



**EIK v BWW (Children Miscellaneous Application E032 of 2023)
[2024] KEHC 3631 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CHILDREN MISCELLANEOUS APPLICATION E032 OF 2023
DO CHEPKWONY, J
APRIL 12, 2024**

BETWEEN

EIK APPLICANT

AND

BWW RESPONDENT

RULING

1. What is before the court for determination is Notice of Motion Application dated 22nd November, 2022 which seeks the following orders:
 - a. Spent.
 - b. The suit Thika Children Case Number E029/2022 be stayed pending the hearing and determination of this application interpartes.
 - c. The suit Thika Children Case Number E029/2022 be transferred from Thika Law Courts to Children’s Court at Kericho for hearing and final determination.
 - d. That the court do issue such other orders and directions as expedient in the interest of justice.
 - e. the costs of this application be provided for.
2. The Application is based on the grounds set out on its face and the Supporting Affidavit of EIK sworn on 11th November, 2022.
3. The Applicant holds that he got married to the Respondent sometimes on 4th August, 2007 and they lived together in Kericho when they were blessed with three children. He states that they separated and entered into a parental responsibility agreement but the Respondent filed the present suit.
4. The Applicant contends that he lives with the children in Kericho as per the agreement and it is difficult to attend the court sessions with the children without affecting their welfare.



5. According to the Applicant, the long distance court attendances have caused him to incur unnecessary travel and accommodation costs. He states that it is in the best interest of the children in the matter, his own convenience and for the sake of a fast and expeditious disposal of the case, that the matter be transferred to Kericho Children’s Court for hearing and determination.
6. The Application was served upon the Respondent and an Affidavit of Service to confirm this was duly filed in court but the Respondent has not filed any response. The ground which the Application is based is territorial jurisdiction of the court.

Determination

7. Having read through the application and Supporting Affidavit sworn by the Applicant, EIK , this Court finds the only issue for determination being whether the suit Thika Children’s Case Number E029 should be transferred to Kericho Children’s Court.

8. The place of suing is determined by Section 11 of the Court Procedure Act which provides:-

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts:

Provided that—

- a. if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and
- b. nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same district.”

9. And where suits have been filed on a wrong court, the High Court has power to return the same to the court where it should have been instituted pursuant to Section 18(1)(a) and (2) of the *Civil Procedure Act* which provides the High Court with the power to transfer a suit to the Subordinate Court. Section 18(1) states:-

“(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. 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;

(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 retry it or proceed from the point at which it was transferred or withdrawn.



10. The suit being sought to be transferred was filed at Thika Children’s Court, which ideally is competent to try and dispose of the same. However, the main reason upon which its transfer is sought is territorial jurisdiction of the said court.
11. The suit, Thika Children’s Case No.E029 of 2022 was instituted in 2022 and the application herein filed in November, 2022. At the time, Kiambu Court was seized with the territorial jurisdiction to hear and determine this application. Today, there is a High Court at Thika which was established vide a Gazette Notice No.11082 in the Kenya Gazette on 25th August, 2023.

The question here becomes, would it be prudent to direct that this application be transferred to Thika High Court for hearing and determination?

12. In answering this question, this Court considered the fact that the suit sought to be transferred involves children and ought to have been concluded expeditiously in line with the spirit of children’s cases, this Court had taken into consideration the time when the suit was instituted, the time when the application herein was filed and the need to avoid undue delay in having the matter concluded. In view of all these factors, this court finds that nothing bars it from exercising its supervisory jurisdiction to transfer a matter to and from any court where appropriate and justice of a case so require. This is a power conferred upon this Court under Article 165(6) of *the Constitution* and is exercisable either on its own motion or on an application by a party to the proceedings in question.
13. Having found so, and guided by the provision of Section 18 of the *Civil Procedure Act*, as read with Section 3 of the same Act, the power to transfer cases is discretionary and therefore a party seeking to transfer a matter from one subordinate court to another has the burden of proving and or demonstrating sufficient reasons as to why the transfer is merited. This was the holding in the case of David Kabungu –vs- Zikarenga & 4 Others, Kampala HCCS No.36 of 1995, where the Court had the following to say on the circumstances under which an order to transfer suits may be granted:-

“Section 18(1) of the *Civil Procedure Act* gives the court the general power to transfer all suits and the 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 a strong case for the transfer. A

mere balance of convenience of 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 or the suit has been filed in a particular court for the purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction.

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 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 expenses, interest of justice and possibilities to undue hardships and if the court is left in doubt as to all the circumstances, it is proper to order transfer, the supplication must be refused

14. In the instant case, the Applicant’s reasons for seeking transfer of Thika Children’s Case Number E029 of 2022 to Kericho Children’s Court are the difficulty to attend court with the children without



affecting their welfare, the unnecessary travel and accommodation costs and the convenience for the children and himself. This has not been controverted by the Respondent since she has not filed any response despite having been served with the pleadings and Hearing Notice dated 18th March, 2023 via her counsel's email of njorogeassociates@gmail.com on 16th March, 2023 and confirmed by the Affidavit of Service sworn by Harry Karanja, counsel for the Applicant and the annexed copies of email delivery receipts marked HK-AS2. And even then, the reasons meet the threshold set for the transfer of a suit from one court to another to be merited. This Court then proceeds to find the application dated 22nd November, 2022 filed by the Applicant meritable and allows the same with orders that:-

- a. The suit being Thika Children's Case Number E029 of 2022 be and is hereby transferred from Thika Law Courts to Kericho Children's Court for hearing and determination.
- b. And in the interest of justice, this being a matter that involves children, the Deputy Registrar, Thika High Court to facilitate the expeditious transfer of the said file to Kericho Children's Court for necessary action.
- c. Costs to be in the cause.

It is so ordered.

RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS ..12TH... DAY OF...APRIL..., 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Njomo holding brief for Mr. H. Karanja counsel for the Applicant

No appearance for and by Respondent

Court Assistant - Martin

