



**SMW (Suing as the Father and Next Friend of WM - Minor) v SNN (Miscellaneous Civil Application E021 of 2023) [2024] KEHC 660 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 660 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
MISCELLANEOUS CIVIL APPLICATION E021 OF 2023  
AK NDUNG’U, J  
FEBRUARY 2, 2024**

**BETWEEN**

**SMW (SUING AS THE FATHER AND NEXT FRIEND OF WM - MINOR) ..... APPLICANT**

**AND**

**SNN ..... RESPONDENT**

**RULING**

1. Before court is the notice of motion dated 25/07/2023 and brought under section 1A, 1B, 3A and 18 of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law. The application seeks the following orders;
  - i. Spent
  - ii. Spent
  - iii. That this court be pleased to withdraw and transfer Nanyuki Children’s Case No E031 of 2023 SNN (suing as the next friend and mother of WM (minor) v SMW to Nakuru Chief’s Magistrate Children’s Court for disposal and/or appropriate dealing.
  - iv. That costs of the application be in the cause.
2. The application is based on the grounds on the face thereof and is supported by an affidavit deposed by the Applicant . It is averred that the Applicant is the biological father of the minor and he has physical custody of the minor and has been happily and fully taking care of the minor. That he resides in Nakuru with the minor who is also schooling there at [Particulars Withheld] International school whereas the Respondent, the biological mother to the minor resides in the United States of America and therefore, Nanyuki Children’s Court lacks territorial jurisdiction to hear the matter since the minor and the Applicant resides in Nakuru.



3. In opposing the application, the Respondent filed a replying affidavit dated 13/09/2023. She deponed that she is the mother to the minor and currently resides in the United States of America. That being a recipient of a green card, the minor became a permanent resident of the United States and will be a United States citizen in a couple of years. That she is a resident of Nanyuki which is within the jurisdiction of Nanyuki Chief Magistrate's Court presiding over Children case No E031 of 2023. That prior to moving to United States of America, she had separated with the Applicant and moved to Nanyuki which is her home and in extension the minor's and having separated with the Applicant, the minor has three homes being Nanyuki, Nakuru and United States of America.
4. Further, she is advised that according to Section 90 of the [Children's Act](#), Nanyuki Chief Magistrate Children Court is seized with the requisite jurisdiction to hear and determine the case as Section 91 of the same Act does not contemplate anything like territorial jurisdiction in matters involving the best interest of a child. The Applicant's application is therefore devoid of merit and orders granted staying Children Case No E031 of 2023 should be discharged to enable the matter proceed in the best interest of the minor.
5. The Applicant filed a supplementary affidavit dated 03/10/2023 and deponed that there was no document that was attached to show that the minor has a home in the United States. That allegations made in paragraph 11 and 14 of the replying affidavit regarding the minor are made without evidence and should be disregarded. It is urged that Section 90 of the [Children's Act](#) merely provides for designation of Children's court by the Chief Justice and therefore, the Respondent's averment is blanket and misleading to the court. Further, section 91 of the [Children Act](#) generally provides for jurisdiction of the court. It is the Respondent's case that the Children's Act should be read together with other statutes which provides for places of suing. That the suit should have been filed in Nakuru Children's Court in accordance with section 15 of the [Civil Procedure Act](#) since it is not disputed that the minor was schooling within the jurisdiction of Nakuru Law Courts.
6. By order of this court, the application was canvassed by way of written submissions. The Applicant in his submissions argued that by virtue of section 18 of the [Civil Procedure Act](#), the High Court is clothed with jurisdiction to withdraw and transfer a case filed in a subordinate court to another competent subordinate court or to itself for trial and disposal. That section 15(a) of the [Civil Procedure Act](#) is applicable as to the place of the institution of suits. That the Applicant has the physical custody of the minor residing and studying in Nakuru and therefore, the suit ought to have been filed in Nakuru. Further section 8(2) of the [Children's Act](#) enjoins courts to treat the interest of the child as paramount in safeguarding and promoting the rights and welfare of the child and therefore, the rights and welfare of the minor will be safeguarded, conserved and promoted by a children's court within the Applicant and the minor's local territorial jurisdiction. Reliance was placed on the case of [JM v ANJN](#) (2017)eKLR where the Judge transferred the matter from Mombasa to Nairobi since the Applicant and the child resided in Nairobi.
7. In rejoinder, the Respondent submitted that after separation of the Applicant and the Respondent, the Respondent moved to Nanyuki where she was residing before relocating to the United States and therefore, the minor can be said to have three homes hence Nakuru Children's Court does not have superior jurisdiction over Nanyuki Children's Court. Reliance was placed on the case of [SMM v AM](#) (2020) eKLR where the court while faced with a similar situation stated inter alia that where two courts have concurrent jurisdiction over a matter, either party can choose the court in which to institute the suit and since Tononoka law court had territorial jurisdiction to entertain the matter, the same did not shift by removal of the children from Ukunda to Nairobi.



