



REPUBLIC OF KENYA



**OMO v CAO (Miscellaneous Application 1 of 2023)
[2023] KEHC 21048 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 21048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 1 OF 2023**

**G MUTAI, J
JUNE 30, 2023**

BETWEEN

OMO APPLICANT

AND

CAO RESPONDENT

RULING

1. Before the Court is the Notice of Motion dated January 12, 2023. The same was filed on January 16, 2023 under a Certificate of Urgency. The application seeks the following orders:
 - a. Spent;
 - b. Spent;
 - c. That this honourable court be pleased to order transfer of Tononoka Children's Case No E063 of 2022; OMO v CAO from the Children's Court at Tononoka to the Senior Principal Magistrate's Court at Nyando for trial and determination; and
 - d. That the cost of this application be in the cause.
2. The application is premised on the grounds therein as well as the applicant's supporting affidavit sworn on January 11, 2023. The applicant's case is that he used to live with the respondent as husband and wife in Mombasa but that relocated to Nyakach in Kisumu County due to Covid-19. The respondent then left with the minor (the subject herein) as a result of which he reported the matter to Nyakach Sub-County Children's Office who issued summons to the respondent. The respondent did not respond to the summons. It is averred that the respondent removed the child from the school he was enrolled in, in the middle of the term which action disrupted his learning. The Applicant later learnt that she was in Mombasa with the minor and was planning to leave Kenya for the Middle East and that the child



was not going to school. Being thus apprehensive he filed the suit in the lower court which is pending hearing. That the events leading to the filing of the suit occurred in Nyakach, Kisumu County. It is also his submissions that all his witnesses are based in Nyakach, Kisumu County and therefore that it would be a toll order for him to transport them to Mombasa.

3. He further stated that the respondent will suffer no damage and or injustice if the orders sought are granted.
4. In response the respondent applicant filed a replying affidavit and grounds of opposition sworn and dated April 17, 2023, detailing the happenings that led to her moving back to Mombasa with the minor. She stated that she moved to Mombasa in search of greener pastures to enable her take care of her son. That the minor is currently enrolled in a school in Mombasa.
5. On the transfer of the suit to Nyando Law Courts she stated that the same was a delaying tactic. By filing the same in the lower court the applicant admitted the jurisdiction of that court to hear and determine the matter. Further she is currently expectant and moving the case to Nyando would prejudice her. The witnesses can be heard virtually and the applicant will not suffer any prejudice. She urged the court to dismiss the application.
6. The grounds of opposition is based on several grounds which includes: that the application offends various provisions of law including; Articles 47(1), 53(2) and 159(2) (b) and (d) of the [Constitution of Kenya, 2010](#), section 1A and 1B of the [Civil Procedure Act](#), that the application filed herein is mischievous, vexatious, an afterthought and a delaying tactic meant to frustrate the best interest principle accorded to the minor.
7. I have considered the application and the responses therein and the issue that emerges for determination is whether the lower court suit should be transferred to Nyando Law Courts.
8. Section 18 of the [Civil Procedure Act](#) Cap 21 provides that: -
 - a. 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.



- b. 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.

9. 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 marinating 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”

10. From the above citation it's evident that in making a decision on whether to transfer a suit or not the court has to consider the following: balance of convenience; questions of expense; interest of justice and possibilities of undue hardship.
11. The applicant's grounds for having Tononoka Children's Case No.E063 of 2022 transferred are; that the events leading to the filing of the suit occurred in Nyakach, Kisumu County; that all his witnesses are based in Nyakach, Kisumu County and therefore it would be a toll order for him to transport them to Mombasa. The respondent on the other hand has argued that the application is a delaying tactic and that the court has developed a hybrid system whereby matters are heard both virtually and physically



thus the applicant's witnesses don't have to travel to Mombasa. That she is expectant and travelling to Nyando would be strenuous to her.

12. It is the Applicant who filed the suit before the subordinate court. He must have been aware that under section 15 of the *Civil Procedure Act* a suit ought to be filed at the place where the defendant resides or where the cause of action arose. The defendant still resides in Mombasa. The child, who is the subject of the proceedings before the Children Court, resides with the mother.
13. On the issue of expenses, it's my view that if this matter is transferred to Nyando Law Courts, the respondent will incur expenses similar to those the applicant is presently incurring as she might then have travel to Nyakach/Nyando with her witnesses. Thus this court has to strike a balance. Further the judiciary has developed a hybrid system whereby a court can hear matters either virtually or physically. This has enabled the courts to hear and determine cases expeditiously. Thus it's my view that with the hybrid system neither the applicant's nor respondent's witnesses have to travel for court's hearing. The applicant has not complained of any likely bias against him by the Tononoka Court.
14. Accordingly, it's my finding that the applicant has not made out a case for the transfer of the case before the subordinate court. I am guided by case of *SMM v AM* [2020]eKLR where the court stated:-

"... 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."

15. The upshot of the above is that the application herein lacks merit and it's hereby dismissed.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF JUNE 2023

GREGORY MUTAI

JUDGE

