



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

ATKISII

Misc. Civ. Appli. 61 of 2008

ROM..... APPLICANT

VERSUS

CAM RESPONDET

RULING

The applicant filed an application under Sections 3A, 15 and 18 (1) (b) of the Civil Procedure Act. He sought transfer of children's case No[...] from Kwale SRM's Court to the SRM's Court at Homa Bay.

In his affidavit in support of the application, the applicant deposed that he got married to the respondent under the Luo Customary Laws and thereafter resided at Homa Bay Township until 2006 when the respondent left their matrimonial home together with their two minor children. The applicant is still residing at Homa Bay Township whereas the respondent is now residing at Ukunda, Kwale District.

The respondent has filed the aforesaid case seeking, *inter alia*, legal custody of the children as well as maintenance of the children by the applicant. The two children, AAK and GO, were born in 1988 and 2004 respectively.

According to the applicant, the case was filed at Kwale Law Courts to make it difficult for him to defend the same. He deposed that he had so far travelled from Homa Bay to Kwale on three different occasions for purposes of defending the suit. On each occasion he allegedly spent more than Kshs. 10,000/= as travelling and accommodation expenses.

The respondent filed a replying affidavit and deposed that she was in gainful employment at Ukunda where she is living with the aforesaid children and single handedly educating and taking care of them. In her view, the application herein was merely intended to delay the finalization of the children's case. She stated that the applicant had travelled to Kwale over seven times and had severally applied for adjournment of the case. Since the children, who are the subject matter of the dispute before court, are living and schooling within Kwale District, the case should not be transferred to Homa Bay as sought, the respondent stated.

The applicant stated in a supplementary affidavit that the respondent, in filing the aforesaid case at Kwale Law Courts, was trying to revive issues that had been determined in Divorce Cause No. [...] at Homa Bay SRM's court between the parties herein. The said case had been filed by the respondent and was heard and dismissed. Thereafter the respondent secretly went away with the children and had since then not allowed the applicant to have access to them. He added that he would be calling at least five witnesses and it would be too expensive for him to transport and accommodate them at Kwale if his application is

not granted.

It is clear that the respondent and the two children

aforesaid are residing at Ukunda. Prior to the filing of children's case No[...] at Kwale SRM's court, the respondent had filed a Divorce cause No.[.....] at the SRM's court at Homa Bay. Although the applicant stated that the divorce cause was heard and dismissed on merits, he did not annex the pleadings or the judgment to enable this court discern what the issues were in that matter. It is not therefore clear whether the question of maintenance of the children featured in the divorce cause.

Section 15 of the Civil Procedure Act provides

that subject to certain limitations, every suit shall be instituted in a court within the local limits of whose jurisdiction the defendant actually resides or carries on business or where the cause of action arises. Section 18 (1) (b) gives this court power to withdraw any suit, transfer any suit pending in any court subordinate to it and thereafter transfer the same for trial or disposal to any other subordinate court. In the plaint that is filed by the respondent at Kwale law courts, she stated that the applicant resides in Homa Bay. She did not state that she had earlier filed the aforesaid divorce cause at Homa Bay SRM's court.

From the provisions of Section 15 of the Civil

Procedure Act, the respondent ought to have filed the case in which she is seeking custody and maintenance of the children before the children's court at Homa Bay unless there was a compelling reason which necessitated filing the same in the SRM's court at Kwale. It is admitted by both parties that the applicant has severally travelled to Kwale for the hearing of the case when the hearing of the same did not proceed. No doubt the applicant incurred considerable expenses in so doing. It is equally true that the respondent will also incur expenses if this application is allowed and the aforesaid case is transferred to Homa Bay for hearing and disposal. However, it is a legal requirement that a case be filed in a court within the local jurisdiction of the defendant's place of residence.

For the aforesaid reasons I allow the application herein.

The costs of the application shall abide the outcome of the case.

DATED,SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF MAY, 2009.

D. MUSINGA

JUDGE.

21/5/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Nyamurongi for the Republic

N/A for the applicant.

COURT: Ruling delivered in open court.

D. MUSINGA

JUDGE.