



**TWW v PMN (Miscellaneous Civil Application E132 of 2021)  
[2022] KEHC 16962 (KLR) (29 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16962 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION E132 OF 2021  
RE ABURILI, J  
DECEMBER 29, 2022**

**BETWEEN**

**TWW ..... APPLICANT**

**AND**

**PMN ..... RESPONDENT**

**RULING**

1. The applicant is TWW whereas the respondent is PMN. By her notice of motion dated September 13, 2021 she seeks the following orders:
  - a. spent.
  - b. That pending the inter-partes hearing and determination of the application, there be stay of proceedings in Nairobi children’s Case No E875 of 2021 and Kisumu Children’s Case No E032 of 2021.
  - c. That the court be pleased to remove and transfer the Nairobi Children’s case No E875 of 2021 from Milimani Commercial Law Courts to Kisumu Chief Magistrate’s court and be consolidated with Kisumu Children’s Case No E032 of 2021.
  - d. Costs of the application be in the cause.
2. The application is premised on the grounds contained on the face of the motion and the affidavit of TWW, the applicant.
3. The applicant deposes that she was staying with the respondent as a couple but separated in the year 2019 due to irreconcilable differences and she has been taking care of the minor since then. She then instituted Kisumu Children’s Case No E032 of 2021 filed on May 3, 2021. That when the pleadings in the above matter were served upon the respondent, he filed Nairobi children’s Case No E875 of 2021 on July 9, 2021.



4. She deposes that she lives and works in Kisumu with the minor and that if the matter was to be heard and determined in Nairobi, she will be greatly inconvenienced as she will have to spent in Nairobi leaving the minor alone. She therefore deposes that the transfer and consolidation of the 2 matters to be heard in Kisumu is in the best interest of the minor and will avoid inconsistencies in the determination of the matters.
5. The application is opposed through a replying affidavit sworn on September 16, 2021 where the respondent deposes that they are indeed separated. He deposes that he filed Nairobi Children’s case No 424 of 2019 in which he sued the applicant over the subject, the applicant filed her responses to the suit and a consent was later recorded that the respondent pays the sum of Kshs 8,000/= maintenance. That the applicant later left Nairobi for Kisumu on transfer before filing the Kisumu suit in 2021.
6. He further deposes that there was an error at the Nairobi registry with the result that the file was marked closed and when he filed suit E875 of 2021, the earlier file was retrieved and consolidated. He avers that the Nairobi matter is active, and in any case, the virtual proceedings now in place can allow the applicant to follow the proceedings virtually.
7. The application was canvassed by way of written submissions. Only the applicant complied. The same have been considered.

#### **Analysis And Determination.**

8. I have considered the application and the response thereto together with the written submissions filed by the applicant. The onus of establishing the need to transfer a suit from one court to another is on the party applying for a transfer and that party bears the duty of providing sufficient reasons why the transfer is merited.
9. The power of the High Court to transfer a suit from one subordinate court to another court or to the High Court for hearing and final determination is found in section 18 of the [Civil Procedure Act](#) which provides that:
  - “(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.”

10. The *Civil Procedure Act* under section 16 provides as follows as regards the place of suing:

“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.”

11. The common denominator in the instant proceedings is that the subject matter of both suits is the minor’s maintenance and custody. Both the applicant and the respondent filed separate suits over the subject matter. Although the applicant did not furnish the court with the status of the matter in Kisumu Chief Magistrate’s Court, she alleges that she filed her suit first before the one in Nairobi was instituted by the respondent. I find the assertion to be incorrect in that the respondent’s replying affidavit contains annexures of pleadings of the applicant’s response to the suit in Nairobi, which suit was initiated much earlier than the Kisumu matter.

12. Despite the above disposition, the applicant did not file any rejoinder on the status of the matter in Kisumu Chief Magistrate’s Court so that this court can, with certainty decide on the status obtaining in that matter. It is not in doubt that both courts have the requisite jurisdiction. What is in contention is the geographical jurisdiction of both courts in light of the fact that the parties stay in Kisumu and Nairobi respectively.

13. This court is aware that the *Children’s Act* 2001 provides safeguards to be considered when evaluating the best interests of the child including but not limited to the fact that the trial court may need to be furnished with reports under the act relating to the minor’s welfare which can conveniently and reasonably be provided within the local jurisdiction where the minor is resident or domiciled.

14. In determining whether to order for a transfer of a suit, the courts over time have formulated the parameters to be considered. In the case of *David Kabungu v Zikarenga & 4 others*, Kampala HCCS no 36 of 1995, 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...”

15. It is not in dispute that sometimes in the year 2018, both parties herein were residents of Nairobi until the applicant transferred to Kisumu bringing the minor along with her and that both her and the minor now live in Kisumu to date. Ordinarily, the place for instituting a suit would be Nairobi, where the respondent resides but for the fact of transfer in line with section 16 of the *Civil Procedure Act* earlier referred to.
16. There is no contention that there is the likely risk of the two courts of concurrent jurisdiction arriving at varying conclusions on the same matter and plunge the administration of justice into confusion if the matters proceed concurrently in the two courts. For uniformity, just and fair determination, the two suits have to be consolidated.
17. The subject of the proceedings is the minor who is now residing in Kisumu with the applicant. It would be expensive and inconveniencing for the minor and the applicant to be traveling to Nairobi for the hearing of the matter. The interest of justice and the best interest of the child would be served better if the minor is subjected to minimal disturbance and movement due to the case. In any event, the respondent’s travel to Kisumu would be minimal given the technology now deployed by the courts in the disposal of court matters virtually.
18. Having considered the application and the law on the subject, I find that the ends of justice would be met by transferring the Nairobi Children’s matter to Kisumu Chief Magistrate’s court for hearing and final determination. In the circumstances, I make the following orders:
  - a. An order of stay of proceedings in Nairobi Children’s case No E875 of 2021 be and is hereby issued.
  - b. An order of transfer of Nairobi Children’s case No E875 of 2021 to Kisumu Chief Magistrate’s court for final disposal is hereby issued.
  - c. Upon the transfer of Nairobi Children’s case No E875 of 2021 to Kisumu Chief Magistrate’s court, the 2 matters shall be consolidated for hearing and final determination.
  - d. Pending the transfer and consolidation of the two suits, Kisumu Children’s Case No E032 of 2021 is hereby stayed.
  - e. There shall be no orders as to costs as the matter involves a minor subject.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 29<sup>TH</sup> DAY OF DECEMBER, 2022.**

**R.E. ABURILI**

**JUDGE**

