



**NHS v HP & 3 others; Kenya National Human Rights Commission & 6 others (Interested Parties)  
(Miscellaneous Application 037B of 2022) [2023] KEHC 2227 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2227 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS APPLICATION 037B OF 2022**

**G MUTAI, J  
MARCH 17, 2023**

**BETWEEN**

**NHS ..... APPLICANT**

**AND**

**HP ..... 1<sup>ST</sup> RESPONDENT**

**HGL ..... 2<sup>ND</sup> RESPONDENT**

**LVH ..... 3<sup>RD</sup> RESPONDENT**

**NMKM ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**KENYA NATIONAL HUMAN RIGHTS COMMISSION ... INTERESTED PARTY**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... INTERESTED PARTY**

**ATTORNEY GENERAL ..... INTERESTED PARTY**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY**

**INSPECTOR GENERAL OF POLICE ..... INTERESTED PARTY**

**TONONOKA CHILDREN’S COURT ..... INTERESTED PARTY**

**DIRECTORATE OF PUBLIC PROSECUTIONS ..... INTERESTED PARTY**

**RULING**

1. The application before this court is dated the 24<sup>th</sup> day of August, 2022. The same is supported by an affidavit of the Applicant sworn on even date. The application seeks to have Tononoka Children’s Court Case No. E.297 of 2022; HG & Others versus NHS transferred to Nairobi Children’s Court. The Applicant’s argument is that he is the father of the children named NNS, KSS and KSG, who are



the subjects of those proceedings, and thus of this cause, initially resided in Nairobi with him and their deceased mother. He argues that being the only surviving parent of the said children, and having in mind that he works and resides in Nairobi, Nairobi Children's Court is the most appropriate forum for the hearing and determination of the said case.

2. The applicant stated that his wife died in April 2022. Following her death he was arrested vide Kiambu Misc. Criminal Case No. E179 of 2022 which was closed on 14<sup>th</sup> June, 2022 and an inquest file, Kibera Inquest No. E005 of 2022, opened. Further while he was in custody the Respondents herein took his children away to Mombasa and filed the Tononoka Children Court Case No. E297 of 2022; HGL & 2 Others versus NHS.
3. He further stated that he is apprehensive that if the matter is heard in Tononoka Children Court, or anywhere within the Coast Region, he will not get justice. He made grave allegations against the Respondents and the judicial officers who are based at the 6<sup>th</sup> Interested Party. He alleged that the latter had been corruptly induced by the Respondents to rule against him.
4. He argued that as the only surviving parent of the minors he had parental responsibilities over the minors that superseded that claimed by the Respondents. The Respondents, he argued are strangers, with no right to the children. He alleged that the minors had in fact been trafficked to Mombasa and called on the various named Interested Parties to investigate how the children had been moved from Nairobi to Mombasa.
5. He argued that the case should have been filed in Nairobi since he, as the defendant, resides in Nairobi. The Court was referred to the [Civil Procedure Act](#) in support of the said argument.
6. He therefore prayed that this Court be pleased to order that the children case before the Tononoka Children Court be transferred to Nairobi for hearing and determination.
7. In response the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed their replying affidavits sworn on 23<sup>rd</sup> November, 2022 and 25<sup>th</sup> November, 2022.
8. The 1<sup>st</sup> Respondent stated that the decision to move the children to Mombasa was informed by the concern for their safety. He further stated that a protective custody order was issued on 8<sup>th</sup> July, 2022 in favour of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents by the Tononoka Children Court. He urged the court to dismiss the application with costs.
9. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents stated they initiated the proceedings in Tononoka Children Court Case No. E297 of 2022 in the best interest of NNS, KSS and KSG.
10. They argued that the applicant had engaged in a forum shopping exercise as he filed a similar application, after filing this cause, seeking same reliefs in the Nairobi High Court Family Division HCSC No. E176 of 2022. They averred that the court, in the latter cause, declined to grant the orders that had been sought and directed instead that the same be filed in Mombasa.
11. They further argued that the transfer of the custody case from Tononoka to Milimani Law Courts would not be in the best interest of the children as the latter court has a large number of cases that would make it difficult for the custody case to be determined quickly. They stated that there would be logistical difficulties of transferring the case to Nairobi. Further as the minors are of tender age, and being already resident in Mombasa, it would not be in their best interest to have the case transferred.
12. On jurisdiction they stated that territorial jurisdiction in children matters is wholly based on the location of the children hence the 6<sup>th</sup> Interested Party would be the ideal court to hear and determine the children's matter herein.



