



REPUBLIC OF KENYA



**KENYA LAW**  
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**SWG v KMG (Miscellaneous Civil Application 10 of 2021)  
[2021] KEHC 9825 (KLR) (7 May 2021) (Ruling)**

Neutral citation: [2021] KEHC 9825 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CIVIL APPLICATION 10 OF 2021**

**JN ONYIEGO, J**

**MAY 7, 2021**

**BETWEEN**

**SWG ..... APPLICANT**

**AND**

**KMG ..... RESPONDENT**

**RULING**

1. The application before Court is a Notice of Motion dated 18<sup>th</sup> November, 2020 brought under the provisions of Section 1A, 1B, 3A, 15 & 18 of the *Civil Procedure Act* Cap 21 Laws of Kenya; Sections 4(2) & (3), 76(1), 118 of the *Children Act*, Order 40 Rule 1, 2 & 4 and under Order 51 of the *Civil Procedure Rules 2010*, and all other enabling provisions of the law. The applicant seeks the following orders from this Court-
  - 1) That this Honourable Court be pleased to withdraw and thereafter transfer Kwale Children's Case No. 15 of 2020 from the Kwale Children's Court to Nairobi Milimani Law Court for hearing and determination.
  - 2) That the present suit be stayed pending hearing and determination of this application for transfer.
  - 3) That costs of this application be provided for.
2. The application is brought on the grounds stipulated on the face of it and supported by an affidavit sworn on November 18, 2020 and a supplementary affidavit sworn on March 4, 2021 both by SWG (the defendant/applicant herein).
3. It is the applicant's case that the respondent herein filed a suit in Kwale law courts for legal custody of the minor herein. That she has since moved from Kwale County and currently lives in Nairobi with the minor.



4. She deposed that the case is still pending determination thus forcing her to travel with the minor to the Court in Kwale whenever the matter comes up hence an expensive affair for her. According to her, if the matter proceeds at the Children's Court in Kwale, she and the minor will be prejudiced and consequently suffer injustice as they no longer reside in Kwale.
5. The applicant averred that maintaining the case at Kwale would mean that she continues to travel with the minor and may be with a friend to help in taking care of the minor, challenges which the respondent shall not be faced with in the event the suit is transferred to Nairobi. She further averred that the transfer of this matter would facilitate just, expeditious, proportionate and affordable resolution of the dispute between the parties herein.
6. It is the applicant's case that she left her matrimonial home and took the minor who is of tender age with her due to the respondent's acts of negligence and it is her top priority to ensure that the best interest of the said minor is met as she resides with her in Nairobi and not Kagio as alleged by the applicant.
7. The respondent filed a replying affidavit sworn on 18<sup>th</sup> February, 2021 in opposition to the said notice of motion.
8. He averred that the minor does not live in Nairobi with the applicant as alleged as she resides with her maternal grandparents in Kagio. He contended that this being a children's matter, the Court has to take into account the best interests of the child under Article 53 (2) of *the Constitution* of Kenya, 2010 and section 4 (3) of the *Children's Act 2001*.
9. The respondent further averred that the minor has been living and schooling in Kwale until the applicant took her away thus denying him access and fatherly love to the minor. He stated that the notice of motion filed is misconceived, frivolous, bad in law and an abuse of the Court process.
10. It was further stated that no cogent or sound reasons and/or grounds have been set forth to warrant this Court to exercise its discretion in favor of the applicant and that the application is simply intended to delay and scuttle this matter from proceeding any further.
11. On February 24, 2021, directions were made that the application be canvassed by way of written submissions. The applicant's submissions were filed by the firm of Lawrence Obonyo Legal Advocates on 8<sup>th</sup> March, 2021 while the respondent's submissions were filed by the firm of Muturi Gakuo & Kibara Advocates on March 30, 2021.
12. Mr. Obonyo learned Counsel for the applicant relied on Section 17 of the *Civil Procedure Act*, 2010 which provides for the law on transfer of suits. Learned Counsel relied on the case of *Mohamed Sitabani v George Mwangi* HCCA No 13 of 2002 to buttress the position that the Magistrates Court Act gives Children Courts countrywide jurisdiction.
13. Learned counsel cited Section 18 of the *Civil Procedure Act*, 2010 which empowers the High Court to transfer a suit from one subordinate Court to another and relied on the case of *Hangzhou Agrochemicals Ltd v Panda Flowers Ltd* [2012] eKLR where Justice Odunga cited with approval the case of *David Kibungu v Zikarenga & 4 others*, Kampala HCCS No. 36 of 1995 by holding that Section 18 (1) (b) of the *Civil Procedure Act*, 2010 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 and that the burden lies on the applicant to make out a strong case for the transfer.
14. Mr. Obonyo submitted that it would not be in the best interest of the minor to transport him from Nairobi to Kwale, back and forth since the applicant is financially constrained. He also submitted that



