REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

MISC CIVIL SUIT NO.145 OF 2021

LJL..1ST APPLICANT

BL..2ND APPLICANT

GKL...3RD APPLICANT

VERSUS

SCM..RESPONDENT

RULING

Introduction & Background

1. The applicants herein through a Notice of Motion dated the 6th of September 2021 and brought pursuant to Sections 1A, 1B, 3A, 6, 17, 18 and 63 (e) of the Civil Procedure Act primarily seeks two orders; first, an order of stay of proceedings in Kehancha Miscellaneous Children Case No. E002/2021 and secondly, the transfer of the aforementioned case to Eldoret CM Court for hearing and final determination.

2. The grounds for the application as gleaned from the supporting affidavit of even date, are that the respondent herein filed a child maintenance and custody case before the Children's Court at Kehancha vide Kehancha Miscellaneous Children's Case No. E002/2021 but that the applicants and the minor do reside at Kaptagat within the territorial jurisdiction of this court and not at Kehancha where the respondent resides. In this regard, the applicants contended that considering the minor is aged 2 years and whose custody ought to be with his mother, it would be prudent for this Court to order the matter be transferred from Kehancha to Eldoret, as the same will be just and expedient and would save them from incurring travel expenses.

3. In any case, the applicants argued, the orders being sought are in the best interest of the minor as envisaged by Section 4 (2) & (3) of the Children's Act and Article 53 (2) of the Constitution.

4. The application is opposed by the respondent, Simon Chacha, through his replying affidavit sworn on the 20th of September 2021 wherein he states that the current application is only meant to delay the cause of justice and cause emotional pain to him as a parent of the minor. He particularly argued that the Kehancha Court has the jurisdiction to hear and determine the matter. He states that having the matter transferred from Kehancha to Eldoret does not in any way inconvenience the applicants since matters can be done virtually and physical attendance by parties is not compulsory.

5. Further, the respondent contended that the applicants are yet to comply with a valid court order issued to them by Kehancha court and this court should thus not grant them an audience as the same would amount to encouraging the disobedience of court orders.

6. In response to the respondent's reply, the 1st applicant filed a further affidavit dated the 29th of October 2021 wherein she deponed that from the order of court dated the 25th August 2021 directing the OCS Kaptagat to ensure attendance of the applicants and in particular the minor at Kehancha courts, it is clear that the applicants would be required to physically attend court. Secondly, the 1st applicant argued that she is not legally mandated to obey the orders issued at Kehancha as the same remain inoperative in light of the stay. Finally, the 1st applicant reiterated the fact that the suit ought to be transferred to Eldoret where she and her parents reside.

7. Parties filed submissions to the application which I have considered. The only issue for determination is whether the applicants have met the threshold for transfer of Misc. Children's Case No. E002/2021 from Kehancha to Eldoret Chief Magistrate's Court.

8. Section 18 of the Civil Procedure Act empowers this Court to transfer suits of a civil nature. It stipulates:

“(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”.

9. As rightly submitted by the applicants, the circumstances that would move a court to grant the order sought were considered in the ***David Kabungu vs Zikarenga & 4 Others, Kampala HCCS No. 36 of 1995***, where Okello J stated 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…”

10. Flowing from the above, it is trite that where a party seeks an order to transfer the trial of a suit, pending in one court to another court having jurisdiction, the applicant must make out a strong case for transfer. Secondly, it is evident that the factors to be considered are more that the mere balance of convenience, through the same is relevant. They include:

a) the balance of convenience

b) questions of expense

c) interests of justice and

d) the possibilities of undue hardship

See Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, law Africa Publishing, 2005. Pgs 76-77.

11. In the instant case, the applicants contend that they live in Kaptagat and travelling to Kehancha would be burdensome on them. The applicants further submitted that the minor who is the subject of the suit, resides in Kaptagat together with the applicants and it would thus be prudent and in the minor’s best interest, that the case be transferred to Eldoret. On the other hand, the respondent submitted that there have been no adequate grounds given to warrant the transfer of the case to Eldoret. It was his submission that the reasons furnished by the applicants are in the applicants’ best interest and not the best interest of the child. In any case, it was his submission that the minor would not be required to attend court during the hearing of the suit at Kehancha. In addition, the respondent submitted that the prevailing situation affects the minor since the minor lives with the 2nd and 3rd applicant and not his mother who is the 1st applicant and that the separation of the minor from his parents is not in the best interest of the child.

12. I agree with the respondent that the grounds provided by the applicants are in my view grounds that are convenient to the applicants and not necessarily in the best interest of the minor. This is compounded by the fact that the minor does not live with the mother, the 1st applicant but rather the grandparents- the 2nd and 3rd respondents, a fact uncontroverted by the applicants. It seems to me that the applicants only reason for seeking transfer of the suit is the travel expenses they are likely to incur as opposed to the best interest of the minor, which the applicants have not raised at all. As rightly held by court in ***In re Estate of RNM (Minor) [2020] eKLR,*** the financial implication is not more important than the interests of the child.

13. ***Section 76*** of the Children’s Act in particular provides for the principles with regard to proceedings in the Children’s Court among them;

a) The ascertainable feelings and wishes of the child concerned with reference to the child's age and understanding.

b) ---------------

b) The likely effect on the child of any change in circumstances.

c) The child's age, sex, religious persuasion and cultural background.

d) Any harm the child may have suffered, or is at risk of suffering.

14. The above in my opinion, is what is applicable in the dispute before me.

15. In this regard, it is my considered view that the best interest of the child overrides any other factor. That is, the best interest of the child is the paramount consideration in the present circumstances. The convenience of the parents and or any other person becomes secondary. This is why I disagree respectfully with the submissions of the applicants that the mere fact they reside in Kaptagat as defendants, is sufficient enough to warrant this court to order transfer of the case from Kehancha to Eldoret.

16. As rightly held in ***In re Estate of RNM (supra),*** the **Magistrate's Court's Act Cap 10 Laws of Kenya Section 3(2)** gives the Court Countrywide jurisdiction to hear and determine any suit notwithstanding where the defendant resides or where the cause of action arose. This position was buttressed in ***Mohamed Sitabani vs George Mwangi H.C.C.A No. 13 of 2002.***

17. The above observation cements the ideal that the paramount consideration in Children Cases, is the best interest of the child. It matters not the financial constraints that may be borne by either parent if the same has no bearing on the best interest of the child. I also take judicial notice of the fact that quite often than not, in children cases, the presence of the child may not be required in court, unless it is extremely necessary. See ***In re ANM (Minor) [2021] eKLR.***

18. In ***SMM vs AM [2020] eKLR*** the Court held that:

> ***"Regarding witnesses' and children's residence being Nairobi and Kitui, one would have to look at the nature and character of the proceedings. This is a children's matter where the children are aged between 6-11 years. <u>The entire suit revolves around custody and maintenance. 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</u>."***

19. It is also in the best interest of the minor that the case be heard and determined expeditiously. Any transfer will merely delay the finalization of the case.

20. The upshot is that the application herein is not merited and the same is dismissed with no order as to costs.

Dated, Signed and Delivered at Eldoret this 25th day of January 2022.

E. O. OGOLA

<u>JUDGE</u>