

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 795 OF 2014

Y A A APPLICANT

VERSUS

A H A RESPONDENT

RULING

The applicant Y A A is the defendant in Civil Case No. 143 of 2014 filed by A H M as the plaintiff before the Kadhi's court Nairobi. The applicant seeks to stay the proceedings before the Kadhi's court and an order for the transfer of that case from the Kadhi's court Nairobi to the Kadhi's court Mandera. The grounds upon which the orders are sought are set out on the face of the application and also an affidavit sworn by the applicant.

The respondent has opposed the application and filed a replying affidavit. Both learned counsel for the parties herein have filed written submissions. Some authorities have also been cited by the learned counsel for the applicant which I have read. As the matter is still pending determination, this court will guard itself from going into some of the averments made by the parties in their respective pleadings.

The applicant has stated *inter alia* that both parties reside and work in Mandera. The matrimonial home is in Mandera, the witnesses of both parties reside in Mandera and the cause of action arose in Mandera. It is also his case that he will undergo great economic and incidental losses by travelling to and from Nairobi to attend the hearing which may also be prejudicial to his employment. The circumstances may also deprive him time to take care of his children due to the expenses involved.

The respondent on the other hand opposes the application on the basic ground that the applicant has already submitted himself to the jurisdiction of the Kadhi's court at Nairobi where he entered an appearance and the court has already given an order for the maintenance of the children which has not been appealed. It is her case that this application is intended to evade the said ruling and delay the final determination of the case.

By his conduct the applicant is therefore estopped from making this application which amounts to abuse of court process and should be dismissed with costs. It is not true according to her that witnesses of both parties reside in Mandera, and has set out the names of her witnesses who reside in Nairobi. She fears for her life because both the applicant and herself come from opposing clans, and in the past she has been assaulted by the applicant when she visited the children in Mandera.

This court has jurisdiction to order a transfer of a case under the Civil Procedure Act and in particular Section 18. Several considerations however come into play before such an order is given. Both parties subscribe to the Muslim religion. The Kadhi's court in Nairobi has jurisdiction to hear and determine this matter. For all intents and purposes this matter is part heard although evidence is yet to be recorded. I say so because an order of maintenance has been given by the Deputy Chief Kadhi.

At the centre of this dispute is the maintenance of the children of the marriage living with the respondent in Nairobi. Their welfare therefore takes the centre stage. When the applicant entered an appearance before the Kadhi's court in Nairobi, it was not conditional neither was it in protest.

There is no allegation that the Deputy Chief Kadhi who is already seized of this matter is biased in any way. There is also no allegation that proceedings may be delayed if the matter is retained in Nairobi.

I observe that the applicant works and resides in Mandera, but the respondent is in Nairobi and resides with some of the children. The averment that she has recently undergone delicate surgery has not been seriously disputed.

I have balanced the interests of both parties and considered the welfare of the children. To avoid any delay in this matter I decline to grant the orders sought. The case shall remain in Nairobi, the proceedings shall be conducted in the Kadhi's court Nairobi and there shall be no stay of the same. The interests of justice dictate that each party shall bear their own costs.

Orders accordingly.

Dated and delivered at Nairobi this 16th Day of December, 2014.

A. MBOGHOLI MSAGHA

JUDGE