



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**MISC. CIVIL SUIT NO. E003 OF 2021**

**NKC .....PLAINTIFF/RESPONDENT**

**VERSUS**

**JJB.....DEFENDANT/APPLICANT**

**RULING**

1. Pursuant to the provisions of 1A, 1B, 3A, and section 18 of the Civil Procedure Act (Cap 21) Laws of Kenya, Order 31 Rule 1 of the Civil Procedure Rules of 2010 and the defendant/applicant has applied for the following orders.

a) *spent*

b) an order to stay the proceedings and/or further proceedings and hearing of Eldama Ravine Principal Magistrate's Court, Childrens' Case No. MCCHCC/E1/2020, pending the hearing and determination of the instant application.

c) An order to transfer Eldama Ravine Principal Magistrate's Court Children's Case Number MCCHCC/E1/2020 to Kabarnet Magistrate's Court for hearing and determination.

d) an order directing costs to be costs in cause.

2. The application is supported by five grounds that are set out on the face of the notice of motion and a 11 paragraphs supporting affidavit.

3. The following are the major grounds. First, the subject matter in Eldama Ravine Principal Magistrate's Court, Children's Case No. MCCHCC/E1/2020 is children's matter.

4. Second, the two magistrates in Eldama Ravine Principal Magistrate's Court have intimated that they are known to the parties and are uncomfortable to hear and determine the matter.

5. Third, there is an application seeking custody and maintenance of the minors.

6. Fourth, the respondent will not be prejudiced if the application is allowed.

7. In addition to the grounds that are set out on the face of the notice of motion, the application is supported by the 11 paragraphs supporting affidavit. The major averments in that affidavit are as follows. First, the plaintiff/respondent lodged Eldama Ravine Principal Magistrate's Court, Children's Case No. MCCHCC/E1/2020.

8. The defendant/applicant then entered a memorandum of appearance, statement of defence and an application dated 26<sup>th</sup> October 2020.

9. The remaining matters are in essence a replication of the matters that are set out on the face of the notice of motion as grounds in support of the notice of motion. I therefore find that it is unnecessary to reproduce them herein.

**The submissions of the defendant/applicant.**

10. Counsel for the defendant/applicant has submitted based on the affidavit of his client that a case has been made for the transfer of the suit to Kabarnet Principal Magistrate's Court. Counsel cited section 18 of the Civil Procedure Act (Cap 21) Laws of Kenya, which vests in the High Court powers to transfer a suit from one magisterial court to another for trial purposes.

11. Furthermore, counsel cited *Daniel Kabungu v Zikarenga & 4 others, Kampala HCCs No. 36 of 1995*, in which it was held that in exercising its powers of transfer the court has to consider a number of factors including the balance of convenience, questions of expense, interests of justice and possibilities of hardship.

12. Counsel also submitted that this court should consider that fact that this is a children's case.

### **The case for the plaintiff/respondent**

13. The plaintiff/respondent has filed a ten (10) replying affidavit in opposition to the application; whose major averments are as follows.

14. First, plaintiff/respondent filed Eldama Ravine Principal Magistrate's Court, Children's Case No. MCCHCC/E1/2020, seeking access to the minor children among others reliefs.

15. The two magistrates at Eldama Ravine Principal Magistrate's Court, recused themselves from hearing and determining the application as they were uncomfortable to do so; since they know both parties.

16. This prompted the defendant/applicant to apply for transfer of the matter to Kabarnet Principal Magistrate's Court. During the pendency of the instant application, the Senior Principal Magistrate at Eldama Ravine was transferred and replaced by another magistrate of the same rank who can comfortably hear and determine the application.

17. He has deposed that the primary reason for seeking transfer of the suit to Kabarnet Senior Principal Magistrate's Court, has been overtaken by events since there is a new magistrate who can hear and determine the suit. He has further deposed that the cause of action arose at Eldama Ravine and it is only fair that the matter be heard and determined at Eldama Ravine.

18. The plaintiff/respondent has further averred that both parties reside in Kobaitek sub-county and it will be economical and convenient if the matter is heard and determined at Eldama Ravine Law courts.

### **The submissions of the plaintiff/respondent**

19. The plaintiff/respondent has submitted that based on the undisputed facts that the balance of convenience tilts in favour of the matter to be heard and determined at Eldama Ravine Principal Magistrate's Court. The plaintiff/respondent's counsel did not cite any authority in his submissions.

### **Issues for determination**

20. I have considered the affidavits and the submissions of both parties and their submissions.

21. I find the following to be the issues for determination.

1) Whether the defendant/applicant has made out a case for the grant of the orders sought.

2) Whether costs should be costs in cause.

### **Issue 1.**

22. The power of this court to transfer a suit is provided for under Section 18 of the Civil Procedure Act, which reads as follows:

“(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) ...

(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) ...

(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.”

23. It is clear that this court has jurisdiction to transfer suits pending in the magisterial courts and this issue is not in dispute.

I find that it is common ground that the instant transfer was sought from Eldama Ravine Principal Magistrate's court to Kabarnet Principal Magistrate's Court, because the two magistrates at that station recused themselves from determining the suit. The basis of the recusal was that both parties were known to the two magistrates.

24. I find as credible the replying affidavit of the plaintiff/respondent that there is a new magistrate who has been transferred to Eldama Ravine Principal Magistrate's court, who has jurisdiction to try the suit. This averment has not been controverted.

25. I further find that an order of transfer to Kabarnet Senior Principal Magistrate's Court will not be convenient to both parties; since both parties reside in Koibatek sub-county, which is where the trial court is situated. A trial of the suit in Eldama Ravine Principal Magistrate's court will dispense with both travel monetary costs and time in travelling to Kabarnet Principal Magistrate's Court; for the latter court is in a different sub-county.

26. Additionally, the trial of the suit in Eldama Ravine Principal Magistrate's court will also save time and money for the witnesses who will be called by the parties. This saving of money and time is in the best interests of the children; since the monetary resources thus saved is likely to go towards the upkeep of the children. The taking into account of the best interests of the child is required of every court in any proceedings involving children as directed by article 53 (2) of the 2010 Constitution of Kenya.

27. I have also considered the issue of costs. I find that the costs of this application will be costs in cause.

28. In the premises, the defendant/applicant's application fails with the result that it is hereby dismissed with costs to be costs in cause.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT KABARNET THIS 30<sup>TH</sup> DAY OF JUNE 2021**

**J M BWONWONG'A**

**JUDGE**

**In the presence of:**

Mr. Sitienei and Mr. Kemboi Court Assistant.

Mr. Kibet for the plaintiff/respondent – (absent).

Mr. Okara for the defendant/Applicant.