



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. CIVIL APPLICATION NO. E020 OF 2021

AKN (Suing for and on behalf of

WM, WM, AND WM (Minors).....APPLICANT

VERSUS

SLW.....RESPONDENT

RULING

1. Before this court is the Notice of Motion application brought under a Certificate of Urgency that is dated and was filed on 29th October 2021. The application seeks for the following orders:

i. Spent.

ii. Spent.

iii. THAT Children case number E016 be transferred to Embu Children's Court for determination preferably before a magistrate who is not from my ethnic community or the Respondent's ethnic community due to the blatant lack of impartiality exhibited by the magistrates in Chuka.

iv. THAT the fraudulent exparte orders issued to the Respondent by Hon. N. Kahara on 22nd June 2021 be set aside with immediate effect to accord me the opportunity to have new tenants occupy the four vacant houses in the commercial/rental building in Chuka and by extension enable me to enter into a financial arrangement with financial institutions to provide funds to immediately pay school fees for the minors who have already so far lost more than two weeks of their term and further provide for their basic and other needs since no one else seems to bother about their welfare so far except me.

2. The application is premised on the grounds on the face of the application and supported by the affidavit of AKN sworn on 29th October 2021.

3. On the first instance, this court when considered the application certified it as urgent and ordered that the **Chuka Magistrate's Court Children Case No. E016 of 2021** be stayed pending the hearing and determination of this application. This court issued these orders on 2nd November 2021.

4. The Respondent opposed the application vide the Replying Affidavit sworn by SLW on 5th November 2021.

5. The application was then canvassed by way of written submissions. The Applicant filed his written submissions on 8th November 2021. On record is also an affidavit sworn on 23rd November 2021 by CNM who is stated to be the Applicant's witness.

Issue for determination

6. The main issue for determination in this ruling is whether the application dated 29th October 2021 is merited. To this end, this court is to determine:

i. Whether the Applicant has presented sufficient reasons to warrant the transfer **Chuka Magistrate's Court Children Case No. E016 of 2021** from Chuka Chief Magistrate's to Embu Chief Magistrate's.

ii. Whether the Respondent stands to be prejudiced by such a transfer.

iii. Whether the orders issued on 22nd June 2021 should be set aside.

Analysis

7. This application is expressed to have been brought under the provisions of **Sections 18, 1A, 1B, 3 and 3A** of the **Civil Procedure Act, Order 51 Rule 1** of the **Civil Procedure Rules**, and **Articles 50(1) and 159(2)** of the **Constitution**.

8. **Section 18** of the **Civil Procedure Act** empowers this court to withdraw and transfer cases that have been instituted in a subordinate court. The subsection 1 of the said section 18 provides 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) 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.”

9. The above provision is to be read in conjunction with **Section 11** of the stated **Act** which provides that:

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same county competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts...”

10. The principles upon which this court will exercise its discretion as regards the transfer of cases have been well laid down in the Ugandan case of **David Kabungu v. Zikarenga & 4 Others Kampala HCCS No. 36 of 1995** (unreported). The case has been cited with approval in various persuasive cases including **Victoria Katuku (Suing as the legal Representative of the Estate of Eunice Mueni Muthamba v Jessinkay Enterprises & 2 others [2017] eKLR**. In the said case of **David Kabungu (supra)** Okello J. stated as follows:

“Section 18(1) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even *suo moto* by the court without application by any party. The burden lies on the Applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction 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 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 principal matters to be taken into consideration are balance of convenience, questions of expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication must be refused. 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.....”

11. The parties herein are a married couple. They have been blessed with 3 issues: W.M. (10 years), W.M. (7 years) and W.M. (3 years).

12. Being a matter that involves children, this court is bound to always consider the best interests of the child. In addition, **Section 15** of the **Civil Procedure Act** provides that suits should be instituted in the place where the cause of action arose or where the Defendant resides or carries on businesses.

13. In this case, both the parties reside in Chuka town and their children attend school in Chuka town. According to the Applicant, he is not in any gainful employment and his only source of income is a commercial/rental property in Chuka town which has 7 two-bedroomed houses, one of which is occupied by his family, that is, the parties herein and their three children. The said children also go to school in Chuka town. In the circumstances, it is my view that Chuka Magistrate’s Court is the best suited court with jurisdiction to hear and determine the issues raised by the parties.

