



CC v LBO (Suing as the Father and Next Friend of AC) (Miscellaneous Civil Application E184 of 2023) [2024] KEHC 46 (KLR) (15 January 2024) (Ruling)

Neutral citation: [2024] KEHC 46 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E184 OF 2023
RE ABURILI, J
JANUARY 15, 2024
IN THE MATTER OF KISUMU CHIEF MAGISTRATE'S COURT
CHILDREN'S CASE NO. E018 OF 2023**

BETWEEN

CC APPLICANT

AND

LBO (SUING AS THE FATHER AND NEXT FRIEND OF AC) RESPONDENT

RULING

1. This ruling determines the applicant's Notice of Motion dated October 16, 2023. The applicant CC seeks for orders transferring Kisumu Children's Case No E018 of 2023 to Eldoret Children's Court for hearing and final determination.
2. The grounds upon which the application is predicated are that the child subject of the proceedings herein resides in Eldoret with the applicant who is her paternal aunt and the only person in whose custody the child's late mother enusted prior to her demise, that the respondent albeit claiming to be the child's father, only appeared during the burial of the child's mother to claim paternity yet the child's birth certificate does not disclose him as her father, that the respondent filed a similar case in Eldoret Law Courts and abandoned it after it was referred to the National Legal Aid Service and proceeded to Kisumu Law Courts to file another case claiming for custody of the child who is of tender years of 5 years of age, and that it is in the best interest of the child that the orders sought be granted.
3. The affidavit supporting the application as sworn by the applicant herein CC reproduces the grounds stated above.
4. When the matter came up exparte on October 25, 2023, this court certified the application as urgent and directed the applicant to serve the respondent to appear for interpartes directions on October 26, 2023. On the latter date, the respondent did not appear although he had been served with the court's



directions that very morning together with the online virtual link. The Court directed that he be served again for interpartes oral hearing on 13/11/2023 but on the scheduled date, the government gazette it to be a public holiday for planting of trees. The court therefore recalled the file and mentioned it earlier on November 10, 2023 and re-fixed the hearing dated for November 19, 2023 and parties were both served with notices to appear.

5. On November 19, 2023, both parties appeared and the applicant's counsel prosecuted the application as pleaded above. The respondent acting pro se submitted that there was no need of transferring the case to Eldoret Law Courts because Kisumu was, for him, a convenient place to sue since he lived in Homabay and that in any case, the applicant herein had never appeared physically in the Eldoret case hence where it was only the respondent who was appearing physically they could still appear virtually.
6. The respondent nonetheless submitted that he will be comfortable with Eldoret Court and was only concerned that the case was filed way back in March, 2023.
7. The applicant's counsel submitted that the case was not part heard as no one had testified and that all the witnesses for the applicant come from Eldoret.

Determination

8. I have considered the Application, the rival submissions and the relevant applicable law. The Applicant was represented by Mr. Korir Advocate instructed by Ms Ledishah J K of Kittony & Company Advocates while the Respondent was a pro se litigant. The law relating to transfer of suits is contained in Section 18 of the *Civil Procedure Act*. Section 18(1)(b)(ii) which gives the Court discretionary powers to transfer cases stipulates as follows:

- “(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 proceeding pending in any court subordinate to it, and thereafter—
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.
- (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either try it or proceed from the point at which it was transferred or withdrawn.”

9. The thrust of the Applicant's case is that the child and the applicant live in Uasin Gishu and that that is where the child is enrolled in school and has lived all her life. Further, that the respondent herein left another custody suit in Eldoret Court and filed the suit for custody in Kisumu Chief Magistrate's Court.



10. Section 15 of the *Civil Procedure Act* Provides that:

“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.

11. It is not in dispute that the Applicant and the child reside in Uasin Gishu which is within the jurisdiction of Eldoret Law Courts. While exercising its discretion set out in Section 18 of the *Civil Procedure Act*, the Court will be mindful of the balance of convenience, questions of expense, interests of justice and possibilities of undue hardship that may be occasioned to the parties. These principles were set out in the case of *Kageny v. Musiramo & Another* [1968] E. A. 43 as follows:

“It is a well-established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make a sound case to the satisfaction of the Court that the application ought to be granted. There are also authorities stating that the principle matters to be taken into consideration are balance of convenience, questions of expense, interests of justice and possibilities of undue hardship; and if the Court is left in doubt as to whether under all circumstances it is proper to order a transfer, the application must be refused.”

12. Mulla in the *Code of Civil Procedure* (2012) 18th ed. at p. 391 expounds on Sections 20(a) and (b) of the *Indian Civil Procedure*, the equivalent of Section 15 of our *Civil Procedure Act* and observes that:

“The principle underlying s 20(a) and s (20)(b) is that the suit is to be instituted at the place where the defendant can defend the suit without undue trouble.”

13. In this case, the Suit involves a child. The best interests of the said child are of paramount importance and supersede the rights and interests of the parties herein. While the Court appreciates the concerns of the respondent that he found Kisumu to be more central since he lived in Homabay, the court is nevertheless bound by the paramountcy principle enshrined in Article 53 of *the Constitution* and the *Children Act*. Article 53(2) of *the Constitution* provides that:

“A child’s best interests are of paramount importance in every matter concerning the child.”

14. The *Children’s Act* No. 29 of 2022 at Section 8 provides that:

8. Best interests of the child.

- (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—



- (a) the best interests of the child shall be the primary consideration;
- (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule

15. Indeed, if the applicant herein who is the caregiver for the child lives in Eldoret, what that means is that the applicant and the child will be required to travel to Kisumu every time that the case comes up for hearing. Albeit the respondent submitted that they can appear online, often, children’s cases are heard in camera and the court may wish that the child be required to be physical present during the said hearing. The applicant will therefore be compelled to travel with the child to Kisumu Law Courts.
16. Having taken into consideration the question of expense, interests of justice and possibilities of undue hardship on both the Applicant and the child, I am satisfied that the Applicant has made a strong case for the transfer of the Suit. The balance of convenience tilts in favour of the Applicant. The Suit ought to have been instituted at the place where the Applicant who has the physical custody of the child can defend the same without undue trouble. It is also the view of this Court that the continuation of the Suit in Kisumu will go against the principle of safeguarding and promoting the welfare of the child. Considering the best interest of the child therefore, I find and hold that the best forum for the resolution of the Suit would be in Eldoret Chief Magistrate’s Court. I consequently allow the Application dated October 16, 2023 with the result that Kisumu Children’s Case No. E018 of 2023 be and is hereby withdrawn and transferred to the Children’s Court at Eldoret Law Courts for hearing and final disposal. This being a matter involving a child, there shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 15TH DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent

.....Court Assistants