13. In conclusion the respondents urged the court to dismiss the application with costs.
14. The 4<sup>th</sup> respondent in her affidavit denied the averments by the applicant in his supporting affidavit and stated that in early July, 2022 she was approached by the leadership of the Shree Cutchi Lewa PS to help with the caring for the minors herein. Upon hearing the plight of the minors after the death of their mother she agreed to the request on compassionate grounds. In the interest of the welfare of the children she agreed to be enjoined in the proceedings in Tononoka Children Court.
15. She further stated that she has provided and continues to provide the children with a quiet, safe, stable and healthy environment. With the pending case already at the pre-trial stage, a transfer to Nairobi children's court would further delay the substantive hearing of the case. She urged the court to dismiss the application with costs.
16. Further the respondents and the 2<sup>nd</sup>,3<sup>rd</sup>,5<sup>th</sup> ,6<sup>th</sup> and 7<sup>th</sup> interested parties filed a Preliminary Objection dated 8<sup>th</sup> September, 2022 and 14<sup>th</sup> September, 2022 respectively. The preliminary objection is based on the following grounds: -
  - a. That the applicant has not sought to appeal nor review the ruling by the court, delivered in Children Case No. E297 of 2022; HGL & Others v NHS hence the application herein is fatally defective and should be struck out.
  - b. That noting that this is a matter relating to children and arising out of Children Case No. E297/2022; HGL & Others v NHS, this court has no jurisdiction to hear and determine the application filed herein.
  - c. That the entire application is ex-facie incompetent, fatally defective and an abuse of the court process as the same is not premised upon any suit as provided under Section 2 and 19 of the Civil Procedure Act as read together with Order 3 rule 1 of the Civil Procedure Rules that provide for the various ways of commencing proceedings.
17. The 2<sup>nd</sup> ,3<sup>rd</sup> ,5<sup>th</sup> ,6<sup>th</sup> and 7<sup>th</sup> interested parties also filed grounds of opposition dated 14<sup>th</sup> september,2022 based on the following grounds;
  - a. That per Section 8 of the Children's Act and Article 53(2) of the Constitution of Kenya, the court ought to have the best interests of the child in making any decision or determination;
  - b. That the applicant herein was a suspect in the death of the biological mother of the minors herein which is now the subject of an ongoing inquest, Kibera Inquest No. E005 of 2022, In the Matter of the Inquiry of the Death of VNH;
  - c. That the Children's Court at Tononoka, in the best interest of the children saw it fit to maintain the status quo on the physical interim custody of the children in the hands of the 1<sup>st</sup> to 4<sup>th</sup> defendants in the ruling delivered on 23<sup>rd</sup> August, 2022 in Children Case No. E297 of 2022; HGL & Others V NHS;
  - d. That the applicant has not sought to appeal nor review the ruling by the court, delivered in Children Case No. E297 of 2022; HGL & Others v NHS hence the application herein is fatally defective and ought to be struck out.
  - e. That noting that this is a matter relating to children and arising out of Children Case No. E297/2022 and HGL & Others v NHS, this court has no jurisdiction to hear and determine the application filed herein.



