



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. CIVIL APPLICATION NO. E 009 OF 2020

IN THE MATTER OF THE ESTATE OF RNM (MINOR)

PMHAPPLICANT

V E R S U S

DMG.....RESPONDENT

RULING

BACKGROUND

1. The Applicant PMH is the mother of a minor RNM while the Respondent is the father of the said minor.

At the Children's Court at Kerugoya, in Children's Case No. 9 of 2020, filed on the 11th August 2020, the father of the minor DMG is the plaintiff. The mother thereof is sued as the defendant.

2. The suit as may be seen from the parties pleadings is all about shared parental responsibility and custody of the four (4) year old girl child.

3. At time of filing of the suit, the Plaintiff (father) stated that the child had been staying with her paternal grandparents at Kirinyaga County, a fact denied by the defendant (mother) who stated that she stays with the minor at Nairobi. The defendant thus raised a Preliminary Objection on the Kerugoya Children's Court territorial jurisdiction to entertain the Children's case, stating that the suit ought to have been file at Nairobi, not Kerugoya.

4. The Preliminary Objection is dated 21/8/2020, and filed on the 25/8/2020. Before the Children's Court, both parties filed submissions on the Preliminary Objection on the matter of territorial jurisdiction of the Children's court. The Court (Hon. G. W. Kirugumi – SRM) rendered its ruling on the 23/9/2020, refusing to strike out the suit as urged by the Defendant, holding that the Children's court (at Kerugoya) has jurisdiction to entertain the suit, pursuant to **Section 73 of the Children's Act**.

5. The court further made a finding that the father of the child resides at Kerugoya while the mother resides at Nairobi, and further that, each of the two Children's Courts, Nairobi and Kerugoya have jurisdiction. The Preliminary Objection was thus dismissed with no orders as to costs.

6. **By a Notice of Motion dated 8/10/2020**, the Applicant PMH approached this court, under a Miscellaneous Application under provisions of **Section 18(1)(b)(11) and 15 of the Civil Procedure Act, Section 4(2) & (3) of the Children Act and Article 45(3) of the Constitution** seeking **Orders:-**

(1) ----- spent

(2) That there be stay of Proceedings in Kerugoya Children's Court No. 9 of 2020 pending hearing and determination of the instant application.

(3) That the Honourable Court be pleased to remove and transfer the suit from Kerugoya Law Courts to the Children's Court at Milimani Nairobi for hearing and final determination.

Upon grounds stated at the face of the application and Supporting Affidavit sworn by the applicant on the 8/10/2020.

7. The application is opposed by a Replying Affidavit sworn by the Respondent. The parties Advocates argued the application before me on the 18/11/2020.

I have considered the affidavits for and in opposition to the application and the parties oral submissions.

Analysis and Determination

8. The Children's Act No. 8 of 2001 makes provisions for the welfare of the child and for connected purposes. **Section 76** provides for the principles with regard to proceedings in the Children's Court among them;

- a) **The ascertainable feelings and wishes of the child concerned with reference to the child's age and understanding.**
- b) -----
- c) **The likely effect on the child of any change in circumstances.**
- d) **The child's age, sex, religious persuasion and cultural background.**
- e) **Any harm the child may have suffered, or is at risk of suffering.**

The above are what is applicable in the dispute before me.

9. **Section 73** provides for the jurisdiction of the Children's court, thus

There shall be courts to be known as Children's Courts constituted in accordance with the provisions of this section for purposes of

- a) **Conducting Civil proceedings on matters set out under parts III, V, VII, VIII -----**
- b) **Exercising any other jurisdiction conferred by this or any other written law.**

10. **Section 76** provides for the general principles with regard to proceedings in the Children's Court.

Section 15 of the Civil Procedure Act 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.

11. **Section 18(1) of the Act** states that the High Court may withdraw any suit or other proceeding pending in court subordinate to it, and thereafter.

18(1)(ii) Transfer the same for trial to any court subordinate to it and competent to try or dispose of the same or re-transfer the same for trial to the court from which it was withdrawn. The Applicant bases her application on grounds that she lives and works at Nairobi and therefore the suit ought to have been filed at Nairobi in the first instance.

12. The suit, as stated under **Article 53 (2) of the Constitution** is for the best interest of the child - custody.

The court takes note that, by the Respondent's pleadings (plaint), the minor child was taken away from Kirinyaga, the Respondents home where the child was under the care of the Respondent and her Grandparents and taken away to Nyamira, to the Applicant's brother, than took her back to Nairobi.

These two allegations, by each of the parents of the minor are subject to proof, upon evidence which is yet to be taken.

