



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC. APPLICATION NO. E008 OF 2021**

**IN THE MATTER OF EBJ(minor suing through the mother)**

**ANM.....APPLICANT**

**VERSUS**

**EB.....RESPONDENT**

**RULING**

1. This is a ruling on application dated 25<sup>th</sup> February 2021 seeking the following orders:-

- a. Spent
- b. That this Honourable Court be pleased to stay the proceedings in Nairobi children case no. MCCC XXXX of 2020.
- c. That this Honourable Court be pleased to transfer MCCC/XXXX of 2020 filed by the respondent in Milimani Law Courts-Nairobi for hearing and determination in the children's court at Nakuru.
- d. That this Honourable Court be pleased to set aside the orders issued on 2<sup>nd</sup> December 2020 in MCCC/XXXX of 2020 and replace them with orders granting the custody of the subject to the applicant herein.
- e. That the costs be paid by Respondent.

2. This application is premised on the following grounds:-

- i. The children's court in Nairobi has no jurisdiction to hear the matter as the course of action arose in Nakuru and the applicant who is the Defendant in MCCC/XXXX of 2020 resides in Nakuru within the jurisdiction of this Honourable court.*
- ii. That the Applicant herein, is the biological mother of the subject.*
- iii. That the Applicant lived with the subject herein in Nakuru until the Respondent took him away from her unlawfully on 7<sup>th</sup> November 2020 and proceeded to file an application in Nairobi for his custody.*
- iv. That the subject is a child of tender years (3 years old) and needs to live with his mother who has single-handedly raised him before he was violently snatched from his mother by the Respondent.*
- v. That the applicant upon taking the subject has blocked the mother from accessing the child and his whereabouts are unknown to the Applicant.*
- vi. That the applicant filed children's case number Nakuru CMCC 049 of 2020 for the custody of the subject on 1<sup>st</sup> December 2020 while the Respondent on the same day filed MCCC/XXXX of 2020.*
- vii. That the Respondent took away the subject from the mother unlawfully without any order of the court and did not disclose this to the court in MCCC/XXXX of 2020 hence misleading the said court in granting its orders*

viii. *That unless the court hears this Application and grants the orders the Applicant stands to suffer irreparably.*

ix. *That for the best interest of the subject and in the interest of justice it is only fair that the order herein is granted.*

3. The application is supported by the affidavit of **ANM** restating the grounds in the application.

4. In response, the respondent filed a replying affidavit dated 17<sup>th</sup> May, 2021. He averred that he had started a beauty shop for the applicant which she mismanaged and the same was closed. He stated that he constantly maintained the applicant and the minor and paid rent but the applicant diverted the money to her use until he realized the applicant was living with another man and the minor did not get the care and attention of the mother. He averred that on various occasions he visited the minor and the applicant and when the applicant moved on he left his household stuff with her.

5. He consulted the applicant to have the minor over for the weekend with no condition attached. Failure to drop the child on Wednesday the applicant would pick the minor on Thursday. According to the respondent when he took the minor he realized he had rashes on his body and his stomach was unusually big and took him to the hospital and the doctor confirmed the rashes were a result of beating and lack of hygiene and child maintenance and informed the applicant on the predicaments and the need to stay with the minor till he recuperates. He honored the summons from the children's office. He averred that he is best suited to be with the minor and it is in the best interest of the minor that the respondent is restrained from interfering with the minor's education.

6. He urged this court to stay the current suit and allow the Nairobi suit to proceed.

7. The applicant filed a further affidavit dated 27<sup>th</sup> May 2021 reiterating the averments in the supporting affidavit and further deponed that the minor was not unwell and the applicant has never maintained her and the minor as she is self-employed. She averred that she has been in constant contact with the minor save for the threats by the Respondent and added that the minor is of tender years and has lived with her in Nakuru before the Respondent took him.

#### **APPLICANT'S SUBMISSIONS.**

8. The applicant submitted that the respondent ignored a summons from the Nakuru Children's Office and he is therefore not fit to have custody of the minor as he acted in bad faith. She submitted that the minor is of tender years and custody should be granted to the applicant who has been with him since birth.

9. The applicant further submitted the Nairobi court lacks jurisdiction as the matter arose in Nakuru where the child was previously residing and urged the court to transfer the matter to Nakuru and have the same consolidated with Nakuru E049 of 2020.

#### **RESPONDENT'S SUBMISSIONS**

10. The respondent submitted that it is in the best interest of the minor that the matter is heard in Nairobi. He said he filed the Nairobi case on 1<sup>st</sup> December 2020 while the applicant filed hers on 8<sup>th</sup> December 2020 and the minor has been in the custody of the respondent since November 2020; and stated that Milimani Children's Court has jurisdiction to determine the matter and cited **Misc. Application No. 145 of 2016 WOO vs. DO.**

11. The respondent submitted that the applicant intends to delay the matter and this court has discretionary powers to set aside the orders issued in Nairobi and to weigh both factual and consideration factors.