- f. That the entire application is ex-facie incompetent, fatally defective and an abuse of the court process as the same is not premised upon any suit as provided under Section 2 and 19 of the Civil Procedure Act as read together with Order 3 Rule 1 of the Civil Procedure Rules that provide for the various ways of commencing proceedings.
18. They urged the court to dismiss the applicant's application with costs.
19. In response to the replying affidavits, notice of preliminary objection and grounds of opposition, the applicant filed a supplementary affidavit sworn on 6<sup>th</sup> February, 2023 and filed on 13<sup>th</sup> February, 2023. He denied the averments made by the respondents and interested parties and stated that the children were taken away without his consent and that it would only be fair for him to be allowed to have his children back by transferring this matter to Nairobi where he resides.
20. The parties agreed to dispose of the application by way of written submissions which were highlighted before me on 20<sup>th</sup> February, 2023. The applicant, in his application, had listed several prayers. During the hearing he abandoned all his prayers save for prayer No. 5 on transfer of the suit from Tononoka Children Court to Nairobi Children's Court. As a result the AG indicated to court that they wouldn't have further interest in the application.
21. The applicant through his advocates Musyoki Mogaka & Co. Advocates filed his written submissions dated 8<sup>th</sup> February, 2023. Counsel submitted on two issues. Firstly, whether this honourable court is vested with jurisdiction to hear and determine this instant application and whether the applicant commenced his action appropriately by filing a miscellaneous application. Secondly whether this application should be allowed.
22. On jurisdiction counsel relied on the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where the Supreme Court stated that a court's jurisdiction flows from either constitution or legislation or both. And thus a court of law can only exercise the jurisdiction conferred to it by the Constitution or other written law.
23. Counsel relied on Section 18 of the Civil Procedure Act and submitted that the High Court has power to transfer cases suo moto or on application by any of the parties. Counsel urged the court to transfer Tononoka Children's Court Case No. E297 of 2022 to Nairobi Children's Court as the children initially resided in Nairobi. He argued this court has jurisdiction under Section 29(3) of the Children's Act, 2022 to do so.
24. Counsel further relied on Section 15 of the Civil Procedure Act on institution of suits and argued that suits ought to be filed where the defendant resides or cause of action arose and submitted that single reason why the respondents took the minors away from Nairobi to Mombasa is because the applicant had been arrested pending investigation of the death of his wife. He submitted that cause of action leading to the minors being in Mombasa arose wholly in Nairobi.
25. To support his arguments in support of the transfer of the case from Tononoka Children Court to Nairobi counsel relied on the case of David Kabungu versus Zikarenga; HCCC No.36 of 1995 and submitted that if the orders sought are not granted the applicant would have to dig deep in his pockets every time the case was slated for hearing or mention or whenever he desired to see his children.
26. On the second issue counsel submitted that the respondents were in essence seeking further delay of the case. To support his position counsel relied on the case of Joseph Kibowen Chemior v William C Kisera [2013] eKLR. He argued that it was appropriate for the applicant to file a miscellaneous application.