it will be costly for the applicant to have to arrange for food, transport and accommodation to attend Court in Kwale over and above the current parental responsibilities which she bears solely when the said resources can be better utilized in meeting the needs of the minor.

15. It was further submitted that the suit involves a minor and the best interest of the said minor are of paramount importance and therefor supersedes the rights and interests of the parties herein. Counsel relied on Article 53 (2) of *the Constitution* and Sections 4(2) & (3) of the Children's Act to emphasize the point that the best interest of the child demands that the matter be heard and concluded at Milimani. court. Counsel further submitted that the continuation of the suit in Kwale will go against the principle of safeguarding and promoting the welfare of the minor and therefore the best forum for the resolution of the suit would be in Nairobi where the applicant and the minor reside. Learned counsel urged this Court to allow the applicant's application dated November 18, 2020 as prayed.
16. Mr. Kibara learned Counsel for the respondent submitted that the Kwale Court has the requisite jurisdiction to hear and expedite the children's case efficiently. Reliance was placed on the case of *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another* [2020] eKLR where the Court dealt with the issue of jurisdiction comprehensively.
17. Mr. Kibara cited section 73 of the Children's Act Cap 141 Laws of Kenya which provides for jurisdiction of Courts regarding children matters and section 3 (2) of the *Magistrate's Act* Cap 10 Laws of Kenya which gives magistrates Courts countrywide jurisdiction to hear and determine any suit notwithstanding the place where the defendant resides or where the cause of action arose. Reliance was placed on the case of *In re Estate of RNM (Minor)* [2020] eKLR where Justice Mulwa was of the view that the Magistrates Court Act would be the applicable legislation, giving the Children's Court countrywide jurisdiction.
18. It was submitted that the only ground in support of the applicant's application is that she has been forced to travel with the minor to Kwale Court at high expense whenever the matter comes up in Court. Counsel contended that Article 53 (2) of *the Constitution* of Kenya, 2010 provides that a child's best interest is of paramount importance in every matter concerning the child. In support of this submission counsel relied on the case of *SMM v AM* [2020] eKLR and *In re Estate of RNM (supra)* where both Courts in dealing with similar applications as the one herein held that in children cases, issues can be determined even in the absence of minors and/or children unless under exceptional circumstances where the Court decides to interview them, thus financial implications not being more important than the interests of the child cannot warrant the Court to exercise its discretion in favour of the Applicant.
19. Mr. Kibara in submitting that the children's case was first instituted at Kwale and therefore the Kwale Court should determine the matter relied on the case of *SMM v AM (supra)* where the Court dismissed a similar application stating that where two Courts have concurrent jurisdiction over a matter, either party can choose the Court in which to institute the suit. Counsel urged this Court to dismiss the applicant's application dated November 18, 2020.

### **Analysis and Determination**

20. I have considered the application herein, affidavits in support, response thereto, written submissions by the respondent's counsel and oral submissions by counsel for the applicant. In determining matters touching on the welfare of children, this court is guided by Section 76 of the *children Act* which sets out the principle for consideration as follows;
  - (a) The ascertainable feelings and wishes of the child concerned with reference to the child's age and understanding.