8. Further, the matter before Nanyuki Children’s Court involves custody of the minor and therefore the welfare and the best interest of the minor should be of priority and not of the warring parents as was held in *In re Estate of RNM (minor)* (2020)eKLR. It is contended therefore, that the Applicant has not made a case to warrant the transfer of the suit to Nakuru Children’s Court.
9. I have considered the Applicant’s application, the response by the Respondent and their rival submissions.
10. The Applicant’s application seeks transfer of the Nanyuki Children’s Case No E031 of 2023 to Nakuru Children’s Court. The gist of the application is that the Applicant and the minor resides in Nakuru where the minor schools whereas the Respondent resides in the United States of America.
11. Transfer of suits from one lower court to another is governed by section 17 and 18 of the *Civil Procedure Act*. Section 17 provides;
 

“Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed.”
12. Section 18 of the Act give the High the power to transfer a case instituted in the lower courts on application by the parties or on its own motion. It provides;
 

“...the High Court may at any stage—

  - (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
  - (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
    - (i) ...
    - (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) ...
13. These provisions give the High court powers to transfer a case from one sub-ordinate court to another if the circumstances of the case so warrant the transfer. In *David Kabungu v Zikarenga & 4 others*, Kampala HCCS No 36 of 1995, as quoted in *Victoria Katuku (Suing as the legal Representative of the Estate of Eunice Mueni Muthamba v Jessinkay Enterprises & 2 others* [2017] eKLR, it was held that;
 

“Section 18 (1) (b) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has



made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is 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 out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused... Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused...”

14. From the above, it is trite that where a party seeks an order to transfer the trial of a suit pending in one court to another court having jurisdiction, the applicant must make out a strong case for transfer. In the instant case, the Applicant contend that he lives in Nakuru as well as the minor the subject to the children’s case in the subordinate court. He further contends that section 15 (a) of the [Civil Procedure Act](#) is clear as to where the suit should be instituted by stating 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;

...”

15. I have considered the rival positions taken by the parties on the matter. The matter before the trial court involves a minor. Article 53(2) of the [Constitution](#) puts the interests of a Minor above all else in a matter involving such a Minor. It reads;

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

16. The child, the subject of the proceedings in the lower court is a central party in the litigation. It is not disputed the child is currently living and schooling at Nakuru. In the course of the trial the court may find it necessary to have the child appear for interviews before the court or for general observations. A children report may be called requiring a Children officer to have contact with and interview the child. Such instances would require that the proximity of the child to the place of trial be such as would bring convenience to the child and avoid unnecessary disruptions to the child’s schooling and social life.

17. The place of filing suit set out in Section 15 of the [Civil Procedure Act](#) is for convenience of the parties. The provision seeks to ensure that undue hardship is not visited upon a party in defending a suit. Amplifying this provision, it must follow that where a child is involved, all deliberate effort must be made to ensure that the suit is filed in a place offering the least inconvenience to the child.

18. On the material before court, am satisfied that the subject suit should be tried at Nakuru. With the result that the Notice of Motion dated is allowed and I make the following orders;

- a. That Nanyuki Children’s Case No E031 of 2023 SNN’(suing as the next friend and mother of WM (minor) v SMW be and is hereby transferred to Nakuru Chief’s Magistrate Children’s Court for disposal and/or appropriate dealing.
- b. That costs of the application be in the cause.



**DATED SIGNED AND DELIVERED THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2024**

**A.K. NDUNG’U**

**JUDGE**

