

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Miscellaneous Civil Application 92 of 2010

L A O.....APPLICANT

VERSUS

A M S.....RESPONDENT

RULING

This is an application by the defendant to transfer the suit filed in Mombasa Tononoka Children’s Court as Case No. 15 of 2010 to the Nairobi Children’s Court for trial and disposal. That case is between A M S (plaintiff) and L A O (defendant), the present applicant. The application is made on the primary grounds that the applicant and J A J, their child who is the subject matter of the said case, live in Nairobi within the jurisdiction of the Nairobi Children’s Court and it is therefore in the best interests of the said child that the case be transferred as sought.

The application is supported by an affidavit sworn by the applicant, L A O who depones that she works, and resides in Nairobi and lives with the said child; that the said child is a student at **[particulars withheld]** High School Nairobi and it will be inconvenient to subject her to the long distance travel in order to attend the court hearings at Tononoka Mombasa. In the premises according to the applicant the said transfer will facilitate the expeditious disposal of the suit.

The application is opposed and there is a replying affidavit sworn by the plaintiff/respondent. The gist of the opposition is that the application for transfer has not been made in good faith but is solely intended to delay the cause of justice particularly in view of the fact that Tononoka Children’s Court has jurisdiction to hear the matter.

I have considered the application, the affidavit in support and the one in opposition. I have also given due consideration to the pleadings. Having done so, I take the following view of the matter. Section 15 of the Civil Procedure Act reads 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.”

There is no dispute that at the time of the commencement of the suit at Tononoka Children’s Court, the applicant, who is the defendant in that suit actually and voluntarily, resided and worked for gain in Nairobi. The respondent acknowledged the same in paragraph 2 of his plaint. The Tononoka case was therefore instituted in contravention of section 15 of the Civil Procedure Act. Section 18 (1) (b) (ii) of the same Act which supplies the remedy reads as follows:

“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 –

- (a)
- (b) withdraw any suit or other proceedings pending in any court subordinate to it, and thereafter –
 - (i).....
 - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same.”

The jurisdiction of the High Court to withdraw and transfer cases instituted in subordinate courts appears unfettered, the only limitation being the competence of the subordinate courts. In the matter at hand, Nairobi Children’s Court has jurisdiction to try the suit instituted by the respondent at Tononoka. The opposition made by the respondent to the transfer has in my view no basis in Law. The respondent has also not demonstrated that he would suffer any prejudice if the order sought in this application is granted after all he

contravened express provisions of the Law in instituting the suit at Tononoka as already found.

In the end the order that commends itself to me is that Tononoka Children's Court – Mombasa (Case No. 15 of 2010) be and is hereby withdrawn from that court and is transferred to the Nairobi Children's Court for hearing and disposal.

The applicant shall have the costs of this application.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF APRIL 2010.

F. AZANGALALA

JUDGE