



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC APPLICATION NO. E064 OF 2021

IN THE MATTER OF RGM AND CWM (MINORS)

FWW.....1ST APPLICANT

GWM.....2ND APPLICANT

VERSUS

PMG.....RESPONDENT

RULING

Brief Facts

1. The applicants filed this application dated 6/7/2021 under **Sections 1A, 1B, 3A, 3B, 17 & 18 of the Civil Procedure Act, Order 51 of the Civil Procedure Rules 2010, Section 4 of the Children’s Act and Article 53 of the Constitution** seeking for orders for transfer of Othaya Children’s Case No. E001 of 2021 from Othaya Senior Principal Magistrate’s Court to Nyeri Chief Magistrate’s Court for hearing and determination.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 15th July 2021.

Applicants’ Case

3. The supporting affidavit was sworn by the 2nd applicant with the authority of the 1st applicant. She deposes that the 1st applicant is said to be the biological mother of the minors whereas the 2nd applicant is the minor’s aunt. The to the applicants contend that the Othaya court in Children’s Case No. E001 of 2021 has not conducted itself in a fair and just manner and the applicants are apprehensive that if the case is not transferred to Nyeri, the minors’ best interests will not be considered. It is stated that on 26/2021, the respondent’s advocate was accommodated at the expense of the applicants’ advocate in that the case, which was coming up for mention, was conducted out virtually because of the respondent’s advocate unavailability to attend court. It is further alleged that the respondent’s advocate does not serve the applicants’ advocate with the requisite document as required by the law. The applicants’ states that his advocate was denied leave by the court to respond to some documents filed by the respondent but not served on the applicants counsel. The applicants further contend that they availed the minors in court upon the court’s directions but the court cross-examined the minors in chambers without the presence of counsel or the parties herein.

4. The applicants further contend that there is a criminal case No. E008 of 2021 where the respondent is the complainant against his own son, who is the minors’ elder brother. The respondent has listed the minors as his witnesses in the said criminal case which is likely to raise issues of conflict of interest and grossly traumatise the said minors. Further, the applicants are apprehensive that the respondent will compromise the children’s case as he together with his brother have been heard boasting of how they with use their office and influence to compromise the criminal case just as they compromised the police to illegally detain the accused.

5. The applicants rely on **sections 17 and 18 of the Civil Procedure Act** and urge the court to transfer this case to Nyeri in the best interests of the child as envisaged in **section 4 of the Children’s Act**. In transferring the case, the applicants rely on section 15 of the Civil Procedure Act and pray that the court considers the physical custody of the minors, where the minors reside and where they go to school. As such, the applicants pray that the application be allowed.

The Respondent’s Case

6. The respondent contends that the application is an afterthought and meant to delay the main hearing of the suit. The matter came up for

directions on 9th June 2021 where the applicants did not raise the issues herein but agreed to proceed with the matter when it was mentioned on 9th July 2021.

7. The respondent further contends that the 2nd applicant abandoned the children and is currently residing in the USA. The respondent adds that he is the one who took care of the children from when they were five years. He states that the applicants obtained the custody of the children illegally by the 2nd applicant using the eldest son to kidnap the minors from respondent's home without any information or permission.

8. The respondent further contends that he instituted the children's case in Othaya because that is where he resides with the minors. The minors were taken away from his custody and taken to Embu where the 2nd applicant resides. The respondent adds that the applicants have not given sufficient reasons to warrant a transfer of the case to Nyeri. He states that the allegations of compromising the magistrate are serious and ought to be investigated. Further, the applicants need to adduce evidence to prove the said allegations. Moreover, the respondent contends that the applicants are using these excuses to delay the hearing of the matter because the 1st applicant is away. As such, the respondent prays that the matter proceed for hearing and the court makes a determination on custody of the minors.

9. The 2nd applicant filed a Further Affidavit dated 29th July 2021 and stated that the minors' elder brother was committed to King'ong'o Prison and was only availed in court when his advocates raised concern about how he was being mishandled by the Othaya Court and the police officers attached to Othaya police station. The applicants add that the bail process was also marred with circumstances created to continue detaining him and making him suffer. The applicants add that prior to the elder brother's arrest, the respondent's brother and a police officer attached to Muthaiga Police station visited the elder brother and the minors and threatened to take the minors by force only to be stopped by the neighbours and well-wishers.

10. The applicants further contend that the respondent does not have the best interests of the minor but he wants custody because he believes that he would be the recipient of the money sent to the minors by the 1st applicant and control the said funds.

11. The applicants contend that the Othaya court does not adhere to the sensitivity of children's matters because it keeps allowing strangers to accompany the respondent who are not parties of the said children's matter in court and this intimidates the minors as well as the applicants.

Applicants' Submissions

12. The applicants reiterate the contents of their affidavits and add that the Othaya court is incapable of hearing and determining Children Case No. E001 of 2021 in a manner that would uphold and protect the best interests of the child judging from its previous conduct in Othaya Cr. Case No. E008 of 2021 and the children's case.

13. The applicants submit that they have shown that the circumstances in this matter warrant a transfer of the case to another subordinate court pursuant to sections 17 and 18 of the Civil Procedure Act. The applicants contend that in transferring the matter to another subordinate court, the court ought to consider the minors' best interests, pursuant to section 4 of the Children's Act, the previous conduct of the respondent, the conduct of the court and judicial officers in Othaya Principal Magistrates Court and other stakeholders in the justice system within Othaya area.

