



**MAO v DSA (Miscellaneous Case E007 of 2025)  
[2025] KEHC 2426 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2426 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS CASE E007 OF 2025**

**RC RUTTO, J**

**MARCH 7, 2025**

**BETWEEN**

**MAO ..... APPLICANT**

**AND**

**DSA ..... RESPONDENT**

**RULING**

1. By notice of motion under certificate of urgency dated 5<sup>th</sup> February, 2025, the applicant sought the following prayers.
  - a. Spent
  - b. Spent
  - c. That the honourable court be pleased to issue an order staying any other further proceedings in Machakos children’s case no. E049 of 2024, DSA vs MAO pending determination of this application.
  - d. That the honourable court be pleased to transfer Machakos Children’s Case no. E049 of 2024 DSA vs MAO from Machakos Childrens Court to Bondo Law courts for determination.
  - e. That any other orders that the court may deem fit to grant for expeditious disposal of the matter.
  - f. That costs for this application be provided for.
2. The application is based on the ground on the face of it and include; that on 2<sup>nd</sup> December 2024, the applicant filed a suit in Bondo Children Case No. E012 of 2024 MAO versus DSA seeking inter alia custody and maintenance of the minors; that on 4<sup>th</sup> December, 2024 interim orders were issued and matter was to be heard on 13/2/2025.



3. The applicant also stated that the Respondent upon being served with the pleadings in Bondo Childrens Case No. E612 of 2024, MAO versus DSA proceeded to file a fresh suit being Machakos Children Case No. E049 of 2024 G.A and others (minors) suing through their father and next of kin DSA versus MAO seeking among others custody and maintenance of the minors.
4. Upon being served with this application, the Respondent filed a Replying Affidavit sworn on 24/2/2025 in which it was deponed that Machakos and Bondo children's court both have similar and equal jurisdiction to determine this matter, that the fact that the Bondo case was filed earlier cannot be used to override or defeat the best interest of the child principle; the court ought to consider which of the courts has made substantive steps towards expeditious disposal of the matter and consider the best interest of the children involved.
5. The Respondent also deponed that the applicant seeks to serve her interest at the expense of the children in question.
6. On 25/2/2025, parties appeared before court and made oral submissions as follows;

### **Applicant Submissions**

7. Applicant submitted that the substantive prayer being sought was prayer (c) of the application which provides that the honourable court be pleased to transfer Machakos Children's Case No. E049 of 2024 DSA versus MAO from Machakos children's court to Bondo Law courts for determination. They submitted that the applicant was the first to file suit at the Bondo children's court. That the suit was filed on 2<sup>nd</sup> December 2024 and the Respondent served on 4<sup>th</sup> December 2024. Thereafter upon being served with the pleadings of the Bondo children matter, he proceeded to file a similar suit at the Machakos Children's Court. They alleged that it is the service of the Bondo Children Cause that triggered the filing of the cause at the Machakos law courts.
8. The applicant set out 2 issues for determination first, which matter takes precedent and second whether the Machakos matter is sub-judice. They relied upon the supreme court decision in Kenya National Commission on Human Rights UAG & 16 others (2020) eKLR to state that consideration should be given to the first matter to be filed.
9. It was also submitted that the Respondent disregarded Section 6 of the *Civil Procedure Act* and as such abused the court process by forum shopping. On the issue of the court ordering for the children's report, it was submitted that the same was an administrative process. They urged the court to exercise its discretion and order the transfer of Machakos Children Case No E049 of 2024 to Bondo Law Courts.

### **Respondents Submissions**

10. The application was vehemently opposed by the Respondent who submitted that he filed the Machakos case on 4<sup>th</sup> December, 2024 and by that time he had not been served with the pleadings from the Bondo children court. He alleged that he was served on the 6<sup>th</sup> December 2024 by which time he had the children in his custody.
11. It was also submitted that the issues raised herein had been raised at the lower court in Machakos where in the court delivered a ruling. They urged the court to find that the applicant is seeking to appeal the ruling of the lower court disguising it as an application for transfer.
12. The Respondent referred to Section 18 (1) (b) of *Civil Procedure Act* which gives this court power to transfer suit and urged that this exercise of power should be exercised upon proof of a strong case. He



made reference to the Mombasa High Court Misc Application No. 9 of 2023 R.M.M versus E.N.W to buttress this argument.

13. While referring to Section 8 of the *Children Act*, they urged the court to take into account the best interest of the children, which in this case should be the primary consideration. Further it was submitted that the court in Machakos had made tremendous steps towards resolving the dispute and had even called for the children report.
14. The Respondent faulted the applicant for making frivolous applications in order to delay the determination of the cause before the Machakos court. They urged the court to rely on the High court case at Kerugoya Re Estate of R.N N (minor) 2020 eKLR.
15. They prayed that the proceedings before the Bondo Children case be transferred to Machakos which is convenient for the children and that steps had been taken to conclude the matter.

