



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. The applicant DRAO and the respondent SSK got married on 10th July 2015. On 21st January 2016 the marriage was blessed with a baby boy, JDA. The marriage was dissolved on 16th September 2020 vide **Divorce Cause No. 12 of 2020** at the Chief Magistrate’s Court at Kisumu.

2. There is before the Principal Magistrate’s Court at Winam the **Children Cause No. 11 of 2020** in which the respondent is seeking from the applicant legal and physical custody of the child; an order that the applicant, either by herself or through any other person acting on her behalf, be stopped from leaving Kenya with the child; and an order for the unrestricted access to the child, as much as is practicably possible. The applicant has applied to this court for the transfer of the cause to the Children Court at Milimani in Nairobi for hearing and disposal. This is on the basis that she lives in Nairobi with the child, and that this fact was known to the respondent at the time he filed the cause at Winam Court. The respondent lives in Kisumu.

3. The application for the transfer of the cause was opposed by the respondent through a replying affidavit.

4. The court asked M/s Waititu for the applicant and Mr. Kouko for the respondent to address the application through written submissions. Counsel file the submissions. I have read and considered what each had to say on the application.

5. **Section 18** of the **Civil Procedure Act (Cap. 21)** provides that:

“18. (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(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed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.”

6. The question posed by this application for transfer is whether the applicant, who is the defendant in the matter at Winam Court, resides in

Nairobi, or in Kisumu. This question is important because, under **section 15** of the **Act**:-

“**15. 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.”

7. Secondly, under **Article 53(2)** of the Constitution and **section 4(2)** and **(3)** of the **Children Act, 2001**, whenever the court is dealing with any matter relating to a child, the best interests of the child should be the primary consideration. I would imagine that in a case dealing with any issue relating to a child, the court best placed to determine it would be, all things being equal, the one nearest to where the child is residing.

8. The respondent's case was that the cause of action arose in Kisumu where both the applicant and the child resided up to May 2020. His contention was that, in any case, the court at Winam had territorial jurisdiction all over Kenya, and therefore able to hear and determine the dispute.

9. It is, however, significant to point out that since May 2020 the respondent has not seen the applicant or the child in Kisumu. They do not reside in Kisumu. He filed the Winam case on 14th September 2020. He indicated in his pleadings that the applicant was to be served in Nairobi. In the affidavit sworn by him in support of the Notice of Motion filed in the Winam case, he deponed that the applicant was living in Nairobi but in a house he was not able to trace. She was making sure he does not access the child, he stated. It is therefore evident that by 14th September 2020 when the cause at Winam was filed the applicant and child were residing in Nairobi. Indeed, this is the position of the applicant.

10. I reiterate that under **section 18** of the **Civil Procedure Act** this court has power to transfer a cause from one subordinate court to another (**Aberdare Investments –v- Bernard Wachira & 5 Others [2014]eKLR**). The applicant has stated that she works and lives in Nairobi. She lives with the child. I find that when the cause was filed at Winam Court on 14th September 2020 the applicant and the child were known to be residing in Nairobi. The case, therefore, ought to have been filed in the Children Court in Nairobi.

11. Consequently, I allow the application dated 5th October 2020 with costs. I order the transfer of **Winam Children Case No. 11 of 2020** to the Children Court at Milimani in Nairobi for hearing and disposal.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 18TH DAY OF MARCH 2021

A.O. MUCHELULE

JUDGE