



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC CIVIL APPLICATION NO. E004 OF 2021
IN THE MATTER OF: JMO (MINOR)

DOM.....APPLICANT

-VERSUS-

PM.....RESPONDENT

RULING

1. The application before Court is a Notice of Motion dated 20th January, 2021 brought under the provisions of Articles 53(1) (e) and 53(2), 159(2), 165(6) & (7) of the Constitution of Kenya, 2010, Sections 4(3), 6(1), 22, 23(2) (c) (i), 82, 90, 91, 93, 96, 98, 113, 114(b) & (g) and 115 of the Children's Act No. 8 of 2001, section 3A of the Civil Procedure Act and all the enabling provisions of the law. The applicant seeks the following orders from this Court-

1. Spent.

2. That the firm of Priscillah Mugambi Advocates be granted leave to come on record on behalf of the applicant.

3. That this Honourable Court be pleased to transfer Machakos Children Case No. 37 of 2017 to Tononoka Children's Court.

4. That costs of this application be provided for.

2. The application is anchored on the grounds set out on the face of it and averments contained in an affidavit sworn on 20th January, 2021 by DOM (*the applicant herein*). The applicant deposed that he is the biological father of the minor herein who was born on 11th February, 2016. That he filed a suit in Machakos Children's Court vide children Case Number 37 of 2017 which matter was settled by way of consent granting custody to the respondent and granting him visitation and access rights. The applicant averred that since the consent dated 11th September, 2018 was signed, recorded and adopted, the respondent has refused to adhere to the Court orders on access and visitation and has continued to deny him access to the minor.

3. The applicant stated that after the Court's judgment, both the applicant and the respondent relocated to Mombasa hence the minor is no longer within the jurisdiction of Machakos Children's Court as he is currently residing in Mombasa. He also stated that he has continued providing for the minor's needs as directed hence it is in the best interests of the child for the issue of access to be dealt with for the safety and wellbeing of the minor.

4. It is the applicant's case that the respondent's actions were carried out without due regard to due process of the law and are therefore prejudicial and detrimental to his rights and interests as the biological father.

5. The respondent filed a replying affidavit sworn on 25th February, 2021 in opposition to the said notice of motion. She averred that the present application seeks to transfer a children's Court case that the applicant had filed in Machakos without disclosing that the said case was against two defendants, the respondent herein as the 1st defendant and EM as the 2nd defendant and that the said EM is still a resident of Machakos County. The respondent further averred that she resides both in Mombasa and Machakos and therefore it will not be prudent to transfer the case to Mombasa without the input of the said EM who is yet to be served.

6. The respondent further averred that the applicant has also failed to disclose that following the issuance of the decree in the Machakos court, he has never contributed to the maintenance of the minor as decreed thus falling into arrears of Kshs. 75,000/=. That he has neither provided clothes nor secured a medical cover from APA Insurance as decreed or at all for the minor nor included the minor in his NHIF card.

7. It was further stated by the respondent that since 2019, the minor has been attending school and the applicant has never contributed for his education save for an amount of Kshs. 10,000/= sent to the school in January, 2021. She averred that she has so far spent a total of Kshs. 86,500/= in school fees and Kshs. 85,000/= in clothes purchase and medical expenses of the minor.

8. She contended that so far she has spent a total of Kshs. 726,500/= on the minor's expenses. According to her, the applicant has never been interested in making the said contributions despite the fact that he has had access to the minor on several occasions in the year 2019 and in February, 2020.

9. The matter proceeded on 11th March, 2021 with the parties' respective Counsel making oral submissions. Both counsel basically reiterated the content in their respective affidavits in support or in opposition of the application.

Analysis and Determination.

10. I have considered the application herein, affidavit in support, response thereto, and oral submissions by parties' respective Counsel. The only issue for determination is whether this court can transfer a suit already finalized in Machakos children's court to Tononoka children court for hearing of further proceedings. It is trite that, Jurisdiction is a creature of either the Constitution or statute. It is incumbent upon the applicant to prove that it is in the interest of the child that the matter be transferred from Machakos to Tononoka and that Tononoka children court has the jurisdiction to hear a matter that has been heard by a court of competent jurisdiction and finalized.

11. Section 73 of the Children's Act No. 8 of 2001 provides for the jurisdiction of the Children's court as hereunder;

“There shall be courts to be known as Children's Courts constituted in accordance with the provisions of this section for purposes of-

a. Conducting Civil proceedings on matters set out under parts II, V, VII, VIII, IX, X, XI and XIII;

b.

12. It is trite that every suit shall be instituted in a court within the local limits of whose jurisdiction the defendant or each of the defendants at the time of the commencement of the suit actually and voluntarily resides or carries on business or personally works for gain as provided for under section 15 of the Civil Procedure Act.

13. Section 18 of the Civil Procedure Act empowers the High Court to withdraw and transfer a case instituted in a subordinate Court as provided for as hereunder: -

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.

14. Although this court was not specifically moved under Section 18 of the Civil Procedure Act, there is no other provision to my knowledge even under the children Act which governs transfer of suits by the high court other than Section 18 of the Civil Procedure Act. In the present application, a suit was filed in Machakos being Machakos Children's Case Number 37 of 2017. A consent dated 11th September, 2018 was thereafter recorded between the parties herein which was adopted as an order of the Court. Consequently, a decree was extracted dated 26th January, 2021. Essentially, the children's case before the children's Court in Machakos is finalized and what is left is execution of the orders issued in the decree dated 26th January, 2021.

15. In my view, the reading of Section 18 (b) of the Civil Procedure Act, gives the High Court powers to withdraw any suit, transfer any suit or other proceeding pending before any court subordinate to it. The key word therein is pending. From the material placed before me and the submissions by counsel, there is no suit pending hearing and determination before the children's Court in Machakos since there is a judgment pursuant to a consent dated 11th September, 2018 and an extracted decree.

16. Accordingly, I find that in as much as Section 3(2) of the Magistrate's Court's Act Cap 10 Laws of Kenya gives the Court Countrywide jurisdiction to hear and determine any suit notwithstanding where the defendant resides or where the cause of action arose with regards to children's matters, this is not a matter where this Court can exercise its discretion in accordance to section 18 (b) of the Civil Procedure Act since there is nothing to be transferred.

17. It is noteworthy that the Magistrate's Court at Machakos where the suit was filed and finalized is competent to enforce execution of the decree dated 26th January, 2021 regardless of the location of the parties herein and the minor. In the event the said Court has difficulties in execution, it can on its own motion under Order 22 R 4 of the Civil Procedure Rules or on application of the parties herein have the decree thereof sent to another Court for enforcement or execution. I do not find any miscarriage of Justice or any interest of the child being at stake by not transferring execution process from Machakos to Mombasa Children Court.

18. For the above stated reasons, it is my finding that the application herein is not merited and the same is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF MAY, 2021

HON. JUSTICE J.N. ONYIEGO

JUDGE