27. In conclusion counsel submitted that this court has jurisdiction under Article 165 of *the Constitution*, Article 159 (2) (d) And Section 18 of the *Civil Procedure Act* and thus the preliminary objection has no merit.
28. The respondents through their advocates Daly Inamdar LLP Advocates filed their written submissions dated 16<sup>th</sup> February, 2023.
29. On jurisdiction counsel relied on the case of Owners of Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd [1989]eKLR and Chudasama versus Chudasama [2014]eKLR and submitted that the court has to determine the preliminary objection first.
30. On the preliminary objection counsel relied on Mukisa Biscuit Manufacturing Co.Ltd versus West End Distributors Ltd (1969) EA 696 for the definition of a preliminary objection. Counsel further relied on the case of Joseph Kibowen Chemjor versus William C.Kisera [2013]eKLR and submitted that a miscellaneous application can only be entertained in limited circumstances. It cannot be invoked, it was argued, where a court is asked to determine the rights of the parties with finality. Further had the application been grounded solely on a transfer of suit under Section 18 of the *Civil Procedure Act* then the preliminary objection would have been unnecessary. However, in this case apart from transfer the applicant sought other orders. Thus the application herein is incompetent and fatally defective.
31. On transfer of the suit counsel submitted that it is a procedural matter dealt with by the High Court in the exercise of its supervisory jurisdiction over lower courts under Article 165(6) of *the Constitution* and Section 18 of the *Civil Procedure Act*. Counsel relied on the case of Kagenyi versus Musirambo & Another [1968] EA 43.
32. In respect to Section 15 of the *Civil Procedure Act* counsel submitted that Section 3(2) of the Magistrate’s Court Act gives the Magistrate’s Court countrywide jurisdiction to hear and determine any suit notwithstanding where the defendant resides or where the cause of action arose. That the mere fact that the applicant resides in Nairobi is not a reason to warrant the transfer of the children’s case from Mombasa to Nairobi.
33. Further, it was argued, given the tender age of the children it is unlikely that they would ever have to attend court. In any case the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents who are in custody of the minors and reside in Mombasa will be required to attend court and if they the case was transferred to Nairobi it would be onerous, disruptive and expensive for them. To support this position counsel relied on the case of SMM versus AM [2020]eKLR.
34. Counsel submitted that the allegation by the applicant that if he is heard in Tononoka he will not get justice is unsubstantiated. She argued that the applicant had not given sufficient reasons to warrant the transfer of the matter from Tononoka to Nairobi.
35. In conclusion counsel urged the court to dismiss the application with costs.
36. I Have considered the application, the responses therein, the notices of preliminary objection and the rival submissions for both counsels and the issues that to me call for my decision are these:-
  - a. Whether this court has jurisdiction to hear determine this application; and
  - b. Whether Tononoka Children’s Case No. E297 of 2022 should be transferred to Nairobi Children’s Court.
37. On jurisdiction, Article 165 of *the Constitution* of Kenya ,2010 provides;
  1. There is established the High Court, which—



- a. shall consist of the number of judges prescribed by an Act of Parliament; and
  - b. shall be organised and administered in the manner prescribed by an Act of Parliament.
2. There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.
3. Subject to clause (5), the High Court shall have—
  - a. unlimited original jurisdiction in criminal and civil matters;
  - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
  - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
  - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
    - i. the question whether any law is inconsistent with or in contravention of this Constitution;
    - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
    - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
    - iv. a question relating to conflict of laws under Article 191; and (e) any other jurisdiction, original or appellate, conferred on it by legislation.
4. Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
5. The High Court shall not have jurisdiction in respect of matters—
  - a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
  - b. falling within the jurisdiction of the courts contemplated in Article 162 (2).
6. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
7. For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.



38. Nyarangi, J in the locus classicus case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (supra) stated,

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

39. Further the Supreme Court in the case of Samuel Kamau Macharia & Another versus Kenya Commercial Bank Limited & 2 Others (supra) stated:-

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

40. As the respondents conceded during the hearing that this court has jurisdiction under Article 165 of *the Constitution* of Kenya, 2010 and Section 18 of the *Civil Procedure Act* to deal with the issue of transfer from one subordinate court to another, and the applicant having abandoned all other prayers except the prayer for transfer, it’s my view that this court has jurisdiction to hear and determine the application herein. Thus it is my finding that the notices of preliminary objection lack merit and must thus be dismissed.

41. On whether Tononoka Children’s Case No. E297 of 2022 should be transferred to Nairobi Children’s Court, the *Civil Procedure Act* Cap 21 Section 18 provides:-

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



42. The court in the case of GKK v ANK & Another [2021] eKLR quoted the Ugandan case of David Kabungu Vs Zikarenga HCCC NO. 36 OF 1995 where 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...”

