



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
MISCELLANEOUS CIVIL APPL. NO. E056 OF 2020
IN THE MATTER OF RK (MINOR)

AND

AMM.....PLAINTIFF

V E R S U S

SMK.....DEFENDANT

RULING

1. Before this Court is the Notice of Motion Application dated **4th November 2020** by which the Applicant **SMK** seeks the following orders:-

i. SPENT

ii. That this Honourable Court be pleased to transfer Nairobi Children's Case No. XXX of 2018 AMM –Vs- SMK from Hon. R. O. Mbogo (RM) to any other Court in Nairobi capable of trying the same.

iii. That this Honourable Court be pleased to stay all proceedings in Nairobi Children's Cause No. XXX of 2018 pending hearing and determination of this application.

iv. That this Honourable Court be pleased to set aside/stay the orders issued by Hon. R. O. Mbogo on 9/3/2020 AND to grant leave to the Applicant to enforce the said Arbitral Award as a decree of this Honourable Court.

v. That the costs of this application be provided for.

2. The application was premised upon **Sections 1A, 1B, 3A and 18** of the **Civil procedure Act Chapter 21 Laws of Kenya** and was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent **AMM** opposed the application through her Replying Affidavit dated **4th November 2020**. The application was canvassed by way of written submissions. The Applicant filed in Court his written submissions dated **1st February 2021** whilst the Respondent filed her written submissions dated **8th February 2021**.

BACKGROUND

4. The Respondent herein had filed suit against the Applicant at the Nairobi Children's Court being **Milimani Children Cause No. XXX of 2018**. The Respondent also filed an application seeking an award of interim maintenance pending the hearing and determination of the suit.

5. On **8th February 2019** the learned Trial Magistrate **HON R. O. MBOGO** granted the prayers for interim maintenance **subject to** the condition that the Respondent set the suit down for hearing within **six (6)** months failing which the interim orders would automatically lapse.

6. As it transpired the suit was not set down for hearing within **six (6)** months therefore pursuant to the orders of the Magistrate the interim orders of maintenance would have lapsed on **8th August 2019**. Nevertheless the trial Court proceeded to set the suit down for hearing on **9th March 2020** and further reinstated and extended the orders of maintenance which had been made on **8th February 2019**.

7. Being aggrieved by the actions of the trial Magistrate the Applicant vide a Notice of Motion dated **9th July 2020** applied that the trial Magistrate set aside the interim orders of maintenance and recuse himself from further handling the matter.

8. The trial Magistrate considered this application but vide the Ruling of **24th September 2020** dismissed the application in its entirety. The Applicant then approached the High Court with the present application.

ANALYSIS AND DETERMINATION

9. I have carefully considered this application, the Replying Affidavit as well as the written submissions filed by both parties. The Applicant is aggrieved by the fact that the learned trial Magistrate despite having made interim orders of maintenance subject to the suit being set down for hearing within **six (6) months** proceeded to reinstate and extend the said orders **after the six (6) months** period had expired. The Applicant further takes issue with the refusal of the trial Magistrate to recuse himself from handling the matter.

10. According to the Applicant the conduct of the trial Magistrate exhibits bias against himself and outright favouritism towards the Respondent. For this reason the Applicant now prays that the suit be transferred to another Court of competent jurisdiction.

11. As stated earlier the application is opposed. The Respondent's position is that the learned trial Magistrate has at all times conducted the matter in a fair and impartial manner and in strict adherence to the law. The Respondent submits that to allow this application will prejudice both herself and the subject minor as the case is at its final stages only awaiting delivery of the Judgment. She submits that the allegations now being raised by the Applicant are malicious and are merely aimed at delaying the finalization of the suit.

12. The transfer of suits from one lower Court to another is governed by the **Civil Procedure Act, 2010** as read together with the relevant provisions of the **Civil procedure Rules, 2010**. **Section 17** of the **Act** provides as follows:-

“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.”

13. **Section 18** of the **Act** give the High Court 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. ...”

14. The Applicant submits that the manner in which the learned trial Magistrate has handled the suit before him is a clear demonstration that:-

i. The Magistrate is incapable of determining the matter before him impartially as he has already exhibited extreme bias and hostility towards the Applicant and;

ii. The Magistrate abused his Judicial powers by extending the interim maintenance orders after the same had lapsed without a formal application being made for such extension.

15. It is trite that whilst the High Court has the discretion to transfer a suit from one Magistrate to another where there is an allegation and/or misapprehension of bias that discretion ought only be invoked in situations where there exists sufficient to back up the allegations of bias. In the case of **KAMANDE & 3 OTHERS –VS- REPUBLIC [2014]eKLR** it was held:-

“When giving consideration to an application for transfer of case, the court will assess whether the applicant's apprehension was reasonable and founded on sufficient material. The reason for laying emphasis on these factors is that the court has a duty to encourage trust in the integrity and independence of the Judiciary. Therefore allegations which may be directed at Judicial Officers, alleging bias and lack of fairness must not therefore be accepted without there being substantive evidence to back them”

16. In deciding whether or not there has been bias the Court must consider how the actions of the Court would appear in the eyes of a reasonable man. In the case of **TUMAINI –VS- REPUBLIC [1972]E.A** the Court stated as follows:-

“In considering the possibility of bias it is not the mind of the Judge which is considered but the impression given to reasonable persons.”

17. The suit in question being a dispute over maintenance involves the welfare and well-being of a minor. I have carefully perused the proceedings before the trial Court. Although the Applicant alleges that the trial Magistrate acted *suo moto* in reinstating and extending the interim orders of maintenance it is evident that infact an oral application was made for the reinstatement and extension of said orders.

Further as correctly pointed out by the trial Magistrate in the Ruling of **24th September 2020** the court had a Constitutional duty to act in the best interests of the child (minor).

18. **Section 98** of the **Children Act 2001** provides that:-

“A court shall have power to make an order and to give directions regarding any aspect of the maintenance of a child, including but not limited to, matters relating to the provision of education, medical care, housing and clothing for the child; and in this behalf may make an order for financial provisions for the child.”

Section 99 of the same **Act** grants the Court powers to vary maintenance orders.

19. I find that the learned trial Magistrate was perfectly in order to make orders necessary to ensure that the minor was adequately maintained. In seeking to uphold the best interests of the child the Magistrate cannot be said to have been biased against any party to the suit. The orders were made within the law.

20. On the issue of recusal it is common ground that the suit before the trial Court is all but concluded. All that remain is delivery of Judgment. It would not serve the interest of justice to transfer the case at this late stage. The Applicant still retains the right to appeal in the event he is dissatisfied with the Court’s final decision.

21. Based on the foregoing I find no merit in this application. I dismiss in its entirety the Notice of Motion dated **4th November 2020** and award costs to the Respondent.

Dated in Nairobi this 7th day of May, 2021.

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MAUREEN A. ODERO

JUDGE