



**SG v SWK (Miscellaneous Civil Application E032 of 2021)
[2021] KEHC 9817 (KLR) (26 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 9817 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E032 OF 2021
JN ONYIEGO, J
NOVEMBER 26, 2021**

BETWEEN

SG APPLICANT

AND

SWK RESPONDENT

JUDGMENT

1. By a plaint dated 5th November, 2019, SWK moved to Nakuru Children’s Court *vide* case No. 23/2019 seeking orders against the defendant as follows;
 - a. An order by this Honourable court that the plaintiff herein be granted sole custody of the minor SW (9 years) being her biological father.
 - b. Costs of the suit
 - c. Any other relief the court may deem fit.
2. The suit is based on grounds that the plaintiff is the biological father to the subject herein and that the subject’s mother having died, the defendant allegedly took actual custody of the child hence the prayer to surrender the baby.
3. During the pendency of the proceedings before the Nakuru Children’s court, SG(hereinafter the applicant) filed a Notice of Motion dated 17th September, 2020 seeking the following orders;
 - a. Spent;
 - b. That the Honourable court do stay the proceedings in Nakuru Children’s court case No 213/2019 SW v SG;



- c. That this Honourable court be pleased to make an order transferring Nakuru Children’s court No 213/2019 SWK v SG from Nakuru Chief Magistrate’s court to Mombasa Chief Magistrate’s court Tononoka for hearing and final determination;
 - d. That the costs of the application be provided for.
4. The application is based on the grounds stated on the face of it and averments contained in the affidavit in support sworn on 17th September, 2021 by SG . Principally, the applicant’s case is anchored on the ground that he and the subject of these proceedings are based in Mombasa and that under Section 15 of the *Civil Procedure Act*, the suit ought to have been filed in Mombasa.
 5. That the unlawful institution of the suit at Nakuru law courts has caused the applicant /defendant incur unnecessary costs in attending the Honourable magistrate’s court Nakuru for purposes of filing , mentioning, and hearing of applications. He further averred that it is quite inconveniencing for him to keep travelling all the way from Mombasa to Nakuru for court attendance. That in the event the child is required in court, it will occasion the child unnecessary disruption.
 6. In response, the respondent filed a replying affidavit sworn on 1st October, 2021 stating that, the defendant /applicant did file his defence on 13th December, 2019 admitting that the children’s court Nakuru had jurisdiction to hear and determine this case.
 7. That the case has reached crucial stage as it is pending submissions hence a transfer will delay the matter further. When the case came up for hearing, parties agreed to file submissions in disposing the application.

Applicant’s submissions

8. Through the firm of Muturi Gakuo & Co. Advocates, the applicant filed his submissions on 2nd November, 2021 reiterating the content contained in the affidavit in support of the application. Mr Gakuo submitted that, under Section 1A and 18 of the *Civil Procedure Act*, the high court has powers to transfer a suit from one subordinate court to the other. In support of this proposition, counsel made reference to the case of *Aberdare Investments v Bernard Wachira and 5 others* (2014) eKLR.
9. Learned counsel further referred the court to the holding in the case of *Kageny v Musiramo and another* (1968) E.A 43 and *David Kabungu Zikarengo* HCC No 36 /1998 Kampala where the respective courts held that; It is incumbent upon the applicant applying for transfer of a case from one court to the other to prove with satisfaction that he is entitled to the orders taking into account the balance of convenience, questions of expense, interest of Justice and possibilities of undue hardship.
10. It was further submitted that in accordance with Section 15 (1) (b) of the *Civil Procedure Act*, there was no justification for filing the case in Nakuru when the defendant and the subject are all residing in Nyali Mombasa hence causing them unnecessary inconvenience and expenses and in travelling to Nakuru. To buttress the position that a suit should be filed in the court in whose jurisdiction the defendant resides, counsel made reference to the holding in the case of *JM v ANJN* (2017) e KLR.
11. In his view, Mr Gakuo opined that it is in the best interests of the subject under Article 53 (2) of the *Constitution* and Section 53 (2) and 3 that the suit be transferred to Mombasa. To emphasize on this fact, counsel referred to the case of *J M v ANJN (supra)* where the court transferred a children’s case to a court in whose jurisdiction the subject was residing citing the best interests of the child.