In the case of Hangzhou Agrochemicals Industries Ltd. Vs Panda flowers Ltd[2012] eKLR the court held:-

“..In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and preparing witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. 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. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case”.

43. From the above citation it is evident that in making a decision on whether to transfer a suit or not the court has to consider the balance of convenience; questions of expense; interest of justice and possibilities of undue hardship.
44. The applicant’s reasons for seeking the transfer are that he resides in Nairobi, the children initially resided in Nairobi, the cause of action arose in Nairobi, he will not get justice at the Tononoka Court as it has already been compromised and that Tononoka Court has no jurisdiction.
45. On the issue of the applicant residing in Nairobi and the children’s case being instituted where the defendant resides, Section 15 of the *Civil Procedure Act* provides:-

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.

46. At the time of filing of the children case in Tononoka Law Courts the children were residing in Mombasa while the applicant was in police custody over the murder of his wife. The cause of action in this case is the custody of the named children. Thus it is my view that the cause of action arose in Mombasa. The respondents were therefore right to file the matter in Tononoka.
47. The applicant has not substantiated his claim that he will not get justice in Tononoka Law Courts. Corruption is a very serious matter that should not be raised willy nilly. It tarnishes the characters of judicial officers, lowers their esteem and drains the peoples faith in our judicial system. The applicant ought to have substantiated his allegations with cogent evidence with probative value. With such evidence this Court wouldn't have hesitated from transferring the case. From what I can discern the applicant is unhappy with a previous decision of the lower court. Although he could have appealed against the same he chose not to do so.
48. Accordingly, it's my finding that Milimani Children's Court has concurrent jurisdiction with Tononoka over this matter and since the plaintiffs, in that court, moved the court first, the applicant cannot be heard to say that Milimani Children's Court is superior to Tononoka. Further it's my view the minors being of tender age would not be required to attend court.
49. On the issue of expenses, it's my view that if this matter is transferred to Milimani Law Courts, the respondents will incur expenses similar, or even more than that that applicant would incur, in travelling to Nairobi and or transporting witnesses to Nairobi. Thus this court has to strike a balance.
50. Accordingly, it's my finding that the applicant has not made out a case to warrant the transfer of the subordinate court case from Tononoka to Nairobi. I am guided by the case of SMM v AM (supra) where the court stated that:-

“Regarding the place of residence of the defendant/applicant, the same is in Nairobi a fact which is not disputed implying that Milimani law courts would also exercise jurisdiction. Where two courts have concurrent jurisdiction over a matter, either party can choose the court in which to institute the suit. Since the plaintiff/respondent first moved to court and filed the suit in one of the courts with territorial jurisdiction, it will not be right for the applicant/defendant to claim Milimani court has superior right over jurisdiction as opposed to Tononoka law courts...These are issues which can be determined even in the absence of the children unless under exceptional circumstances the court decides to interview them. The case can be conducted without necessarily calling children to attend court. Further still, with the electronic case management directions in place, witnesses if necessary can testify virtually....The claim that it will be costly for the applicant and witnesses to travel to Mombasa, the same will be the position for the plaintiff if she were to travel to Milimani in



Nairobi. Litigation is all about inevitable expenditure. In my view, the case has been pending for over one year now. Parties should fast track the hearing and have the matter concluded.”

51. The upshot of the above is that the Notice of Motion application dated 24<sup>th</sup> August, 2022 lacks merit and hereby dismissed with costs.
52. In the interest of justice, I direct that Tononoka Children’s Court Case No. E.297 of 2022; HG & Others versus NHS be heard and determined without further delay.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17<sup>TH</sup> DAY OF MARCH, 2023**

.....

**GREGORY MUTAI**

**JUDGE**

**In the presence: -**

No appearance for the Applicant

The Applicant present in person

Ms. Akwana and Mr. Mwanzia for the 1<sup>st</sup> to 4<sup>th</sup> Respondents

No appearance for the Interested Parties.

