



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC FAMILY E 003 OF 2020**

**SFA.....APPLICANT**

**VERSUS**

**AOA.....RESPONDENTS**

**RULING**

1. Through a notice of motion dated 2<sup>nd</sup> October, 2020 and filed on 8<sup>th</sup> October, 2020, the applicant herein one “SFA moved to this court pursuant to sections 1A, 1B, 3A, 6 17, 18 and 63 of the CPA seeking various orders against her estranged husband AOA as follows;

**a. Spent**

**b. That pending the hearing and determination of this application interpartes, this Honourable court be pleased to set aside and vary the exparte custody orders issued at Tononoka Children’s case No. 260 of 2020 (E O11/2020) on 17<sup>th</sup> September, 2020 and in their place do issue orders vesting the actual or physical custody of the minor J.A in the applicant.**

**c. That there be stay of proceedings and/or further proceedings in Tononoka Children’s case No 260/2020 (E011/2020 pending the hearing and determination of this application interpartes.**

**d. That Tononoka Children’s case No 260/2020) be transferred to Eldoret Chief Magistrate’s court for hearing and final determination.**

**e. That the costs of this application be costs in the cause.**

2. The application is premised upon grounds stipulated on the face of it and an affidavit in support sworn on 2<sup>nd</sup> October,2020 by the applicant. It is the applicant’s case that she is the biological mother to the minor herein aged about six years old while the respondent is the biological father

3. She averred that she and the respondent divorced sometime the year 2018 leaving her with the actual custody of their son. She stated that at all material times she has been residing in Eldoret with the subject who was enrolled at [Particulars Withheld]Integrated School within Eldoret.

4. That the respondent lives and works for gain in Mombasa. She further averred that despite having mutually agreed that she was to stay with the minor in Eldoret and the respondent to retain access rights by picking him during holidays and be returning him after the holiday, the respondent acted contrary to that agreement by picking the boy on 12<sup>th</sup> July 2020 but failed to return him as agreed.

5. That to her surprise, the respondent served her with orders issued on 17<sup>th</sup> September,2020 by Tononoka children court in case No 260/2020 awarding physical custody of the minor to the respondent. That contrary to the law requiring a child of tender age to stay with the mother, the court did grant actual custody orders to the father respondent.

6. She further contended that since the child was staying and schooling in Eldoret, the court with jurisdiction should be Eldoret children’s court hence the prayer for transferring her case to Eldoret law courts. That by transferring the case to Eldoret, the objective of expeditious disposal of cases in an affordable manner pursuant to section 1B of the Civil Procedure Act will be met. In her view, the orders sought will promote the best interests of the child underpinned under second 4 (2) and (3) of the children Act and Article 53 (2) of the Constitution.

7. She stated that, changing the minor’s environment in such short notice and leaving the minor under the care of the respondent’s relatives

will be prejudicial to the minor.

8. In response, the respondent filed a replying affidavit sworn on 26<sup>th</sup> October 2020 opposing the application. He averred that on 15<sup>th</sup> October, 2020 he took the minor from his mother who lives in Eldoret to Mombasa where he resides. According to him, the minor who was ill had insisted in seeing the father after the mother remarried.

9. He stated that the minor is comfortable living with him while enjoying the company of his cousins who live a close their neighborhood. That before their divorce, they were living in Mombasa hence the minor's preferred place of stay. He alleged that the minor had disclosed to him that he was uncomfortable staying in Eldoret and that he will run away if forced to go back to Eldoret.

10. In his view, it was in the child's best interest that he stays in Mombasa with him as the father as per his wishes hence the reason why he obtained custody orders.

11. He claimed that the applicant had filed an application dated 23<sup>rd</sup> September,2020 seeking review of the orders and that the same is still pending. That in view of this pending application, he urged the court to find that the applicant is forum shopping. He opposed the prayer for transfer of the suit to Eldoret arguing that the minor the subject of the proceedings is resident in Mombasa hence convenient for the minor.

