



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
MISC. APPLICATION NO. 251 OF 2010**

MMM.....1ST APPLICANT
 AWM.....2ND APPLICANT
VERSUS
 ANN.....RESPONDENT

RULING

This ruling relates to an application by way of a Notice of Motion dated 13th May 2010 in which the applicant seeks orders of court to transfer Nakuru Children's Court Case No. 10 of 2010 (*in the matter of S.W.M and V.M.M - minors*) between **ANN vs. M M M and AWM**, from the Nakuru Chief Magistrate's Court in Nakuru to the Magistrate's Court in M for trial and final disposal.

The application is premised upon the provisions of section 1A, 1B, 3A, 15, 18(1)(b) and 81(3) of the Civil Procedure Act and Practice Directions by the Hon. Chief Justice published in Gazette Notice No. 1756 of 2009, Order L, rule 1 of the Civil Procedure Rules. It is supported by the Affidavit of the 1st Applicant sworn on behalf of the deponent and also the 2nd applicant, and on the grounds upon the face of the application.

In a Replying Affidavit sworn on 24th May 2010 and filed on 25th May 2010 the Respondent has opposed the application for transfer of the Children's Court Case No. 10 of 2010 to M.

The application was urged before me on 25th May 2010. Miss Gatut Magana represented the applicants while Mr. Wambeyi appeared for the Respondent.

The facts are not disputed. The 1st applicant and the applicant are estranged husband and wife, and have been so estranged since the year 2002. Following their estrangement; the children of the relationship (*marriage*) then aged 6 and 4 years respectively were taken by the father, the 1st applicant, to live with his elderly mother, the 2nd applicant. The children have since lived with the grandparent in M and the first child S is now 12 years of age, and is in Form I while her brother V, is now in Standard 7 and that both are happy in M.

Miss Gatut Magana learned counsel for the applicant has made extensive reference to SS 1A & 1B (*the so called oxygen provisions*) and to the older provisions of Sections 3A, 15, 18(1) and 81(3) of the Civil Procedure Act, Practice Directions by Hon. the Chief Justice under Gazette Notice Number 1756 of 2009, and Order L, rule 1 of the Civil Procedure Rules.

In my humble opinion, those provisions do not apply. The reason is that the Children Act, 2001 (*No. 8 of 2001*) is a complete Code of law relating to parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children, and gives effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes.

Section 3 of the Civil Procedure Act provides that nothing under the Act shall limit or otherwise affect any special jurisdiction or any power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

Examples of other such laws include, the Arbitration Act, 1995, (No. 5 of 1995 and Sections 8 and 9 of the Law Reform Act (Cap 26, Laws of Kenya). Other examples include the Law of Succession Act (Cap. 160, Laws of Kenya) and the Children Act, the subject of this ruling. Those Acts, subject only to exceptions and rules of procedure specifically adopted under those statutes, provide a complete code on both the substantive and procedural law.

In the matter of the Children Act, Part VI (ss 73-79) establish and provide the jurisdiction and procedure of Children's Courts, and appointment of magistrate's to preside over cases involving children in respect of any area of the country. For instance section 73(a) incorporates Orders III, V, VIII, IX, X XI and XIII (*relating respectively to Recognized Agents and Advocates; Service of Summons, Defence and Counterclaim; Appearance of Parties, Interrogatories, Discovery and Inspection, Consolidation of Suits, and Production, Impounding and Return of Documents*). The part also provides for sitting of the Children's Court (S. 74), power to clear the court (s.75), general principles with regard to proceedings, in Children's Court (s.76), legal aid (s. 77), reports (s. 78), appointment of a guardian ad litem, (s. 79), and section 80 (*appeals to the High Court and further appeal to the Court of Appeal*). There is no provision in Part VI of the Children Act which empowers the High Court to transfer any case from one Children's Court to another. The Children's Act being a special legislation with its own jurisdictional provisions, SS1A, 1B, 3A, 15, 18(1) & (b) and 81(3) of the Civil Procedure Act have no application at all. The only jurisdiction the High Court has is that of an appeal under section 80 of the Children Act, and not transfer.

The application dated 13th May 2010 is therefore dismissed with costs to the respondent. I direct that the matter do proceed as per the provisions of the Children Act.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 11th day of June 2010

**M. J. ANYARA EMUKULE
JUDGE**