



REPUBLIC OF KENYA

High Court at Meru

Miscellaneous Application 93 of 2012

CALEB MONG'ARE .....APPLICANT

VERSUS

CAROLINE GAKII..... RESPONDENT

R U L I N G

The applicant CALEB MONG'ARE through a Notice of Motion dated 12<sup>th</sup> September, 2012 brought under Section 1A, 18 and 63(e) of the Civil Procedure Act sought the following Orders:-

- 1. That there be a stay of proceedings in and of MERU CHILDREN'S CASE NO. 114 OF 2010 as the trial court lacks territorial jurisdiction.***
- 2. That Meru CM Children's Case No.114 of 2010 be and is hereby transferred to the Children's court in Nairobi.***
- 3. That costs of the application be provided for the applicant.***

The application is based on the grounds on the face of the application and supported by attached affidavit of the applicant dated 12<sup>th</sup> September, 2012 and the annexures thereto. The main grounds for seeking transfer of the suit is that all parties in the case reside and work in Nairobi and that the minor is also a resident of Nairobi and that is expensive and inconvenient to have the case continue to be tried in Meru and moreover both parties had time and again, petitioned or agreed to move the lower court on the issue of jurisdiction. The applicant further sought transfer as the lower court lacked territorial jurisdiction.

The application on the other hand is opposed by the respondent as per her replying affidavit dated 27<sup>th</sup> September, 2012. The respondent averred that when the suit was filed the child in issue lived in Meru and that her contractual engagement in Nairobi was due to terminate in October, 2012 and it would be expensive to travel to Nairobi, if the primary case is transferred to Nairobi. The respondent deponed that Meru Court has no requisite jurisdiction as per the parental responsibility agreement annexed to her affidavit and marked CG5.

A careful perusal of the pleadings herein reveal that the instant suit was filed at the Meru Children's Court sometimes during the month of September, 2010. That paragraph 2 of the said plaint reads as follows:-

***“The defendant is an adult male person of sound mind and work for gain as an Architect with AAKI CONSULTANT ARCHITECTS URBAN ENGINEERS WESTLAND-NAIROBI.”***

The applicant in paragraph 6 of the Notice of Motion has stated that the Children Court in Meru lacks territorial jurisdiction to hear and continue to hear Meru CMCC No.114 of 2010.

Under Section 15 of Civil Procedure Act which deals with place of institution of suits 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.**

In the instant suit the respondent in her replying affidavit contends that the Meru Court has the requisite jurisdiction. In her view then the suit was filed in a court with jurisdiction to hear and determine the matter, whereas the applicant challenges the court's jurisdiction for lack of territorial jurisdiction.

It is a trite law that this court has no jurisdiction under Section 18 of the Civil Procedure Act to transfer a case from one subordinate court to another if the original court had no jurisdiction in the first place to hear and determine the suit. In the case of **OWNERS OF MOTOR VESSEL "LILIAN" – V- CALTEX OIL LIMITED (1989) 1KLR** the Court of Appeal had this to say on jurisdiction.

***"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending either evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....."***

The respondent having admitted that the trial court had jurisdiction to hear and determine the matter as the child in issue was living at Meru at the time of filing the suit cannot with the same breath be heard to say the same court lacks jurisdiction.

Notwithstanding various local geographical limitations in jurisdiction imposed by Sections 11, 12, 13, 14 and 15 of the Civil Procedure Act, the Resident's court have jurisdiction throughout Kenya. Section 3(1) and (2) of the Magistrate's Court Act, (Cap.10) provides:-

***"3. (1) There is hereby established the Resident Magistrate's Court, which shall be a court subordinate to the High Court and shall be duly constituted when held by a chief magistrate, a senior principal magistrate, a principal magistrate, a senior resident magistrate or a resident magistrate.***

***(2) The Resident Magistrate's Court shall have jurisdiction throughout Kenya."***

I have carefully examined the pleadings and authorities relied upon by parties. I have considered authority in case of **JOHN MWANGI KARANJA – V- ALFRED NDIANGUI HC.MISC. APPLICATION NO. 357 OF 2010** in which Hon. Justice H.P.G. Waweru held that the discretion to transfer suit by this court was a procedural rather than a jurisdictional issue. The court allowed an application to transfer a suit which had been instituted in a court without jurisdiction. The Counsel for the respondent on the other hand relied on the case of **KAGENYI –V- MUSIRANO & ANOTHER(1968) E.A. 43** in which case it was held Section.18 of Civil Procedure Act gives the High Court general power to transfer of all suits, which power may be exercised at any stage of proceedings, even *suo motu* by the court, provided the suit

had been in the first instance brought to a court which had jurisdiction to try it.

In the instant suit I find the suit had been instituted in a court with jurisdiction to try and determine this matter. I find both parties reside in Nairobi and even the respondent had sought at one time to have the suit transferred to Nairobi as the child in issue also resides in Nairobi.

In the circumstances of this case I will allow the application by Notice of Motion dated 12<sup>th</sup> September, 2012 and proceed to make the following orders:-

1. ***That there be stay of the proceedings in Meru Children's Case No.114 of 2010.***
2. ***That Meru Children's Case No.114 of 2010 be and is hereby transferred to the Children's Court in Nairobi.***
3. ***That the costs of this application be in the cause.***

***DATED, SIGNED AND DELIVERED AT MERU THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2013.***

***J. A. MAKAU***

***JUDGE***

***DELIVERED IN OPEN COURT IN THE PRESENCE OF:***

1. ***Mr. Ombwayo for applicant(absent)***
2. ***Miss Waithaka h/b for. C. Mbaabu for the respondent***

***J. A. MAKAU***

***JUDGE***