Respondent's submissions

12. On his part, the respondent filed his submissions on 2nd November, 2021 through the firm of Nancy Njoroge Kairu & Co. Advocates who submitted on three issues namely;
 - a. Whether the application has met the legal threshold for transfer
 - b. Whether the transfer of the lower court case contradicts the oxygen principle
 - c. Whether the applicant is deserving of the remedy prayed.
13. According to the respondent, the applicant did admit the jurisdiction of Nakuru court hence cannot be heard to state that the same court has no jurisdiction. According to the learned counsel, parties are bound by their pleading. That since 2019, the applicant has been conducting proceedings without any objection hence an abuse of the court process. He contended that the case has substantially been heard and that it is pending filing submissions hence it is in the interest of justice that the Nakuru court completes case.
14. It was further contended that no element of prejudice has been raised should the case proceed before Nakuru law courts. That there is no proof of any tangible financial loss likely to be suffered if the orders are not granted. Counsel submitted that with covid in place court proceedings are heard virtually hence no travelling of litigants is involved. That the child only appeared once for extraction of DNA samples after which the court dispensed with her appearance in future.
15. Referring to the oxygen principles, counsel submitted that it is in the interest of justice that the case be disposed of as soon as possible without further delay. Counsel further submitted that parties should be bound by rules of procedure without resorting to undue technicalities. In support of this position, reliance was placed in the holding in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electrical and Boundaries Commission and 6 others* (2013) eKLR.
16. It was submitted that the orders sought are discretionary and that equity should apply. Counsel opined that sometime 2019, the applicant was ordered to share DNA samples but he has since ignored them thus delaying the case further. That he who seeks equity must come with clean hands. In this regard, reliance was placed in the case of *Paul Njue Nyaga Vs Nicholas Njiru Nyaga and another* (2013) e KLR

Analysis and Determination.

17. I have considered the application herein, response thereto and submissions by both parties. The issues for determination are; whether Nakuru Children's court has jurisdiction to hear and determine the subject suit and whether there are good grounds to transfer the suit from Nakuru to Mombasa.
18. This court's jurisdiction has been called upon pursuant to Section 18 of the *Civil Procedure Act* which confers authority upon the high court to transfer at any stage proceedings pending before it to any court subordinate to it or from one subordinate court to the other. It is worth noting that such powers are discretionary depending on circumstances of each case. See *Mohamed Shally Sese(Shah Sese) v Fulson Company Ltd and another* (2016) e KLR where the court held as follows;

“ It is apparent that the appellant has not been candid with this court. The orders the applicant seeks are discretionary. Equity calls to those seeking its aid to come before court with clean hands and also do equity”
19. The issue in contention is that the suit was filed before a wrong court with no territorial jurisdiction. Under Section 15 of the *Civil Procedure Act* , every suit shall be instituted in a court in whose local



jurisdiction the defendant permanently or temporarily resides or conducts business or where the cause of action arose. Equally, Section 13 of the Magistrate's Act commands that a magistrate's court shall hold its sittings at the local limits of its jurisdiction.

20. In the instant case, the plaintiff /applicant is a resident of Uganda while the child in question and the defendant are residents of Mombasa. Ideally, and naturally in compliance with Section 15 of the Civil Procedure Act, the suit ought to have been filed in Mombasa. The objective of this provision to guard against any possible or unnecessary hardship, inconvenience or unnecessary costs attendant to the suit. See also *David Kibingu v Zakarengo (supra)* where the court held that;

“...it is a well-established principle of law that the onus is upon the party applying for a case to be transferred from one court to another court for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principle matters to be taken into consideration are; balance of convenience, questions of expense, interest of justice and possibilities of hardship, and if the court is in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused...”

21. The respondent /Plaintiff has not advanced any good reason as to why he chose Nakuru and not any other court. However, the respondent is of the view that the applicant having admitted court's jurisdiction in his defence and having participated in the proceedings from 2019, cannot be heard to challenge court's jurisdiction at this stage.
22. As stated, there was no justification in filing the suit at Nakuru. However, for some reason, the applicant through his defence did voluntarily submit himself to the jurisdiction of the court. He has since 2019 to date participated in the same proceedings. Some applications have since been determined and rulings delivered. I do agree with the respondent that parties are bound by their pleadings. One cannot be heard to submit to court's authority and thereafter change that position.
23. In the case of Raila Amolo Odinga and another v Independent Electrical Boundaries Commission and 2 others (2017) e KLR the court held that;

“In absence of pleadings, evidence if any, produced by parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity placing the relevant evidence before the court for its consideration ...therefore, it is neither desirable nor permissible for a court to frame an issue not arising in the pleadings”

24. In my view, the moment the applicant subjected himself to the jurisdiction of the court, he was bound by that pleading. It will amount to an abuse of the court process for a party to submit himself to court's authority and after adverse orders are made against him, he turns around to dismiss court's authority. On that ground alone, it is my finding that the applicant is not being sincere to the court.
25. Besides, this application has been filed when the matter is at its tail end. In upholding the oxygen principle and equity, the scales of justice would tilt in favour of having the suit finalized at Nakuru. In any event, with electronic case management in place, the case can be heard virtually which translates to no travelling expenses. Already, the court has dispensed with the appearance of the baby hence no inconvenience or travelling costs for the baby.



26. In the interest of justice and to avoid further delay ,it is convenient to uphold justice without undue regard to procedure technicalities. See *Ayub Murumba v John Chaka of Webuye County Council* Civil Appl No 107/2009. Having held as above, I do not find any merit in the application herein hence the same is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH DAY OF NOVEMBER, 2021

J. N. ONYIEGO

JUDGE

