



SKM v SNI (Suing as the Mother and Next Friend) (Miscellaneous Application E98 of 2022) [2023] KEHC 19932 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
MISCELLANEOUS APPLICATION E98 OF 2022**

GMA DULU, J

JULY 13, 2023

BETWEEN

SKM APPLICANT

AND

SNI (SUING AS THE MOTHER AND NEXT FRIEND) RESPONDENT

RULING

1. A party in a pending children case – Nairobi Children Case No MCCHC xxxx of 2022 at Milimani Children’s Court, SKM who is the defendant in that case, has come to this court through this Notice of Motion filed through Counsel Mutuku Wambua & Associates dated October 14, 2022.
2. The Notice of Motion herein was filed under Section 1A, 1B, 3A, 6, 17, 18 and 63 of the Civil Procedure Act, and all other provisions of the law and seeks the following orders:-
 1. (Spent)
 2. (Spent)
 3. That this court be pleased to remove and transfer Nairobi Children Case No MCCHCC xxxx of 2022 from Nairobi to Makueni Law Courts for hearing and determination.
 4. That the costs of this application be in the cause.
3. The application has grounds on the face of the Notice of Motion that the Children case in Nairobi was filed when the defendant (should be plaintiff/respondent) was residing in Nairobi, that the respondent has since left the country and now resides in the United States of America while the minors stay in Taita Taveta County with their maternal grandmother, that the parties are separated and the minors used to live partly with each of the parties before they were relocated to Taita Taveta; and that the applicant lives in Makueni and the court will need a report from the Children Officer Makueni to determine the applicant’s suitability to have actual custody of the children.



4. The application was filed with a supporting affidavit sworn by Faith Mutio Mutuku the advocate on October 14, 2022 in which the movement of the minors to Taita Taveta, and the relocation of SNI to United States of America was deponed to.
5. The application is opposed through a Grounds of Opposition filed by Matundura & Wamalwa Advocate for the respondent in the following terms:-
 1. That the application for transfer of the suit goes against Section 91 of the Children's Act as it will cause unnecessary delays thereby infringing on the best interests of the minors.
 2. As noted by the applicant, the suit was filed when the respondent and minors had their home in Nairobi and transferring the suit to Makueni Chief Magistrate's Court serves no purpose as the suit is not about the applicant but the minors, the applicant's application therefore offends Article 53(2) of the Constitution.
 3. That the Magistrate's Court Act 2015 Laws of Kenya Section 7 does not limit the territorial jurisdiction of the court but only provides for pecuniary limitations.
 4. That the trial court has jurisdiction.
 5. That costs of the application be provided for.
6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Mutuku Wambua & Associates Advocates for the applicant as well as the submissions filed by Matundura & Wamalwa Advocates for the respondent. Both sides relied on decided court cases or rulings.
7. The facts around the legal proceedings herein are not in dispute. There are pending proceedings filed in the Nairobi Children's Court, which are neither divorce/separation or proceedings or for division of matrimonial property. The issues raised in the pleadings in Nairobi Children court relate to custody and parental responsibility for the children.
8. This application will fail for two reasons. The first reason is that the affidavit in support of the application does not meet the threshold of a serious statement of facts on oath, because it was sworn by an advocate and is on contentious factual issues, which advocate had no capacity to verify. The supporting affidavit herein should have been sworn by the applicant and not the advocate. In my view, it would be wrong for this court to rely on the supporting affidavit herein to support the position of the applicant, especially on the factual matters which are ordinarily not in the knowledge of a professional advocate. On that account the application cannot stand.
9. The second reason why the application will not succeed is that the Children's Court at Nairobi has the jurisdiction to hear and determine the pending matter based on documents filed and submissions filed therein. The fact that a report might have to come from the Makueni rural area of the applicant is neither here nor there, because the maker of that report can if need be, be summoned in court to the Nairobi Court present his report and be questioned thereat if need be.
10. Ultimately, the interests to be protected as provided under the Constitution and the Children's Act, are the best interests of the children, not the interests of the parties herein, and the applicant has not disclosed any of the children's interests that will be adversely affected and in what way, in the Nairobi Court, which would be protected specifically in the Makueni Magistrate's Court.
11. In my view therefore, the applicant herein is simply forum shopping which is not permitted in our legal system.



12. I find that the application is unmerited. I dismiss the application with costs to the respondent SNI.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF JULY 2023 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

