



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 10 OF 2019

LWN.....DEFENDANT/APPLICANT

VERSUS

EJN.....RESPONDENT

RULING

1. In the Application before me dated 17.4.19, the Applicant, LWN seeks the transfer of Tononoka Children’s Case No. 420 of 2018 (“the Suit”) filed against her by the Respondent, EJN to the Children’s Court at Limuru for hearing and final determination.

2. According to the pleadings filed in the Suit, the parties are the biological parents of a child known as VNN. The parties though not married, began to cohabit in 2013. They lived together at [particulars withheld] until June 2018 when they separated. The Applicant returned to her parents’ home in Limuru and took the minor with her. The Respondent filed the suit seeking *inter alia*, custody of the child and that the child be returned to the school she was attending at [particulars withheld].

3. The grounds upon which the present Application is premised are that at the time the Suit was filed, both the Applicant and the child resided in Limuru, Kiambu County. The child is 5 years old and it will be tiring and a great inconvenience to her to have to travel all the way to Mombasa for the hearing of the case. It would also interrupt her learning.

4. The Respondent opposed the Application by his grounds of opposition dated 25.6.19. The grounds are that the he resides in Mombasa and that the cause of action arose in Mombasa. The matter can be expeditiously heard and determined in Mombasa. The Application is therefore an abuse of the Court process.

5. I have given due consideration to the Application and the Applicant’s advocate’s oral submissions which reiterated the grounds in the Application. Neither the Respondent nor his advocate attended the hearing.

6. The law relating to transfer of suits is contained in Section 18 of the Civil Procedure Act. Section 18(1)(b)(ii) which gives the Court discretionary powers as follows:

“(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) ...

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

7. The foregoing provision clothes this Court with jurisdiction to transfer suits from one subordinate Court to another at any stage of the proceedings. The only rider is that in the exercise of its discretion in this regard, the Court must act judicially.

8. In the present matter, the Applicant’s case is that both she and the child reside in Limuru. Further, hardship will be visited upon the child

who lives in Limuru if the Suit continues in Mombasa. Her schooling will be interrupted by Court attendances in Mombasa. The travel to Mombasa will be tiring for a 5 year old.

9. Section 15 of the Civil Procedure Act Provides:

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

10. The Applicant states that she resides in Limuru. In his grounds of opposition, the Respondent did not deny this. Indeed in his plaint in the Suit, the Respondent acknowledges this fact as he averred that the Applicant “*removed the minor from the home in Mtwapa and took her to Limuru away from home and school*”. His opposition to the transfer of the Suit is that he resides in Mombasa and that the cause of action arose in Mombasa. The Court also notes that in the exhibited replying affidavit sworn by the Applicant on 13.12.18 and filed in the Suit, she gave her address as P. O. Box [xxxx], Limuru. In the absence of any evidence to the contrary, I am satisfied that the Applicant who is the defendant in the Suit, resides in Limuru together with the child.

11. While exercising its discretion set out in Section 18 of the Civil Procedure Act, the Court will be mindful of the balance of convenience, questions of expense, interests of justice and possibilities of undue hardship that may be occasioned to the parties. These principles were set out in the case of Kageny v. Musiramo & Another [1968] E. A. 43 as follows:

“It is a 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 a strong case to the satisfaction of the Court that the application ought to be granted. There are also authorities stating that the principle matters to be taken into consideration are balance of convenience, questions of expense, interests of justice and possibilities of undue hardship; and if the Court is left in doubt as to whether under all circumstances it is proper to order a transfer, the application must be refused.”

12. Mulla in the Code of Civil Procedure (2012) 18th ed. at p. 391 while expounding Sections 20(a) and (b) of the Indian Civil Procedure, the equivalent of Section 15 of our Civil Procedure Act observes:

“The principle underlying s 20(a) and s (20)(b) is that the suit is to be instituted at the place where the defendant can defend the suit without undue trouble.”

13. Further and most fundamentally, the Suit involves a child. The best interests of the said child are of paramount importance and supersede the rights and interests of the parties herein. The Court is bound by the paramountcy principle enshrined in the Constitution of Kenya, 2010 and the Children Act. Article 45(3) of the Constitution provides:

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

While the Children Act at Section 4(2) and (3) provides:

(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a 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...

14. Limuru is about 527 Kilometers away from Mombasa. To require a child of 5 years to travel this distance to and fro to attend Court would no doubt cause both the child and the Applicant extreme undue trouble, inconvenience and expense. It would also be costly and further interrupt the child’s learning. The child’s right to education and access to justice would thus be comprised.

15. Having taken into consideration the questions of expense, interests of justice and possibilities of undue hardship on both the Applicant and the child, I am satisfied that the Applicant has made a strong case for the transfer of the Suit. The balance of convenience tilts in favour of the Applicant. The Suit ought to have been instituted at the place where the Applicant can defend the same without undue trouble. It is also the view of this Court that the continuation of the Suit in Mombasa will go against the principle of safeguarding and promoting the welfare of the child. Considering the best interest of the child therefore, I determine that the best forum for the resolution of the Suit would be in the Children’s Court at Limuru and not Mombasa.

16. In the result, my finding is that the Application dated 17.4.19 has merit and the same is hereby allowed with the result that Tononoka Children’s Case No. 420 of 2018 be and is hereby withdrawn and transferred to the Children’s Court at Limuru for hearing and final disposal. This being a matter concerning a child, there shall be no orders as to costs.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 17TH DAY OF JANUARY 2020

.....

M. THANDE

JUDGE

In the presence of: -

..... for the Applicant

..... for the Respondent

..... Court Assistant