14. The applicants further rely on **section 76 of the Children's Act** and submit that a court when making an order in respect to a child should make an order which is more beneficial to the welfare of the child keeping in mind the ascertainable feeling and wishes of the child concerned with reference to the child's age and understanding, any harm the child may have suffered or is at risk of suffering and the likely effect on the child of any change in circumstances. The applicants relied on the case of **In Re H. J. O (Minor) [2017] eKLR** to support their contention.

15. The applicants further submit that according to law, suits are instituted where the defendant ordinarily resides, works for gain or where the cause of action arose. Thus, the court ought to consider where the minors live, where they go to school and who has physical custody of the children. The applicants rely on **N. G. M vs A. G [2015] eKLR** to support their contention.

The Respondent's Submissions

16. The respondent submits that the 1st applicant left for the USA in 2011 leaving the minors with strangers and the respondent took them up and has been staying with them until the 2nd applicant with her husband, Mr. NM took away the minors assisted by the respondent's eldest son who was later arrested and charged with kidnapping.

17. The respondent further submits that the allegations of bias ought to have been raised in the trial court to enable the court address the said allegations. Further, the applicants ought to have sought the guidance of the Chief Magistrates court to which the children's court is answerable. The respondent adds that the applicants did not exhaust the avenues given for fair administrative justice as the applicants did not accord the trial court a chance to answer the allegations of bias towards her and as such, filing the said application is only meant to malign the good name of the judicial officer who is only doing her duty. Moreover, the trial court moved the criminal case to another court in order to handle the children's case and this portrays that she was out to do justice.

18. The respondent further submits that the case ought to proceed for hearing and determination and if the applicants are not satisfied with the outcome, they should then appeal to this court.

19. The respondent submits that the application ought to be dismissed for it is only meant to delay the main suit and buy time because the 1st

applicant is in the USA and is not available for cross examination and neither has she donated her authority to the 2nd applicant.

Issues for determination

20. On perusal of the application, the affidavits and the submissions, the main issue for determination is whether the applicants have established a case for transfer of the Othaya children's case to Nyeri.

The Law

21. The High Court has powers to transfer a case from one subordinate court to another pursuant to **sections 17 and 18 of the Civil Procedure Act** which provides:-

22. Section 17:-

Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed.

23. Section 18:-

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)

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or.....

24. The law provides 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. The respondent states that he has been living with the minors since the 1st applicant went to the United States five (5) years back until the 2nd applicant took them away from him.

25. From the material presented to the court, it is apparent that the mother of the children is living in the United States of America and that the 2nd applicant is the aunt of the minors. The allegation that the 2nd applicant took away the children from the respondent through unlawful means has not been denied

26. It is not in doubt that the party applying for a transfer has the burden of proving sufficient reasons as to why the transfer is merited. Further, the Constitution in **Article 53** and the Children's Act require the court to treat the interests of the child as the first and paramount consideration and must do everything to safe guard, conserve and promote the rights and welfare of the children herein.

27. The 2nd applicant herein is not the biological parent of the minors. She had not been appointed guardian of the children and indeed plays a secondary role in the custody case. The 1st applicant is living outside the country and the 2nd applicant is a resident of Embu. It does not make sense for the applicants to argue that the case ought to have been filed where the defendants reside. It is further argued that due to the fact that the minors stay with the 2nd applicant in Embu, the case ought to be moved from Othaya to Nyeri. I pose the question, why not to Embu where the 2nd applicant resides.

28. I take judicial notice that the trial magistrate has already interviewed the minors and that she may not require attendance of the minors physically in court every time the case is coming for hearing or mention. As such, the court knowing very well that the children are living in Embu will in its own wisdom reduce the physical attendances of the minors in the interest of justice.

29. I also take judicial notice that the judiciary has for the last two (2) years adopted virtual mentions and hearings of most of the cases. The 2nd applicant and the children if need be can connect to the virtual court in Othaya from Embu. Similarly, the 1st applicant may use similar or other means to give her evidence from the United States.

30. The applicants have made allegations of the trial magistrate being biased against them from the way their advocate has been treated. The applicants have the obligation of prove bias on the part of the said magistrate. From the facts of this application, the applicant's had a duty to discharge the burden of proof by way of annexing the court proceedings to this application which they failed to do. An affidavit by their advocate would have been very useful too but none was availed. This being the position, it is only the evidence of the applicants that the court has before it on allegations of bias. The respondent has vehemently denied such bias in his replying affidavit. As such, the applicants have fallen short of proof of bias on part of the magistrate.

31. It was further alleged that the magistrate examined the minors in her chambers in exclusion of the other parties in the case and never released any communication of proceedings to the parties. In my considered view, the court is an arbiter between the parties and can choose any lawful method of taking evidence of witnesses depending on their circumstances. As for the minors, the court may choose to hear them in camera due to their tender years or to prevent exposing them to trauma or intimidation. In this regard, I do not find any wrong doing in the conduct of the trial magistrate.

32. I have considered all the foregoing analysis of the evidence of the parties herein and I am of the considered view that the applicants have not established a case for transfer.

33. I hereby find no merit in the application and dismiss it accordingly.

34. There will be no order as to costs.

35. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF AUGUST, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 26th day of August, 2021.