12. In her rejoinder, the applicant filed a further affidavit sworn on 17<sup>th</sup> Novembe,2020 contending that the replying affidavit is full of lies. That the respondent had failed to respond to the issue of jurisdiction to wit which court ought to hear the matter. She further stated that the respondent has admitted that the child has been residing and schooling in Eldoret a fact that justifies hearing of the mater in Eldoret.

13. When the matter came up for hearing, parties agreed to file submissions in disposition of the case.

#### **Applicant's submissions**

14. The firm of Isiaho Sawe appearing for the applicant filed their submissions on 18<sup>th</sup> November,2020 literally reiterating the averments contained in the affidavit in support of the application. It was submitted that under section 18 of the civil procedure Act , the court with jurisdiction to entertain the matter is Eldoret law courts taking into account that the minor is residing and schooling in Eldoret. He further contended that the respondent is working for gain and resides in Eldoret.

15. In support of the assertion that it is Eldoret law courts which has jurisdiction, counsel placed reliance in the holding in the case of **Hangzhou Agrochemicals Industries Ltd v Panda flowers ltd (2012) e KLR** where the court held that in determining which court has jurisdiction in a matter, the court ought to consider the nature and character of the proceedings; the nature and relief or remedy sought, interests of litigants; expense which parties will incur in transporting and maintaining witnesses; balance of convenience; interest of justice and possibilities of undue hardship. According to the learned counsel, the balance of convenience tilts in favour of the applicant.

16. On the issue of interim custody of the minor pending hearing and determination of the children's case on merit, counsel referred the court to the best interests of a child principle underpinned under section 4 (2) and (3) of the Children Act.

#### **Respondent's submissions**

17. On his part, the firm of Obonyo representing the respondent filed his submissions dated 23<sup>rd</sup> November 2020 reiterating the averments contained in the replying affidavit which content I have already referred to herein above.

18. Submitting on the issue of courts' jurisdiction, counsel submitted that the minor who is the subject of the suit is residing in Mombasa hence the cause of action arose in Mombasa thus satisfying the requirements of section 15 and 18 of the Civil Procedure Act. Learned counsel invited the court to consider the holding in the case of **Re H J O (minor) (2017) e KLR in which the court quoted the case of David Kibungu Vs Zikarenga & 4 others, kampala HCC No 36/1991** where it was held that the high court has the discretion even suo motto to transfer a case from one lower court to another under Section 18 of the Civil Procedure Act subject to the applicant making a strong case. That as a general rule, a court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice.

19. In further support of the above holding, learned counsel made reference to the holding in the case of **Kageny vs Musiramo and another ( 1968) E 43** where the court stated that the onus lies with the appellant to convince the court that he or she deserves orders of transfer of a case from one court to the other subject to attainment of justice.

20. Touching on the prayer to set aside the orders of the trial court, counsel termed the same as misconceived and an abuse of the court process and that the best interests of the minor ought to take priority and not parties' interests or differences.

#### **Determination**

21. I have considered the application herein, response thereto and rival submissions by both counsel. Issues that arise for determination are;

**a. Whether Tononoka law courts has jurisdiction to entertain children case no 260/2020.**

**b. Whether this court can set aside Tononoka children's court's impugned orders and direct custody of the minor to the applicant.**

22. The applicant is seeking this court's intervention in setting aside the orders of the trial court in Tononoka Children's court case no 260/2020 issued on 17<sup>th</sup> September, 2020. Although the trial court file is referred to as case No 260/2020, the plaint attached as an annexure to the affidavit in support of the application reflects the case as file No E003/2020. Assuming that the two refer to the same suit, the impugned orders made on the said date directed as follows;

**“That the defendant is hereby restrained from removing the minor herein J.A from the residence of the plaintiff and jurisdiction of the court pending the hearing and determination of this application.**

23. According to the applicant, immediately preceding the institution of the proceedings before the trial court, the minor was residing with her while schooling in some school within Eldoret. That the court with jurisdiction therefore, should be Eldoret law courts considering that as a defendant, she is living and working for gain in Eldoret.

