



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MERU  
MISCELLANEOUS APPLICATION 74 OF 2010**

**W N ..... APPLICANT**

**VERSUS**

**L K ..... RESPONDENT**

**RULING**

This ruling relates to the Notice of Motion dated 17<sup>th</sup> May 2010. It is brought under Sections 3, 3A and 18 of the Civil Procedure Act. The applicant seeks an order for stay of proceedings in Marimanti Children's Case No. 1 of 2010. Further, it seeks an order for the transfer of that case from Marimanti Children's court to the Chief Magistrate's Court at Meru for hearing and determination. The applicant deponed that he is a school teacher by profession. He denied that he knows the respondent or that they have ever had any relationship with each other. That he is married with 3 children. He was shocked beyond belief when he received the summons relating to that children's court matter. The children court matter alleged that he and the respondent were cohabitating from 1994 to 1996. That as a result of that cohabitation, it was alleged in that case that a child, T.M., was born. He denied knowledge of the allegation made in that children's court matter. On receiving the summons, he did his own investigation and found that the case was initiated through the collusion with Ms Karimi who is the secretary at the Marimanti Magistrate Court. That the said Karimi had been calling his colleagues, especially one Muriuki and making enquiries of the applicant's whereabouts. That the said Karimi also delivered a warning message to the principal of the school where the applicant teaches. At this point, I would state that the averments relating to information given to the applicant is hearsay evidence and is contrary to order XVIII Rule 3 of the Civil Procedure Rules. For that reason, those averments will be struck out of the affidavit. Order XVIII Rule 3 (1) provides as follows:-

***“Affidavits shall be confined to such facts as the deponement is able of his own knowledge to proof.”***

That Rule also provides that in interlocutory proceedings, hearsay evidence can only be relied on with the leave of

the court. No leave was obtained by the applicant and accordingly, paragraph 8 of the applicant's affidavit is hereby struck out. The applicant further stated that he is apprehensive that he may not get justice due to the information given to him by his colleagues and the school principal. The application was opposed by the respondent. The respondent confirmed in her affidavit that she was married to the applicant and that the child was born during that marriage. That the applicant had paid part of the dowry to her father. That the applicant had even sent money for the care of the child through third parties. She therefore termed his allegations about Karimi as pure imaginations. She stated that the said Karimi was blameless and that she had nothing to do with the case before court. To show that there is no basis of fearing that the applicant would not get justice from the Marimanti Children's Court, she deponed that interlocutory judgment had been entered against the applicant but on the applicant making an application, the court had set aside that interlocutory judgment. The respondent stated that she is without employment and normally relies on casual jobs and the transfer of the case from Marimanti Court was aimed at frustrating her because she would have to pay the witness expenses of traveling to Meru Chief Magistrate court. The respondent finally stated:-

***“That the matter is urgent as the child is suffering and the applicant's intention is to delay the matter as much as possible.”***

The matter before Marimanti Children's Court relates to a child. In deciding any matter relating to a child, the court is bound to consider the welfare of the child as paramount. Section 76 (1) of the Children's Act makes that clear. It provides:-

***“76 (1) Subject to Section 4 where a court is considering whether or not to make one or more orders under this Act with respect to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all.”***

The applicant in all his depositions does not refer to the welfare of the child. It does seem to me that the application is made to suit the convenience of the applicant. I must state that there is no evidence shown that the learned magistrate who presides over the children's court at Marimanti would be biased against the applicant. The issues relating to Karimi are of no substance to consider in this matter. Bearing in mind that the respondent is un-employed, and is having difficulty in raising the child who is the subject of that matter, the welfare of the child in my view would be best served by the case being heard by Marimanti Children's Court. The Notice of Motion dated 17<sup>th</sup> May 2010 is rejected and is dismissed with costs being awarded to the respondent.

Dated and delivered at Meru this 2<sup>nd</sup> day of July 2010.

MARY KASANGO  
JUDGE