



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL APPLICATION NO. E5 OF 2020

BOO.....APPLICANT

VERSUS

JAO.....RESPONDENT

RULING

The application dated 5th October 2020 was brought by **BOO** seeking 3 substantive orders, which can be summarized as follows;

(a) Stay of proceedings in the case of JAO Vs BOO, BUTERE CHILDREN'S CAUSE NO. XX OF 2020;

(b) Transfer of the Children's Cause No. XX of 2020, from Butere to Homabay Magistrate's Court; and (c) Consolidation of the Children's Cause with the Homabay Divorce Cause No.

XX of 2020.

1. The Applicant asserted that the Resident Magistrate's Court Butere, lacks jurisdiction to hear and determine the case before it.
2. He stated that the cause of action arose in Homabay, and that, therefore, it is the court at Homabay that has jurisdiction.
3. Furthermore, the Applicant pointed out that the matrimonial home of the parties herein was in Homabay; and that he would be prejudiced if the Children's Case was not transferred from Butere to Homabay.
4. Pursuant to the provisions of **Section 18** of the **Civil Procedure Act**, the High Court has power to, inter alia, transfer a case from one subordinate court to another subordinate court.
5. In this case one of the grounds upon which the Applicant sought the transfer of the case was that the court at Butere lacked jurisdiction to hear and determine the Children Case.
6. In the case of **DAVID KABUNGU Vs ZIKARENGA & 4 OTHERS, KAMPALA HCCC NO. 36 OF 1995**, which was cited by the Applicant, the Court held as follows;

“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 could be refused.”

7. I note that on 9th July 2020 the Applicant had lodged a Notice of Preliminary Objection in the Children Case, asserting that the Resident Magistrate's Court, Butere lacked jurisdiction.
8. The Respondent told this Court that the said Preliminary Objection was dismissed by the learned trial magistrate.
9. If the trial magistrate dismissed the Preliminary Objection, it would be wrong for the Applicant to raise the same issue as a ground upon which the case should be transferred. I hold the view that such a determination ought to be challenged by way of an appeal.
10. On the other hand, if the issue had not yet been determined, the Applicant ought to have canvassed it before the trial court.

11. In any event, the chronology of the proceedings before the trial court shows that the case had been set down for trial, with the concurrence of the Applicant's counsel. Therefore, I find that that conduct is inconsistent with the position now adopted by the Applicant.

12. Another inconsistency on the Applicant's part stems from the fact that whilst in the grounds cited on the face of the application, he said that he risked being prejudiced

“since the matrimonial home is in Homabay”;

in the Applicant's further affidavit he says that he was not married to the Respondent.

13. If the Applicant is not married to the Respondent, (as deponed at paragraph 8 of his further affidavit); and because the only nexus between the children and Homabay would be the presence of the Applicant in Homabay, I find that it would be extremely prejudicial to the Respondent and the children to have the case transferred to Homabay.

14. It is to be noted that, in any event, the authority cited by the Applicant to support his case, expressly held as follows;

“The burden lies on the applicant to make out a strong case for transfer.

A mere balance of convenience in favour of the proceedings in another court, is not sufficient ground, though it is a relevant consideration.”

15. I find that the Applicant failed to make out a strong case for transfer.

16. If anything, the filing of this application has given rise to a delay in the Children case. Any delay in the hearing and determination of cases involving children must be discouraged by the court.

17. In this case, advocate **JAVAN DEREK ADUWO** has deponed that on 8th October 2020, the case was heard, despite the fact that the trial court was shown a copy of the application herein.

18. A perusal of the record of the proceedings herein reveals that on 6th October 2020, when the application dated 5th October 2020 came up before the court, the Judge did not grant any order for the stay of the proceedings before the trial court.

19. As the Applicant had sought an order for stay of proceedings, at that ex parte stage, and because this Court declined to stay the said proceedings, I hold the considered view that the learned trial magistrate cannot be faulted for proceeding with the trial on the scheduled date.

20. Finally, I note that whilst the Applicant says that he is based at Homabay, and he requests that the Children case be transferred from Butere to Homabay, he filed his application at Kisumu.

21. When it is borne in mind that there is a High Court at Homabay, I would have expected the Applicant to file his application at Homabay, especially when it is noted that the Applicant described himself as jobless.

22. I wondered to myself why the Applicant would argue his application based on the geographical location where the cause of action allegedly accrued, (which was said to be Homabay), and then file his application at Kisumu.

23. In conclusion, there is no merit in the application dated 5th October 2020. It is therefore dismissed, with costs to the Respondent.

DATED, SIGNED and DELIVERED at KISUMU

This 29th day of July 2021

FRED A. OCHIENG

JUDGE