13. The minor is only four (4) years old. She may not fathom or understand what the two parents are fighting over, save that, I think, that she misses the company and care of both parents, and is lost as to why she is being tossed from Kirinyaga to Nyamira to Nairobi by the parents.

This state of affairs no doubt prejudices the child's best interests – **Article 53(2) of the Constitution**.

Any order a court makes must be for the best interest of the child – **Section 76 (1)**.

14. The **Magistrate's Court's Act Cap 10 Laws of Kenya Section 3(2)** gives the Court Countrywide jurisdiction to hear and determine any suit notwithstanding where the defendant resides or where the cause of action arose – **George Mwangi Karori – HCCA No. 13 of 2002**. The Magistrate's Court Act is the substantive law establishing the Magistrates Courts. The **Civil Procedure Act** is a statute that was established earlier than the Magistrate's Court's Act, and in the event that a conflict between the two statutes arises, the later statute is deemed to have amended the earlier statute.

In such case, the Magistrates Court Act would be the applicable legislation, giving the Children's Court countrywide jurisdiction – **Mohamed Sitabani –v- George Mwangi (Supra)**.

15. While the above was the submission by the applicant (mother of the minor) it concludes by stating that the suit ought to be transferred to Nairobi, for the only reason that the Applicant, being a Police Officer is a busy woman and bringing the child to Kerugoya Children's Court

would involve extra expenses. The Applicant fails to appreciate that in the Children's case filed at Kerugoya, the presence of the child of the age of the minor may not be required in court, unless it is extremely necessary.

The financial implication is therefore not more important than the interests of the child.

16. It is the Respondent's submission that the parent's interests should not override or be superior to that of the child – **Section 76 (1)**. It is observed by the Respondent that the trial court at Kerugoya is competent to try the case, so is the Milimani Children's Court; that the difference is that if transferred to Milimani, more delay would be occasioned due to the transfer procedural steps before the suit is set down for hearing and thus causing further delay.

17. In the case **V N M –vs S M M & Another (2018) eKLR**, the court (on appeal) held that provisions of **Section 15 of the Civil Procedure Act** is for convenience of the parties, as it seeks to ensure that undue hardship is not visited upon a party defending a suit. The same holding was upheld in the case **Betty Nyamusi Machora –v- Betty Nyanduko (2018) eKLR**, adding that **Section 15 Civil Procedure Act** provides for the jurisdiction of the Magistrates Court on the basis of subject matter and/or its value and that it does not limit the territorial jurisdiction of the Magistrate's Courts.

18. In the premises, the two courts having equal jurisdiction over Children's cases what is the peculiar circumstances that the court ought to consider? The child's interest is of paramount importance -, not that of the two warring parents – **Article 53(2) of the Constitution**.

19. In **K M N –v- Children's Court, Tononoka & Another (2015) eKLR**, the court made a finding that both court's – **Tononoka Children's Court** and the **Nairobi Kadhi's Court** had equal jurisdiction and determined that as the two courts cannot conduct concurrent proceedings over the same minor, the proceedings at the Tononoka Children's Court were stayed to await hearing and determination of an appeal over the proceedings at the Kadhi's Court.

20. In my considered opinion, and having stated that the two Children's Courts – Nairobi Milimani and Kerugoya – have similar and equal jurisdiction, the only issue for my further determination is the interest of the child, being the delay the transfer of the suit may occasion.

The issue of financial hardship and busy work schedules of the parents (father, a businessman at Kirinyaga and Nairobi) is non consequential. The delay in having the case transferred to Milimani would obviously cause delay of determination of the case raised in the suit filed at Kerugoya Children's Court.

21. Without a doubt, the Kerugoya Children's court is not as busy as the Nairobi Milimani Court. As such the case would be heard faster and a determination rendered within a shorter period. Further, in the proceedings, the child would not be inconvenienced or prejudiced in any way as her presence in court may not be required.

I therefore agree with the Respondent's submissions that it is clearly the applicant who has been applying delaying tactics thus delaying the expeditious disposal of the case.

22. Consequently, being guided by the paramount consideration, the welfare and interests of the child, I find no merit in the application for transfer of the Children's Case at Kerugoya No. 9 of 2020 to Milimani, Nairobi. The application is dismissed.

The Interim Orders of stay of proceedings at the Kerugoya Children's Court issued by this court on the 14/10/2020 are hereby vacated. I direct that the court file in respect of Children's Case No. 9 of 2020 be returned to the said court for further hearing and determination on priority basis.

Orders accordingly.

Dated, signed and Delivered Electronically, by email at Kerugoya this 17th day of December 2020.

J. N. MULWA

JUDGE