriate court to hear the matter will hinge on which location will be in the best interest of the child.

9. Having taken the child's best interest as the paramount consideration, I must also look at the statutory provisions on transfer of cases as I must have jurisdiction to do that which I have been asked to do. Without jurisdiction, I must down my tools (see *The Owners of the Motor Vessel Lilian "S" v Caltex Oil Kenya Ltd* [1989] eKLR). What do the relevant statutory provisions say?

10. Section 18 of the [Civil Procedure Act](#) provides 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) 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.”



11. Regarding the locus of institution of a suit section 15 of the [Civil Procedure 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.”

As I understand the provision of section 15 of the said [Act](#) cases are ordinarily filed at the place that is most convenient to a defendant. The law provides as such so that a plaintiff may not make it difficult for a defendant to defend himself by filing the case in a place that the defendant would not be able to attend court, or may be able to do with great difficulty or at great expense.

12. Based on the provisions of section 18 of the [Civil Procedure Act](#) it is clear to that this court has jurisdiction to transfer a matter pending before one Subordinate Court for hearing and disposal by another Subordinate Court. This court’s jurisdiction to do so was not denied by the Respondent. Given the facts in this matter has a case been made for the transfer of this matter? Would the transfer of the cause before the subordinate court at Tononoka to Milimani Children Courts be in the best interest of the child?

Issues for Determination

13. Both parties agree that there is only one issue for determination by me; which is whether the case before the Tononoka Children Court should be transferred to Nairobi.

Analysis of the Facts and the Law

14. I have read the pleadings before me. I have also looked at the annexures that were attached to the affidavits. The facts as I discern them are as follows: -

1. The Applicant and the Respondent are married. The child the subject of the cause is the issue of the said marriage;
2. There was a breakdown of the said marriage. In January 2022 the Applicant left the matrimonial home together with the child; and
3. In June 2022 the Respondent filed the case before the court below. The said cause hasn’t been heard on merits to date. The court has been dealing with interlocutory matters so far.

15. I was unable to tell if there has been disobedience of the court orders, and if so, by which party, as no material that would have helped me decide, one way or another, was provided.

16. I take note that the child is of a very delicate age, being 3 years old. The case before the Subordinate court is for her custody, upkeep and maintenance. To put it in another way, she is the subject of those



proceedings. As a subject her locus in June 2022 is determinative. Where was the Applicant then? From the affidavits on record, both the child and the Appellant were in Nairobi when the suit was filed. Given the foregoing it does appear to me that the case was filed in a court that is bereft of territorial jurisdiction as section 15 of the *Act* wasn't complied with.

17. Whereas it is true that most hearings and mentions take place virtually these days, there could always be instances when physical hearing is necessary. Where a physical hearing is called for, and for as long as the matter is in Tononoka, the Applicant would have to travel to Mombasa with or without the child, to attend court. Such an event would be very disruptive to the child and would not be in her best interest. She would be abandoned in the hands of a caregiver for a considerable period of time.
18. What are the principles courts use when assessing whether or not to transfer a case? In *Hangzhou Agrochemical Industries Ltd v Panda Flowers Limited* [2012] eKLR the court stated as follows: -

“In my view, which 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 are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship.”
19. The principles were also discussed in the Ugandan case of *David Kabungu v Zikarenga & 4 Others* Kampala Hccs No. 36 OF 1995 (unreported) in which Okello J stated as follows:-

“Section 18(1) 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 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 or the suit has been filed in a particular court for the purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction 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 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 expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication 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 could be refused...”
20. Having considered the foregoing, I find and hold that it would be in the best interest of the child if the cause before the Subordinate Court was transferred to Milimani Children Court. I do so as the child resides with the mother in Nairobi. This fact was well known to the Respondent when he filed the case in Mombasa. Although the Applicant should have filed this application at the earliest possible opportunity I do not think that her failure to do so is fatal. In any case I must consider the excusable



failure on her part against what I have found to be the best interest of the child, which consideration I have already stated is paramount.

21. Whereas the Respondent may suffer some inconvenience it is my view that such inconveniences will be manageable as most court proceedings are virtual.

Disposition

22. It is clear from the foregoing that Notice of Motion application before me is one I should allow. I therefore order as follows: -

1. I order that Tononoka Children Case No E268 of 2022; IMK versus IMN be transferred to Milimani Children Court Nairobi for hearing and determination;
2. I further order that the case does proceed from where it had reached unless parties agree otherwise; and
3. I make no orders as to costs.

23. Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS 29TH DAY OF MAY 2023 AT MOMBASA VIA MICROSOFT TEAMS

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GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Rukwaro for the Applicant

Mr. Birir for the Respondent

Ms. Winnie Migot – Court Assistant

