



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Application 6 of 2012

IN THE MATTER OF: A. R. M., S. R. M. AND B. N. M. – MINORS SUING THROUGH
THEIR MOTHER AND NEXT FRIEND

M. R. M. APPLICANT

VERSUS

S. N. N. RESPONDENT

RULING

(1) Before the Court is an application by Notice of Motion dated 17th April 2012 for the transfer of Nairobi Children's Court case No. 423 of 2012 to Tononoka Children's Court, Mombasa for hearing and disposal. The Applicant is the divorced former husband of the Respondent and the three children the subject of the proceedings are their children. The application is opposed and the parties have in addition to filing affidavits in support of their respective cases put in written submissions in lieu of oral argument, and ruling was reserved. It is regretted that owing to heavy work load and official assignments out of court, it has not been possible to deliver a ruling on the matter earlier.

(2) It was contended for the Applicant that the three children were in the lawful custody of the Applicant at Mombasa except for one who was unlawfully taken from school by the Respondent, the children lived with the Applicant at Mombasa. It is argued that **“it would be disruptive and contrary to the best interest of the issues to transport them from Mombasa to Nairobi back and forth It will also be costly for the Respondent [in the Nairobi case] to have to arrange for food, transport and accommodation over and above the current parental responsibilities which he bears solely without any support or maintain from the Respondent. Subjecting the issues to examination by Children's Officers who would then have to report their findings to Nairobi Children's Court or alternatively their production in Nairobi for examination by a Children's Officer there is oppressive.”** Counsel for the Applicant also pointed out that there is already a suit pending before the Tononoka Children's Court, Mombasa seeking order for the vesting of the physical and legal custody of the one child whom the Respondent had taken from school and for restraining **“the Respondent from interfering with the learning process of the issues or transferring them from their current schools or interfering with their custody.”**

(3) For the Respondent, it was contended that the High Court lacks jurisdiction to transfer the case filed by the Respondent in Nairobi **“as according to Rule 1 of the General Rules and Regulations governing the children's proceedings and Rule 5 have clearly stated what provisions of the Civil Procedure Act apply in the children proceedings”** and sections 3A, 15 and 18 (1) (b) of the Civil Procedure Act do not apply. It was argued that the Respondent who was in physical custody of the one child had filed suit **“at the nearest court where she was residing with the child.”** The Respondent also

contends that **“all the children are in boarding schools away from Mombasa that is in Embu and Nakuru respectively and most of the time they spend in school.”** The Respondent further contends that the Applicant should have raised the issue of the jurisdiction of the Nairobi Children Court before that court rather than filing another suit at Tononoka Children's Court and seeking the transfer of the Nairobi suit to Mombasa.

(4) With respect, the General Rules and Regulations, L.N. No. 77 of 2002 made under the Children Act do not limit the jurisdiction of the court under section 18 of the Civil Procedure Act to transfer suits. The reference to “the Act” in Rules 1, 4 and 5 of the General Rules clearly refer to the Children Act under which the Rules and Regulations are made. Section 89 of the Civil Procedure Act provides that the Act shall apply **to all proceedings in any court of civil jurisdiction**, and I find that the High Court has jurisdiction over the transfer of cases between the Children's Courts.

(5) In considering whether to transfer the Nairobi Children's Case No. 433 of 2012 to Mombasa as sought by the Applicant, the court must, in accordance with section 4 (2) of the Children Act, take into account the best interest of the children as the primary consideration over and above the parents' respective convenience as to the court nearest to them or which saves greatest expense and hardship. Each party has suggested that the interests of the children are better secured by having the case proceed at their respective choice court.

(6) However, before the court exercises its discretion to grant or refuse the Application for transfer of the Nairobi Children Court case No. 433 of 2012, it is obliged by section 4 (4) of the Children Act to hear or take the opinion of the Children as to their best interest in the matter. Section 4 (4) of the Children Act is in the following terms:

“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.”

(7) Accordingly, for the reasons set out above, I shall hear the children on their best interest with respect to their opinion as to the case, the party with whom and from what location they would wish to attend the court proceedings, which, in my view, are factors that affect the best place of suing, on a date to be fixed in consultation with the counsel for the parties, during the current school vacation/holidays before making a final determination on the application.

Dated and delivered this 20th day of December 2012.

EDWARD M. MURIITHI

JUDGE

In the presence of:

Miss Muyaa for the Petitioner

Mr. Yator for Amere Machio & Co. for the Respondent

Miss Linda Osundwa - Court Clerk