12. The respondent submitted that under the overriding objectives, the court is enjoined to ensure there is just determination of proceedings in timely, efficient, and affordable to the parties. The respondent submitted that the applicant has failed to demonstrate that she is not suited to have the minor, and it is in the best interest of the minor that the custody is granted to the respondent. She urged this court to dismiss the application with costs to the Respondent.

#### **ANALYSIS AND DETERMINATION**

13. Having considered the application and the submissions filed, the issues for determination are:

a. *Whether the file transferred to Nakuru for hearing and determination?*

b. *Whether the application meets the threshold of setting aside proceedings in Nairobi MCCC/XXXX of 2020*

**(i) Whether the applicant meets the threshold of setting aside proceedings in Nairobi MCCC/XXXX of 2020 and the file transferred to Nakuru for hearing and determination?**

14. I do observe that both courts that are the children's court at Milimani and Nakuru are conferred with similar and equal jurisdiction to hear and determine the matter.

15. The applicant stated that the child previously resided in Nakuru before he was taken to Nairobi and thus the court having jurisdiction is where the subject matter arose, and she will incur expenses in attending court if the matter proceeds at Milimani.

16. The respondent stated that the applicant has on various instances delayed the matters in Milimani which could have been heard and determined. Whereas I note that a transfer of the file from Nairobi to Milimani would occasion further delay in determining the matter. Thus in my opinion I would recommend that the matter do proceed at Nairobi.

17. In the upshot, being guided by the paramount principle of the best interest of the child I find the application lacks merit and recommend the same be dismissed.

**(ii) Whether the application meets the threshold of setting aside proceedings in Nairobi MCCC/XXXX of 2020**

18. It is not in dispute that the Applicant and the Respondent are biological parents of the Minor the subject of this Application. According to the Applicant she was living with the minor in Nakuru before he was transferred to Nairobi by the Respondent.

19. The child is of a tender age being he is 4 years of age; there is no doubt that he needs the care and control of both parents. **Article 53(2)** of the **Constitution of Kenya, 2010** provides as follows:

*“A child’s best interests are of paramount importance in every matter concerning the child.”*

20. **Section 76 (1) of the Children Act** provides that any order the court will make must be in the best interest of the child as per.

21. **Section 4(2) and 3(b) of the Children’s Act** provide as hereunder:-

*“(2) In all actions concerning children, whether undertaken by Public or Private Welfare institutions, Courts of Law, Administrative Authorities, or Legislative bodies, the best interest of the child shall be the primary consideration.*

*(3) All Judicial and Administrative Institutions and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with the adopting a course of action calculated to –*

*a. Safeguarding and promoting the rights and welfare of the child;*

*b. and promote the welfare of the child.”*

22. The Court of Appeal in **J.O. v S.A.O (2016) eKLR** stated as follows:-:

*“There are a plethora of decisions by this court as well as the High Court that in determining matters of custody of children and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother because mothers are best suitable to exercise care and control of the children. Exceptional circumstances include the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in a deplorable state; or where her conduct is disgraceful and/or immoral.”*

23. **Section 83(1) of the Children Act (Cap. 141)** sets out the factors to be considered by the court while determining whether or not a custody order should be made in favor of the Applicant. Under **sub-section 83(1) (j)**, the court is required ultimately to have regard to the **‘best interests of the child’** as fundamentally obligated under the provisions of **Article 53(2) of the Constitution of Kenya**.

24. Parties herein have stated the reasons why the child should place in their respective custody. I note that the child is aged 4 years, therefore, being of tender age and requiring to be taken care of by the mother. A good school and other provisions without motherly love and care for a child under 10 years would still leave a vacuum in the life of a child not taken care of by a mother while at a tender age.

25. An exception to the above is when a child is when placing a child under a mother’s care would endanger the child’s life or subject the child to suffering; this can be ascertained from an inquiry carried out by a children’s officer. without such a report, it would be difficult to determine in whose custody will best interest of the child be achieved

26. From the foregoing, I direct that an inquiry be done by the children’s officer and the same be availed to Nairobi children’s court. in my view, the lower court file in Nakuru cms court should be transferred to Milimani children’s court.

**27. FINAL ORDERS**

**1) Nakuru CMCC 049 of 2020 is hereby transferred to Milimani children’s court and the same be consolidated with Milimani MCCC/XXXX of 2020.**

**2) The director of children’s service does conduct inquiry & file a report to enable directions/orders on custody of the minor herein.**

**3) Mention on 24<sup>th</sup> November Before Milinani children’s court.**

**RULING** dated, signed and delivered via zoom at **Nakuru**

This 4<sup>th</sup> day of November, 2021

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jenifer - Court Assistant

Ondande holding brief for applicant

Lyn Nganga for respondent