



**BT v JMT (Family Miscellaneous Application 25 of 2021)  
[2021] KEHC 12526 (KLR) (12 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 12526 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY MISCELLANEOUS APPLICATION 25 OF 2021  
JN ONYIEGO, J  
NOVEMBER 12, 2021  
IN THE MATTER OF MBT AND SMT (MINOR)**

**BETWEEN**

**BT ..... APPLICANT**

**AND**

**JMT ..... RESPONDENT**

**RULING**

1. By a plaint dated January 6, 2020BT(hereinafter the applicant) filed a suit before Tononoka Children’s court against JMT (hereafter the respondent) with whom they had a love relationship giving rise to two issues namely MBT and SMT seeking orders that; he be granted sole and actual custody, care and control of the minors herein.
2. During the pendency of the said proceedings, the applicant (plaintiff) moved to this court vide a Notice of Motion dated July 6, 2021seeking the transfer of the said suit from the Tononoka Children’s court to Naivasha Chief Magistrate’s court.
3. The ground advanced on the face of the application and averments contained in the affidavit in support sworn by the applicant on the same day is that; the applicant has since moved his residence and that of the children to Naivasha. That having been given actual custody of the children by the court on April 5, 2021, he has settled in their new home at Naivasha and that the children are now schooling at [Particulars Withheld] school Nakuru.
4. That due to the prevailing circumstances, Tononoka children’s court lacks territorial jurisdiction. In the applicants’ view, it will be costly and inconveniencing for the children to keep travelling to Mombasa for hearing.



5. In reply, the respondent filed a replying affidavit sworn on September 20, 2021 stating that the matter is at its tail end at Tononoka children's court hence no need to transfer the same as the children have already been interviewed. That it is in the best interest of the children that the matter be heard and concluded at Tononoka to avoid any further delay.
6. During the hearing, M/s Walubengo counsel for the applicant basically reiterated the averments contained in the affidavit in support of the application. Equally, Ms Mumbo for the applicant also adopted the content contained in the affidavit in support.
7. I have considered the application herein, affidavit in support and response thereto. The only issue for determination is, whether there is sufficient ground or reason to transfer the subject proceedings from Tononoka children's court to Naivasha children's court.
8. There is no dispute that it was the applicant who filed the subject suit at Tononoka children's court . At the material time, he and the respondent were residing at Diani Kwale County. It therefore means that, he recognized and appreciated that the court with jurisdiction was Tononoka.
9. The fact that he has relocated Naivasha from Mombasa does not mean that court's jurisdiction has shifted to Naivasha. Court's jurisdiction does not change according to change of a litigant's location. Assuming for a moment that the case is transferred to Naivasha and before completion and he relocates to Busia, will the case move to Busia?
10. I am cognizant of the fact that the high court has powers to transfer a suit from one subordinate court to another pursuant to Section 17 and 18 of the *Civil Procedure Act*. However, such powers do not operate in a vacuum. In *David Kibungu v Zikarenga & 4 others* Kamplala HCC No 36/1995 quoted with approval in the case of *Hangzhou Agrochemicals Limited vs Panda flowers Limited* ( 2012) eKLR, it was held that Section 18 (1) (b) of the *Civil Procedure Act* 2010 gives the court general powers to transfer suits from one subordinate court to another at any stage of the proceedings even suo moto and that the burden lies with the applicant to make a strong case.
11. In the instant case, the applicant's explanation is that he is no longer residing within coast region hence the case should follow him to Naivasha. He cited the cost of travelling from Naivasha to Mombasa as one such reason to justify the transfer. what about the respondent who will also bear costs travelling to Naivasha?
12. The second ground is that, the children will be inconvenienced travelling to Mombasa. It is worth noting that Court proceedings are not held daily. Children even travel on holiday without much difficulty. In any event, they do not need to attend all court sessions. If required for an interview by the court, which is very rare, they will appear may be once. Alternatively, an interview can be done by the children officer Naivasha and a report filed in Tononoka court.
13. Besides, with electronic case management in progress, witnesses do not have to appear physically in court unless it is absolutely necessary. See *SMM VS AM* ( 2020) eKLR where the court held;

“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 conditions the court demands 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”.



14. I am not the least persuaded that Tononoka has ceased to have jurisdiction simply because one party is on transfer. Had both parties moved, it would have been more appealing.
15. In view of the above observations, it is my finding that the application is not merited. The same is accordingly dismissed with no order as to costs. The trial court to expedite the hearing and determine the matter sooner than later.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2021**

**J. N. ONYIEGO**

**JUDGE**