- (b) -----
  - (c) The likely effect on the child of any change in circumstances.
  - (d) The child's age, sex, religious persuasion and cultural background.
  - (e) Any harm the child may have suffered, or is at risk of suffering.
21. Section 73 of the Children's Act No. 8 of 2001 further provides for the jurisdiction of the Children's court as hereunder;
- There shall be courts to be known as Children's Courts constituted in accordance with the provisions of this section for purposes of
- a. Conducting Civil proceedings on matters set out under parts II, V, VII, VIII, IX, X, XI and XIII;
  - b. ....
22. It is trite that every suit shall be instituted in a court within the local limits of whose jurisdiction the defendant or each of the defendants at the time of the commencement of the suit actually and voluntarily resides or carries on business or personally works for gain as provided for under section 15 of the *Civil Procedure Act*.
23. As correctly submitted by the applicant's counsel, the High Court has the power to withdraw and transfer a case instituted in a subordinate Court as provided for under Section 18 of the *Civil Procedure Act* which states as hereunder: -
- (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—
    - i. 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
    - ii. withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
      - 1. try or dispose of the same; or
      - 2. transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
      - 3. retransfer the same for trial or disposal to the court from which it was withdrawn.
  - (2) ...
24. This being a suit where the respondent is seeking legal custody of the minor, this Court shall be guided by Article 53 (2) of *the Constitution* of Kenya, 2010 which provides for the best interest of the child. The applicant averred that she left her matrimonial home with the minor who is of tender age and is currently residing with her in Nairobi. The respondent on the other hand avers that the minor does not reside in Nairobi with the applicant instead, she resides with her maternal grandparents in Kagio. These two allegations, by each of the parents of the minor are subject to proof by way of calling and/or adducing evidence which is yet to be done.



25. Accordingly, where a court is considering whether or not to make one or more orders with respect to a child, it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child as provided for under Section 76 (1) of the Children’s Act. In the case of *In re Estate of RNM (Minor)* [2020] eKLR the Court held that:

“The Magistrate’s Court’s Act Cap 10 Laws of Kenya Section 3(2) gives the Court Countrywide jurisdiction to hear and determine any suit notwithstanding where the defendant resides or where the cause of action arose – George Mwangi Karori – HCCA No. 13 of 2002. The Magistrate’s Court Act is the substantive law establishing the Magistrates Courts. The *Civil Procedure Act* is a statute that was established earlier than the Magistrate’s Court’s Act, and in the event that a conflict between the two statutes arises, the later statute is deemed to have amended the earlier statute.

26. In view of the above, it is evident that Magistrates Children’s Court has countrywide jurisdiction which is derived from the *Magistrates Court Act* Cap 10 Laws of Kenya. The applicant submitted that she is financially constrained and therefore it would not be in the interest of justice for her to transport the minor from Nairobi to Kwale back and forth. It begs the question that in the event the application herein is allowed and the suit transferred to Nairobi Milimani, then the applicant is forced to move from Nairobi to another location and/or County, will this suit again be transferred to wherever the applicant shall have relocated to.

27. Quite often than not, in children cases, the presence of the child may not be required in court, unless it is extremely necessary. Therefore, the minor shall not be inconvenienced or prejudiced in any way and consequently the financial implications referred to by the applicant have no bearing on the interest of the minor. Infact, they sway towards the interests of the applicant which are not more important than the interests of the child. In *SMM v AM* [2020] eKLR the Court held that:

“Regarding witnesses’ and children’s residence being Nairobi and Kitui, one would have to look at the nature and character of the proceedings. This is a children’s matter where the children are aged between 6-11 years. The entire suit revolves around custody and maintenance. 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.”

28. It is noteworthy that the Magistrate’s Court at Kwale where the suit was filed is competent to try the case, thus transferring the suit to Nairobi Milimani on account of the applicant’s financial constraints would occasion unnecessary delay to the just conclusion of this matter due to the transfer procedural steps before the suit is set down for hearing. Having in mind that the Court has to consider the best interest of the Child when determining this matter the aspect of financial hardship of the mother who is also the applicant herein is non consequential. The delay in having the case transferred to Milimani would obviously cause further delay of determination of the case in the suit filed at Kwale Children’s Court.

29. Allowing the present application shall be equivalent to saying that the children’s Court jurisdiction shifts with the minor which is a wrong principle in law and contrary to Article 50 of *the Constitution* of Kenya, 2010.



30. For the above stated reasons, it is my finding that the application herein is not merited and the same is dismissed with no order as to costs. The lower court to fast tract the matter and dispose the same as soon as possible.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 7TH DAY OF MAY,  
2021**

**HON. JUSTICE J.N. ONYIEGO**

**JUDGE**

