



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT CIVIL MISC. NO. E20 OF 2020**

**GKK.....APPLICANT**

**VERSUS**

**ANK & SKK (Minors suing through the mother RWN).....RESPONDENT**

**RULING**

**Brief Facts**

1. By a Notice of Motion dated 21<sup>st</sup> December 2020, the applicant invoked Order 40 Rule 4 of the Civil Procedure Rules and Section 15(a), (b) (c) and 63 (e) of the Civil Procedure Act and sought the Honourable Court to transfer Karatina Children Case No. 14 of 2020 to Molo for hearing and determination.
2. In opposition of the application, the respondent filed a replying affidavit and a notice of preliminary objection both dated 29<sup>th</sup> January, 2021 and filed in court on 1<sup>st</sup> February 2021.

**Applicant's Case**

3. It is the applicant's case that the respondent and himself were previously married and established their matrimonial home in Molo together with the two minors. The respondent thereafter deserted her matrimonial home in Molo and went to live in Karatina in her parents' home. The respondent subsequently instituted Children Case No. 14 of 2020 in Karatina Law Courts seeking maintenance and custody of the minors.
4. The applicant further states that he raised a preliminary objection in respect of the territorial jurisdiction of the court to determine the matter however the preliminary objection was dismissed.
5. The applicant further contends that it is not in the best interests of the minors to travel to Karatina for the case considering the surge of corona virus cases in the country.
6. The applicant states that according to the law, suits are instituted where the defendant ordinarily resides, works for gain or where the cause of action arose and thus since he resides in Molo with the minors the suit ought to be transferred there.

**The Respondent's Case**

7. The respondent raised a preliminary objection that the miscellaneous application herein offends Section 75 of the Civil Procedure Act and Orders 42 and 43 of the Civil Procedure Rules. That the application herein is bad in law and an abuse of the court process and further that it has been filed in the wrong court and form.
8. The respondent further contends that she moved to Karatina after incessant physical and mental torture from the applicant.
9. The respondent agrees to instituting the Children's Case no 14 of 2020 in Karatina, but adds that when the application was coming up for hearing on 21<sup>st</sup> October 2020, the applicant raised a preliminary objection opposing the territorial jurisdiction of the court. The said preliminary objection was dismissed and it is then the Applicant filed the miscellaneous application herein.
10. The respondent further states that the applicant is misleading the court in averring that the children ought not to travel because of the covid 19 surge.

11. The respondent states that this Honourable Court ought to take into consideration the best interests of the child and dismiss the application herein.

### **Applicant's Submissions**

12. It is the applicant's submission that according to the law, a suit ought to be instituted where the cause of action arose or where the defendant resides. In the present case, the applicant married the respondent and they established their matrimonial home in Molo. According to the applicant, the respondent fled to Karatina where she instituted Children's case No. 14 of 2020 seeking custody and maintenance of the children.

13. The applicant further submits that the suit herein ought to be instituted in Molo and not Karatina because the cause of action arose in Molo and that he as the defendant resides and works in Molo.

14. The applicant submits that the best interest of the child is of paramount consideration. In the instant case, the minors attend school in Molo, their school fees has been paid, their needs have been met and it would not be in the best interests that they be shifted to another town.

15. The applicant further submits that rather than opting for an appeal which would take a longer time, he opted to invoke this Honourable court's supervisory jurisdiction.

16. The applicant concludes his submissions by relying on Section 18 of the Civil procedure Act which gives the High Court power to transfer a case instituted in the lower court on application by the parties or its own motion. The Applicant further relies in the case of Mombasa Civil case No. 3 of 2015 O.S.A vs M.S.A.

### **The Respondent's Submissions**

17. The respondent submits the Applicant raised a preliminary objection on the territorial jurisdiction before Karatina Magistrates court which was dismissed. Thus by vide of Section 75 of the Civil Procedure Act, the Applicant ought to lodge an appeal rather than file a miscellaneous application. Accordingly, by the filing a miscellaneous application, the Applicant has denied this Honourable court a chance to appreciate the reasoning and ruling of the learned magistrate.

18. The respondent further submits that she resides and works in Karatina after she fled her matrimonial home in Molo where she was being subjected to physical and emotional abuse by the applicant.

19. The respondent contends that what is of paramount importance is the child's best interest and subjecting respondent to a jurisdiction in control of the applicant would be an injustice.

20. Additionally, the respondent has not seen the minors for over a year and transferring the matter to Molo would prejudice her chances of seeing her children.

### **Issues for determination**

21. On perusal of the Application, the affidavits and the submissions, the main issue for determination are identified as follows:-

- a) Whether the application herein is competent.
- b) Whether the application is merited.

### **Determination**

22. It appears that after the preliminary objection was dismissed, the applicant in this application opted to apply for transfer of the children custody case from Karatina to Molo.

23. On the merits of the application, the court will refer to the relevant law. Section 18 of the Civil Procedure Act provides as follows:-

#### **“Power of High Court to withdraw and transfer case instituted in subordinate court**

**(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.”**

24. The applicant has not complained of any likely bias against him by the Karatina court or that he is likely to suffer any difficulties or hardships if the case remains at Karatina.

25. Section 18 empowers the High Court to withdraw and transfer a case instituted in a subordinate court on application of any of the parties or on its own motion. For the court to grant an order of transfer the applicant must satisfy the court as to the reasons for such orders.

I note that, the applicant is challenging jurisdiction of the Karatina magistrate court where the case was filed relying on section 7 of the Civil Procedure Act. It is argued that the case ought to be filed either where the defendant resides or where the cause of action arose.

From the wording of the preliminary objection that was heard and dismissed by the magistrate, issues of jurisdiction were determined by the court between both parties. It is not in doubt that the magistrate's court was competent to hear and determine those issues. The said issues on jurisdiction were between the same parties as in this application. What the applicant ought to have done was to appeal against the magistrate's ruling to the high court.

However, I note that before the Karatina court, the applicant raised issues of geographical jurisdiction. Before this court, the applicant has presented other grounds for transfer of the case. As such this application cannot be said to be res judicata. Furthermore, an application for transfer ought to be filed in the high court. The applicant is therefore within the jurisdiction of this court as by law established.

The applicant states in his affidavit that he stays in Molo with the children of the marriage which is the matrimonial home. He states further because of that reason, it will not be in the best interests of the children to travel to Karatina for the case in view of this period of Covid -19 disease.

The case before Karatina court is for custody of the children of the parties. In my view, the children will not be required to travel for the hearing of the case to Karatina since they are not parties to the case. It is the applicant who will be travelling for the hearing. If the court requires the opinion of the children as to custody, as required by the law, the court may call for the children to appear before it once considering the distance, the inconvenience and the expenses that may be involved.

Except for that reason of the applicant and the children being inconvenienced in travelling from Molo to Karatina, there is no other reason for transfer of the case that has been given. As I said earlier, the other issues, for example of where the case ought to be filed were determined by the Karatina court.

It was held in the Ugandan case of David Kabungu Vs Zikarenga HCCC NO. 36 OF 1995 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 marinating 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”*

26. Taking into consideration the provisions of Section 18 and the principles in the two decided cases, I find that the applicant has failed to present any tangible grounds to justify orders for any case at all for transfer of this case from Karatina to Molo.

27. I therefore find no merit in this application and I hereby dismiss it with costs.

28. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 13<sup>TH</sup> DAY OF MAY, 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 13<sup>th</sup> day of May 2021.**