



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**MISC. CAUSE NO. E044 OF 2020**

**DRAO.....APPLICANT**

**VERSUS**

**SSK.....RESPONDENT**

**RULING**

1. On the 18<sup>th</sup> March 2021 this court ordered the transfer of the dispute between DRAO (the applicant) and SSK (the respondent) over the minor JDAM from the Children Court at Winam to the Children Court at Milimani in Nairobi. The respondent had filed the cause at Winam Children Court seeking the legal and physical custody of the minor and that the applicant, either by herself or through any other person acting on her behalf, be stopped from leaving Kenya with the minor. The parties had got married on 10<sup>th</sup> May 2015, the child born on 21<sup>st</sup> June 2016 and the marriage dissolved on 16<sup>th</sup> September 2020.

2. Winam Children Court had, following application, issued an *ex parte* order compelling the applicant to produce the minor in court on the date scheduled for the *inter parte* hearing of the application. It had also barred the applicant by herself or through any other person acting on her directive from leaving the borders of the Republic of Kenya with the minor or removing or causing the emigration of the minor from Kenya to any other country outside the jurisdiction of the court under Passport No. xxxxxx without the express written consent of the respondent, and the Immigration Services be directed to enforce the order.

3. The present application dated 24<sup>th</sup> March 2021 by the applicant sought that this court sets aside and/or vacates those orders by Winam Children Court. The complaint by the applicant was that, when she filed before this court the application for the transfer of the case to the Children Court at Milimani she obtained an interim order staying the proceedings before Winam Children Court. However, when this court delivered the ruling of 18<sup>th</sup> March 2021 and allowed the transfer of the cause, it did not vacate the *ex parte* orders issued by Winam Children Court.

4. The response by the respondent was that the application was abuse of the process of the court as the matter was *subjudice* because it was before the Children Court which had the first instance jurisdiction to hear and determine questions of custody and maintenance of a child. The response was through a notice of preliminary objection dated 26<sup>th</sup> May 2021. His case was that, once the Winam Children Court had issued the order in question it was only the Children Court that could set them aside, and that the High Court could only be approached on appeal, which was not the case here.

5. The applicant filed grounds of opposition to the preliminary objection, saying that the *ex parte* orders by Winam Children Court were extinguished by the ruling of this court. Therefore, that the application was not *subjudice*.

6. It should be clear that when the applicant came before this court seeking the transfer of the cause from Winam Children Court to Milimani Children Court, her complaint was that Winam Children Court did not have the territorial jurisdiction to hear and determine the cause as both her and the minor were living in Nairobi. This court agreed with her, and moved under **sections 15 and 18** of the **Civil Procedure Act** to transfer the matter to Milimani Children Court. This court was not exercising its appellate jurisdiction, and therefore was not being invited to discuss or decide on the merit of the cause before Winam Children Court. The Court was not being called upon, at that point, to discuss the issues of custody and maintenance of the minor. Under **sections 73 and 118** of the **Children Act (No. 8 of 2021)**, it is only the Children Court that has the jurisdiction to hear and determine all matters relating to the custody and maintenance of a child (**VKK -v- PNO [2012] eKLR**).

7. Secondly, now that the dispute is before the Children Court at Milimani, it would be *subjudice* under **section 6** of the **Civil Procedure Act** for this court to seek to deal with it in any manner. (**KNCHR -v- A.G, IEBC and 16 Others [2020]eKLR**). **Section 6** of the **Civil**

**Procedure Act** provides as follows: -

**“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”**

8. In the written submissions by counsel for the applicant, it was contended that, courtesy of **Order 40 Rule 6** of the **Civil Procedure Rules**, the *ex parte* orders, that were issued on 15<sup>th</sup> September 2020 and were never extended and the suit had not been determined within a period of 12 months, have elapsed by the operation of the law. If that is the applicant’s position, then why did she bring the present application?

9. The applicant’s counsel’s further submission was that because this court has under **Article 165(6)** and **(7)** of the Constitution supervisory jurisdiction over the Children Courts, it should make appropriate orders or directions in relation to the *ex parte* orders by Winam Children Court. The High Court supervises the Subordinate Courts through appeals and through revisions. The Constitution does not allow the High Court to interfere with a matter that the law has allowed the subordinate court to hear and determine. The hierarchy and structure of the courts have to be respected, and the subject jurisdiction of each court obeyed. This is good for the proper and orderly administration of justice in Kenya.

10. Lastly, counsel for the applicant argued that there was an error by this court in not vacating the *ex parte* orders by the Winam Children Court which it needs to revisit and correct by review. To start with, the present application was not premised on **Section 80** of the **Civil Procedure Act** or **Order 45 rule 1** of the **Civil Procedure Rules**. Even if it was, there was no demonstrated mistake or error that this court was being called to review or set aside in regard to the ruling delivered on 18<sup>th</sup> March 2021. If any mistake or error can be shown in regard to the *ex parte* orders by Winam Children Court, an appropriate application should be brought before the Children Court Milimani for review.

11. In conclusion, the preliminary objection taken out against the applicant’s notice of motion is hereby sustained with costs, and the motion is struck out with costs for want of jurisdiction and for being *subjudice*.

**DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 17<sup>TH</sup> DAY OF JANUARY 2022.**

**A.O. MUCHELULE**

**JUDGE**