24. There is no doubt that this court has jurisdiction to entertain an application seeking transfer of a case from one subordinate court to the other. Such powers are however at the discretion of the court which should not be exercised whimsically or with caprice. The court must be mindful of the consequences of making such transfer order taking into account certain parameters inter alia; balance of convenience, parties attendant travelling and witness's maintenance expenses, likelihood of occasioning parties' undue hardship and above all, the best interest of the minor. See Kageny Vs Musiramo and another(supra) where the court stated that;

**“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 strong 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 expenses, interests of justice and probabilities of undue hardship and if the court is left in doubt as to whether under all circumstances it is proper to order for a transfer, the application must be refused”**

25. Similar position was held in the case of Kithita Ngeana Vs Mwaniki Kisume (2018) eKLR where the court held ;

**“the balance of convenience calls upon this court to have the matter heard where the cause of action arose which is a place of residence of both the plaintiff and the defendant”.**

26. It is trite that jurisdiction is everything and without it a court has no power to make any more step. See Owners of the motor vessel “Lillian S” Vs Caltex oil (Kenya) Ltd (1989) KLR

27. The law governing institution of suits before a court of law is provided under section 13, and 15 of the CPA. Section 15 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 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,**

**(c) Any of the defendants where there are more than one, at the time of commencement of the suit or personally works for gain, provided either the leave of the court as given, or the defendants who do not reside or carry any business, or personally work for gain as aforesaid acquiesce in such institution.**

**(d) The cause of action wholly or in part arises**

28. Section 18 goes further to clothe the court with the power to transfer suits from one subordinate court to the other. In this case, the applicant has heavily and largely relied on her and the child's residence being Eldoret and therefore the Eldoret court ought to hear the case. On the other hand, the respondent claimed that the child was staying in Mombasa by the time the cause of action arose.

29. When did the cause of action arise? By the time the suit was instituted, the child was staying with the respondent in Mombasa. It then follows that the cause of action and custody of the child arose when the child was in Mombasa. Therefore, the respondent had the liberty to either sue in Eldoret where the defendant / applicant resides or Mombasa where the minor was residing by the time the suit was filed.

30. Accordingly, it is my finding that both Eldoret and Mombasa law courts have jurisdiction. Taking into account that the suit is already before a competent court, the balance of convenience and interest of justice will dictate that the suit be expedited for quick disposal in Tononoka law courts. It will cause unnecessary inconvenience and hardship to the minor to be traveling to Eldoret for the hearing of the case.

31. Regarding whether this court can stay proceedings, the applicant must prove that it is in the interest of justice that the proceedings be stayed. It is trite that courts should not as a matter of course stay proceedings unless there are strong and convincing reasons to do so. See Global Tours Limited winding up cause No 43 of 2 000 where the court stated that, the court should essentially weigh the pros and cons of granting the order and that, in considering those matters it should bear in mind such factors as; the need for expeditious disposal of the case; the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.

32. For the court to stay proceedings, there must be a prayer for substantive orders. That brings me to the question whether this court can set aside the orders of interim custody of the child to the respondent.

33. The manner in which the orders sought are framed, there is no prayer for substantive orders. The applicant is asking for interim orders. There is no appeal filed challenging the impugned orders. To grant the orders in the manner sought will amount to granting substantive orders with finality in an application.

34. Perhaps the applicant should have sought for the interim orders pending hearing and determination of an appeal which unfortunately is missing. In this case there is no appeal in place. What purpose will the interim orders of child custody serve without a substantive suit or prayers? For the reasons stated, it is my finding that that prayer cannot issue.

35. It is worth noting that the applicant has already filed an application for review of the orders before the trial court which was pending by the time this application was being heard. Why did the applicant file this application seeking to vary the orders of the lower court when there is a similar application pending before the trial court? She should have waited for the ruling of the review application and then file an appeal if dissatisfied. In the circumstances, this application seeking to vary or review the orders of the lower court is premature and indeed an abuse of the court process. Regarding who has the right to custody, that will be decided before the lower court as a court of first instance.

36. Accordingly, I do not find merit in this application and the same is hereby dismissed with no order as to costs. The trial court is urged to expeditiously dispose of the matter.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12TH DAY OF MARCH 2021.**

**J. N. ONYIEGO**

**JUDGE**