



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

MISC. CIVIL CASE NO. 210 OF 2010

TOM MINJAAPPLICANT

VERSUS

SUSAN MWIYERIARESPONDENT

RULING

Pursuant to the provisions of sections 3A, 15 and 18 of the Civil Procedure Act and Order XI rules 1 and 2 of the Civil Procedure Rules, Tom Minja, the applicant herein, took out the motion dated 29th October 2010 in which he applied for the following orders:

1. ***That this application be certified urgent and be heard exparte in the first instance due to the urgency involved.***
2. ***That there be a stay of proceedings in Children's case number 754 of 2010 in the Children's court at Nairobi.***
3. ***That this court be pleased to order withdrawal and transfer of Children's case Number 754 of 2010 in the Children's court at Nairobi to Children's court at Nanyuki for consolidation with Children's case number 10 of 2009 pending before the Children's court at Nanyuki***
4. ***That the costs of this application do abide the outcome of the hearing of the suit at Nanyuki children's court.***

The applicant filed an affidavit he swore in support of the motion. Susan Mwiyeria, the Respondent herein swore a replying affidavit which she filed to oppose the motion.

The applicant has beseeched this court to grant him the orders in view of the fact that the Nanyuki children's case No. 10 of 2009, (*hereinafter referred to as the 'Nanyuki case'*), was filed earlier than Nairobi Children's case No. 754 of 2010 (*hereinafter referred to as the Nairobi case*) since the proceedings relate to same parties. The applicant claimed that the Respondent was notified of the Nanyuki case but decided to avoid service. The applicant accused the Respondent of instituting the Nairobi case without disclosing the existence of the Nanyuki case. The Respondent on her part refuted the applicant's allegations. She claimed that she was not aware of the Nanyuki case because she had not been served with the pleadings therein hence the applicant is not entitled to the orders sought. The Respondent urged this court to find that the applicant's application is meant to delay the hearing and determination of the Nairobi case to the utter detriment of the minor. The Respondent further beseeched this court to reject the motion because if the Nairobi case is transferred to Nanyuki, then the Respondent who lives in Nairobi with the minor will incur costs and face untold hardship.

I have considered grounds set out on the face of the motion plus facts deponed in the affidavits filed for and against the motion. I have further considered the oral submissions made by learned advocates from both sides. There are certain facts which are not in dispute in this motion. First, that both the Nanyuki and the Nairobi cases involve the same parties namely Tom Minja Kigetu, Susan Mwireria and Shawn Sadikiel, the minor. Secondly, that the Nanyuki case was filed first in time as opposed that in Nairobi. In the Nanyuki case, the applicant's main prayer is for the custody of the minor plus cost. The plaintiff was filed on 17th November 2009. In the Nairobi case, The Respondent herein, seeks the custody of the minor, maintenance and costs of the suit. Thirdly, there is no dispute also that the applicant has not served the Respondent with the pleadings in respect of the Nanyuki case. The main reason advanced by the applicant which prevented him from effecting service of process upon the Respondent is that the Respondent had secretly moved out of the Nanyuki matrimonial home with minor to an unknown location. It is said the Respondent also avoided service of process. Fourthly, it is also not in dispute that the issues raised both cases are interrelated hence can only be determined in one trial. The question is whether or not the applicant has raised good reasons to be given the orders sought. I have already started that the applicant has admitted he did not serve the pleadings upon the Respondent because the respondent moved out of the matrimonial home to an unknown location and that she avoided service. I have examined the plaintiff filed at Nanyuki and it is obvious that the applicant knew that the Respondent had moved to Nairobi. It is therefore not true that the Respondent had moved to an unknown location. In fact he clearly avers that the Defendant (Respondent) resides in Nairobi. On the other hand the Respondent avers in her plaintiff filed in Nairobi that the Defendant (applicant) resides and works for gain in Nanyuki at Nanyuki chemist. I am convinced the Respondent was not aware of the existence of the Nanyuki case hence she cannot be accused of having avoided service. The spirit and the letter of the law under section 15 of the Civil Procedure Act is that a suit should be filed where the defendant resides or where the cause of action arose. In this case the Respondent is clear that the defendant resides in Nanyuki and that there is no doubt that the cause of action arose at Nanyuki. There is no explanation as to why the Respondent decided to file the suit in Nairobi yet the law required that the same be filed at Nanyuki. I expected the Respondent to explain the reasons why she chose to file the Nairobi case or why she thinks the Nairobi case should not be transferred to Nanyuki. I have carefully perused the Respondent's plaintiff and it's apparent that the Respondent averred in paragraph 2 of the plaintiff that the Defendant (Applicant herein) works for gain and resides in Nairobi. The Respondent has not attempted to amend that erroneous averment. I can only infer that the averment was made for purposes of woodwinking the Nairobi registry to accept the plaintiff for registration. For the above two reasons I am convinced that the Respondent was not candid. After a careful consideration of the matter I am satisfied that it is to the best interest of justice and the parties to have the Nairobi suit withdrawn from that registry, transferred to Nanyuki registry to be consolidated with the Nanyuki case. This will enable the court to effectually determine the real issues in dispute.

In the end the motion dated 29th October 2010 is allowed as prayed with an order that each party meets his or her own costs.

Dated and delivered this 25th Day of February 2011.

J.K. SERGON
JUDGE

In open court in the presence of Mwangi h/b Opiyo for Respondent N/A for the Applicant.

J.K. SERGON
JUDGE