



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISC. CAUSE NO. 123 OF 2019

IWW.....APPLICANT

VERSUS

DOO.....RESPONDENT

RULING

1. The applicant IWW and the respondent had a relationship which led to the birth of a daughter EW on 14th April 2006. The two did not marry. The applicant stayed with the child in Mombasa whereas the respondent stayed with his wife and children in Nairobi. In November 2016 the parties agreed that the child stays with the respondent in Nairobi where she was to continue in school. The child stayed with the respondent and his family in Nairobi until 21st March 2019. She was taken back to Mombasa. The circumstances under which she left Nairobi to Mombasa are contested. The applicant stated that the child was suffering under the hands of the respondent's family. She escaped from the house. The applicant was contacted and came and picked her. The respondent denied the alleged mistreatment. He stated that he and his wife returned home to find that the child was missing. He later found out that she had been taken back to Mombasa.

2. On 2nd April 2019 the respondent filed a cause at the Children Court at Nairobi seeking an order that the applicant be compelled to produce the child to the court for her to be handed over to him so that she could continue with school at [Particulars withheld] School in Nairobi.

3. On 14th May 2019 the applicant filed a defence seeking the dismissal of the suit.

4. There are interlocutory proceedings going on before the Children Court.

5. On 17th July 2019 the applicant filed the present application seeking the transfer of the cause to the Children Court in Mombasa for hearing and disposal. The grounds were that both the applicant and the child were resident in Mombasa, and that there is a Children Court in Mombasa that can competently hear and determine the dispute. It was further pleaded that if it becomes necessary for the court to question the child regarding the dispute, the child will conveniently be available to the court.

6. The respondent opposed the application. His case was that the matter had already commenced before the Children Court at Nairobi where the court has already interviewed the child, and called for the counselling of the child and received a report on the same. It will not therefore be necessary, the respondent continued, for the court to further interview the child.

7. The court called for, and received, written submissions from counsel on the application for transfer. I have considered what each counsel had to say on the application.

8. This court has power under **sections 17 and 18** of the **Civil Procedure Act** to transfer the cause from one subordinate court to another (**Aberdare Investments –v- Bernard Wachira & 5 Others [2014]eKLR**). Secondly, under **section 15(a)** of the **Civil Procedure Act** a suit is supposed to be filed where the defendant at the time of the commencement of the suit, actually resides or carries on business or personally works for gain. There is no dispute that when the cause was commenced the applicant was residing, and continues to reside, in Mombasa. That is where the cause ought to have been commenced.

9. But more important, this dispute is about a child. It is about whether the child should stay with the mother (the applicant) or the father (the respondent). Under **section 4(2)** of the **Children Act, (2001)** and **Article 53(2)** of the Constitution, whenever the court is dealing with any

matter relating to a child, the best interests of the child shall be a primary consideration (**In Re H.J.U (Minor) [2017]eKLR**). In determining which, between Nairobi and Mombasa, is the appropriate and convenient forum for the resolution of the dispute regarding the child herein, the court has to consider the child's best interests. The court should consider where the child presently lives and where she goes to school. The forum should, given the facts of the case, be the Children Court at Mombasa.

10. In conclusion, I allow the application by the applicant. I order the transfer of the **Children Court Cause No. 437 of 2019** at Nairobi between the applicant and the respondent to the Children Court at Mombasa for hearing and resolution.

11. Costs shall be in the cause.

DATED and DELIVERED at NAIROBI this 6TH day of FEBRUARY, 2020

A.O. MUCHELULE

JUDGE