14. The Applicant is however not challenging the jurisdiction of Chuka Magistrate’s Court. His only contention is that an alleged scheme by the said Magistrate’s Court to deny him justice. According to the Applicant, the interim order obtained on 22nd June 2021 in the subordinated court were fraudulently obtained and should thus be set aside. A brief background of the facts leading to the impugned orders are as follows:

i. The Respondent herein instituted a suit against the Applicant herein and his mother vide a Complaint dated 21st June 2021 seeking custodial and maintenance orders for the subject minors.

ii. Contemporaneously, the Respondent filed a Notice of Motion application dated 21st June 2021 which were heard by the subordinate court and the following impugned orders were made:

i. THAT this application is hereby certified urgent and heard *ex parte* in the first instance.

ii. THAT interim orders be and is hereby issued directing the 1st Defendant/Respondent to allow the Plaintiff/Applicant unconditional access into, occupation and utilization of their matrimonial home/house within Chuka Town and to release to the Applicant all her personal effects pending *inter-partes* hearing and determination of this Application.

iii. THAT interim orders and is hereby issued granting the Plaintiff/Applicant exclusive custody of the parties herein minor namely:- W.M. (10 years), W.M. (7 years) and W.M. (3 years) *inter-partes* hearing and determination of the instant application.

iv. THAT interim orders do issue directing the 1st and 2nd defendants/respondents be and are hereby ordered to release the three minors namely W.M. (10 years), W.M. (7 years) and W.M. (3 years) immediately to the plaintiff/applicant together with all the children personal effect carried with them and the keys to the matrimonial house in Chuka Town pending hearing and determination *inter-partes* hearing and determination of the instant application.

v. THAT *inter-partes* hearing and determination of the suit herein interim orders to restrain the 1st and 2nd Defendants/Respondents either by themselves, agents, servants, proxy and/or anybody else acting at their behest from in any manner whatsoever intruding into and interfering with the Plaintiff/Applicant's exclusive and free occupation and utilization of her matrimonial home/house at Chuka town.

vi. THAT the OCS, Chuka Police Station be and is hereby directed and authorized to ensure compliance with the orders issued hereof.

vii. THAT *interpartes* hearing on 07/07/2021 before Court 1.

15. Looking at the above orders of the subordinate court, it is my view that the same do not in any way interfere with the Applicant's right to have tenants occupy the four vacant houses in the commercial/rental building in Chuka. The orders only restrain the Applicant from evicting the Respondent and the minors from the matrimonial home which is only one unit in the said commercial/rental building in Chuka. If the Applicant was aggrieved by the decision of the subordinate court, then he ought to have filed an appeal to this court for consideration and determination of the same.

The provisions of the children Act are applicable in the proceedings before this court and the lower court. Section 88 of the Act gives court powers to make interim orders on custody of minors. It provides:

***"88. (1) The court shall have power to make interim custody orders and may from time to time review, suspend or vary such orders.
(2) An interim custody order shall not be made in respect of a period exceeding twelve months."***

On the other hand, **Section 91** gives the court powers to issue interim orders of maintenance which can be reviewed from time. In the circumstances I find that the trial magistrate cannot be faulted for issuing the interim *ex parte* orders. As for the prayer to have the file in the subordinate court transferred to the Embu Magistrate's Court, I am persuaded by the case of **Hangzhou Agrochemicals Industries Ltd. Vs Panda flowers Ltd[2012] eKLR** where the court held that:-

"..In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case."

16. Considering the circumstances of this case, it is my view that the Applicant's conduct in instituting the present application was not in the best interest of the subject minors who are currently not attending school because of his non-compliance with the orders issued by the subordinate court. In my view, the Applicant is only determined to settle scores with the Respondent as result of the marital problems they have been facing without carefully considering how such a battle will affect their children. This being a children matter to dealing with the matters touching the best interest of the children. **Section 4 of the Children Act** provides as follows:

"(4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity."

This is buttressed under **Article 53(2) of the Constitution** which provides:-

“(2) A Children’s Court may at any time, on its own motion or on the application of any person, revoke an order committing a child to a rehabilitation school, but before doing so it shall call for all the relevant records of the court which made the order, and all relevant records of any court which may previously have considered an application under this section.”

It follows that the orders issued by the trial magistrate were not fraudulent as they were lawful in accordance with the provisions of the **Act**. The Applicant could move the court to review the orders. The applicant should separate the matters of children and the matrimonial dispute he has with the wife.

Conclusion

17. Accordingly, I opine the application dated 29th October 2021 lacks merits and should therefore be dismissed with costs. It is however my considered view that it is in the interest of justice to have the file transferred to another court for expedient disposal, by dint of **Section 18(1)(b)(i)** of the **Civil Procedure Act**.

In conclusion:

1) I allow prayer three (iii) of the application and order that the Chuka Law Courts **Children Case No.E016/2021** be transferred from the trial magistrate, **Hon. John Njoroge - Chief Magistrate**.

2) The Chuka Law Courts Children Case No. E016/21 shall proceed before **Hon. H.I Mwendwa**, Senior Resident Magistrate Chuka Law Courts who is the designated Children’s Court Magistrate.

3) Prayer four (iv) of the application is without merits and is dismissed. The matters be raised in the Children’s Courts which has jurisdiction.

4) Being a children’s matter I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 16TH DAY OF DECEMBER, 2021.

L.W. GITARI

JUDGE

16/12/2021

The ruling has been read out in open court.

L.W. GITARI

JUDGE

16/12/2021