



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CHILDREN’S MISC. APPLICATION NO. 19 OF 2015

IN THE MATTER OF CHILDREN’S ACT AND RULES

AND

IN THE MATTER OF CONSTITUTION OF KENYA

AND

IN THE MATTER OF J N & E M (MINORS)

N G MAPPLICANT

VERSUS

A GRESPONDENT

R U L I N G

1. The Applicant **N G M**, through Notice of Motion dated 8th April 2015 brought pursuant to section 1A, 1B, 3A and 18 of Civil Procedure Act and enabling provisions of Law prays that this Honourable Court be pleased to order transfer of Children’s case NO.70 of 2015 at Tononoka, Mombasa to Meru Chief Magistrate’s Court for hearing and determination and that pending the hearing of the application for the transfer case No. 70 of 2015 Tononoka be stayed.
2. The application is premised on the grounds on the face of the application *inter alia*; that the Applicant met the Respondent at Mombasa and stayed together up to January 2015; that the two have two children namely; J N aged 5 years and E M aged 8 months; that the two separated on 22nd January 2015 and the Applicant and the children came to live at Meru; that the 1st child is in school while the 2nd is breast feeding; that the Respondent has filed a case in Tononoka Court Mombasa for legal custody of the children; that the Applicant travels to Tononoka Court at high expense with the children and that in the interest of justice the matter ought to be transferred to Meru for hearing. The application is supported by Applicant’s affidavit dated 8th April 2015 which has reiterated the grounds on the face of the application and to which the Applicant has attached annexures “**NGM 1**”, “**NGM 2**” and “**NGM 3**” showing that the 1st child is a nursery school going child and that the Respondent does not support her and the children. Annexures “**NGM 4**” is a copy of the Complaint filed on 19th February 2015 and “**NGM 5**” is a Notice of motion dated 16th February 2015 filed at Tononoka Court, Mombasa. “**NGM 6**” is letter of admission of J N at [particulars withheld] Academy dated 20th March 2015 showing he was admitted at the nursery on 20th January 2015.
3. The Applicant filed supplementary affidavit dated 27th April 2015 challenging the Respondents

- purported replying affidavit. I have very carefully perused the Court file and even called from the registry for the purported copy of the Replying affidavit but the same could not be traced in the court file or at the registry. The only receipt available from the Respondent is for Notice of appointment of an advocate.
4. M/s Nderitu Advocate appeared for the Respondent and submitted that the application for interim orders in respect of Respondent's application has been heard and is pending a Ruling on 6th May 2015. She urged the matter is properly filed before the Tononoka Court, Mombasa, as both parties are residents of Mombasa. She urged if this matter is transferred to Meru Chief Magistrate's Court the Respondent would be forced to travel to Meru. She further urged the Applicant has been sending threats to the Respondent and prayed the matter to remain at Mombasa.
 5. The Applicant relied on her supportive affidavit and denied having send threatening messages to the Respondent urging that the confusion is being caused by one E W T. She urged that Meru is her home and the matter should be transferred.
 6. I have carefully considered the pleadings, the application, affidavit in support, Counsel's and Party's submissions. The issue for consideration is whether the Applicant has satisfied the conditions to warrant transfer of the suit from Tononoka Court, Mombasa to Meru Chief Magistrate's Court?
 7. **Section 15 of the Civil Procedure Act** provides where suits can be instituted and more specifically as regards the residence of the defendant or as to where the cause of action arose.

Section 15(a) (b) and (c) of Civil Procedure Act provides as follows;

“15: Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-

- a. ***the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit actually and voluntarily resides or carries on business, or personally works for gain; or***
 - b. ***any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the Court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution or;***
 - c. ***the cause of action wholly or in part arises”.***
8. The Applicant left Mombasa at or about 2nd January 2015 and proceeded to Meru County. That the Children's case No.70 of 2015 was filed on 19th February 2015 when the Applicant was already in Meru. The Plaintiff under paragraph 2 clearly points that the Applicant is currently residing in Meru. There is no dispute the two children of the union between the Applicant and Respondent are minors of tender years and stay with the Applicant. The Respondent was aware at the time of commence of this suit that the Defendant was actually and voluntarily residing at Meru. He did not seek the leave of the Court to file the suit at Mombasa nor did the Defendant acquiesce to institution of the suit at Mombasa. In view of the facts of this case it is my view that the proper place of instituting the Children's case No.70 of 2015 given the facts herein above should have been Meru and not Mombasa.
 9. **Section 18(1)(b)(ii) of Civil Procedure Act** provides;

“18. (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;

(b) Withdraw any suit or other proceedings pending in any Court

subordinate to it, and thereafter

(ii) transfer the same for trial or disposal to any

court subordinate to it and competent to try or

dispose of the same”.

10. I have considered the Applicant's application and I am satisfied the suit pending at ***Tononoka Court Mombasa, Children's Case No.70 of 2015*** ought to have been filed at Meru Chief Magistrate's Court as the Defendant at the time of filing the suit was residing at Meru; that no leave of the Court was sought to file the suit at Children's Court at Tononoka, Mombasa; nor did the Defendant acquiesce to the institution of the suit at Mombasa; I am satisfied that if the matter continues at Children's Court at Tononoka Court, Mombasa, the Applicant and her two minor children; one of whom is breast feeding and the other is a nursery school going pupil will be prejudiced and will suffer injustice as the Applicant is no longer residing at Mombasa. The transfer of this matter would in my view facilitate just, expeditious, proportionate and affordable resolution of the dispute between the two parties. The suit will be timely disposed of at a cost affordable by the respective parties as by maintaining the case at Mombasa, it would mean the Applicant will have to travel with the two minor children and may be with a friend to help her in taking care of the two minors; whereas if the Respondent would travel to Meru he won't be faced with such challenges.
11. The High Court has jurisdiction under ***section 18 of the Civil Procedure Act*** on an application by any of the parties or of its own motion without a notice by the parties at any stage to withdraw any suit or other proceedings pending in any Court subordinate to it and transfer the same for trial and disposal to any Court subordinate to it and competent to try or dispose of the same.
12. I am after careful consideration of the Applicant's application satisfied that the application meets conditions laid down to warrant transfer of the suit to a Court subordinate to this Court for trial and disposal. I therefore find the application to be meritorious and allow the same. I order as follows;
- a. ***The Children's case No. 70 of 2015 pending at Tononoka Children's Court, at Mombasa is withdrawn from the said Court and transferred to Meru Chief Magistrate's Court for trial and determination.***
- b. ***Applicant gets costs of this application.***

DATED AT MERU THIS 28TH DAY OF MAY, 2015.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. M/s Nderitu for the Respondent
2. Applicant in person
3. C/clerk – Peninah/Mwenda

J.A. MAKAU

JUDGE