### **Analysis and Determination**

16. I have considered the Notice of Motion application, the grounds in support, the Respondent Replying Affidavit and the oral submissions by both parties. The issue arising for determination is whether this court should exercise its discretion and transfer the Machakos Children Cause No. E049 of 2024 to Bondo Law courts.
17. Section 18 of the *Civil Procedure Act* gives this court powers to transfer case instituted in the subordinate court. In this instance, it is not in dispute that there are two suits involving the same parties over similar cause of action one filed in Bondo law courts and the other filed at the Machakos law courts.
18. It is also not in dispute that the case filed at the Bondo law courts was the first in line to be filed having been filed on 2<sup>nd</sup> December, 2024 while the one in Machakos children's court was filed on the 4<sup>th</sup> December 2024.
19. The applicant position is that the case in Bondo having been the first to be filed should be allowed to proceed. Thus this court should proceed and transfer Machakos Children case no E049 of 2024 from Machakos to Bondo for determination. Further that the filing of the cause of action in Machakos was forum shopping and an abuse of the court process.
20. On the other hand, the Respondent alleged that this issue had been determined by the lower court and a ruling on the same delivered, thus the applicant was seeking to appeal the Ruling of the lower court through this application. He further urged that the Machakos file had proceeded thus it should be allowed to conclude. Further that it is in the best interest of the children for the matter to be heard in Machakos.
21. This court has reviewed the ruling delivered by the trial court in Machakos. The issues raised therein were that the suit be struck out on the basis of duplicity and that the matter was res judicata. Further that the respondent be compelled to comply with the order of the court in Bondo Children Cause No E012 of 2024. The issues for determination before the lower court was whether the suit was res judicata. Notably, the court upon hearing parties held that the suit was not res judicata and that the principle of res judicata do not apply in children matters.
22. This court finds that the issues addressed in the ruling differ from those outlined for determination in this suit. While the lower court ruled on whether the matter is res judicata this court is now being asked to transfer the case to Bondo law courts. Besides under Section 18 of the *Civil Procedure Act*, the authority to transfer a suit lies solely with the High Court and it cannot be exercised by the lower court.



23. Having said that, I wish to draw attention to the Supreme Court decision in Kenya National Commission on Human Rights vs Attorney General, IEBC & 16 others (2020)eKLR, where the court while dealing with the issue of sub-judice at paragraph 67 stated that;

The term ‘sub-judice’ is defined in Black’s Law Dictionary 9<sup>th</sup> Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

24. I have also reviewed the decision cited by the Respondent Mombasa Misc. RMM (suing as next friend of AMP a minor) versus ENW (Misc Application 9 of 2023) (2023) KEHC 36B (KLR) 28/4/2023. In that case, the court addressed various issues, including the applicant’s conduct. The court also noted that the Respondent was the first to initiate the proceedings in the cause filed at Mombasa. However, the present case is different, as the applicant was the first to file, not the Respondent.
25. In determining this case, I must emphasize that the court must always be guided by the best interests of the child. In this matter, both parties—who are the parents of the minor—are each advocating for what they believe serves the child’s best interests. However, the children being spoken here, are a single entity, and their best interests cannot be pursued in conflicting directions.
26. This court therefore finds that the best course of action is to have the matter heard and determined expeditiously. Allowing two parallel suits to proceed is neither in the child’s best interests nor permissible under the law, as it risks leading to conflicting decisions. This is why, when such a situation is brought to the court’s attention, consolidation of the suits is recommended.
27. Ideally, if both parties genuinely have the child’s best interests at heart, as they claim, they should reach a mutual agreement and allow one court to hear and determine the matter. Filing multiple suits under the guise of serving the child’s interests is contradictory and risks reducing the child to a pawn in the parents’ disputes. In the absence of a consensus between the parties, this court will proceed to make a determination.
28. Consequently, guided by precedent from the Supreme Court decision cited earlier, and recognizing that the Bondo children case was first to be filed, it follows that the principle of first in equity applies. Consequently, the application is allowed. The Machakos Children Cause No. E049 of 2024 is hereby forthwith transferred to Bondo law courts for hearing and determination.
29. This being a children’s matter, I shall not issue orders as to costs.

**DATED AND SIGNED AT MACHAKOS THIS 7<sup>TH</sup> DAY OF MARCH, 2025.**

**RHODA RUTTO**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 7<sup>TH</sup> DAY OF MARCH, 2025.**

In the presence of;



.....Applicant  
.....Respondent  
.....Court Assistant

