



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS APPLICATION NO. 43 OF 2019

EO.....APPELLANT

-VERSUS-

RNA alias RNO....1ST RESPONDENT

RULING

[1] This Miscellaneous Civil Application was filed on **13 February 2019** by **EO** pursuant to **Article 53** of the **Constitution, Section 18** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders that:

[a] Spent

[b] There be stay of execution of the Order of **Hon. Mbogo**, Resident Magistrate, given in **Nairobi Children's Case No. 20 of 2019: In the Matter of EOO, TOO and WMO (Minors) ex parte RNA** given on **16 February 2019**, pending the hearing and determination of the application and further orders of the Court;

[c] The Court be pleased to transfer **Nairobi Miscellaneous Children's Case No. 20 of 2019** to Eldoret Chief Magistrate's Children's Court for hearing and final determination;

[d] Spent;

[e] The Respondent be barred from taking **EOO, TOO** and **W M O (a minor)** out of the jurisdiction of this Court pending the hearing and determination of the application, and pending the transfer and hearing of **Nairobi Miscellaneous Children's Case No. 20 of 2019**, or further orders thereto;

[f] The orders herein be enforced by the Officer Commanding Station Eldoret South Police Division and the Officer Commanding Station, Langas Police Station; and be served on the Embassy of Switzerland and the Embassy of the United States of America; and

[g] Costs of the application be borne by the Respondent.

[2] It was the Applicant's contention that he is the biological father of the children who are the subject of this application; and that he therefore has absolute and unfettered parental responsibility over the children. He averred that the children, whose mother died and was buried in Uasin Gishu County, attend schools and colleges in Eldoret within the jurisdiction of this Court; and that he is also resident of Uasin Gishu County; and therefore that the Children's Court, Nairobi, has no jurisdiction over this matter. The Applicant further averred that the Respondent resides in **Geneva, Switzerland** and **London**; and that it would be in the interest of the children that the orders of the Children's Court, Nairobi be vacated to forestall the children being taken out of jurisdiction.

[3] In response to the application, the Respondent filed a Notice of Preliminary Objection dated **25 February 2019** on the following grounds:

[a] That under **Section 12(3)** of the **High Court (Organization and Administration) Act, No. 27 of 2015**, this Court has no corresponding supervisory jurisdiction over the Children's Court in Milimani, Nairobi, and accordingly, has no jurisdiction to hear and determine the Applicant's application dated **13 February 2019**;

[b] That in any event, this Court has no jurisdiction to stay the orders issued in **Nairobi Children's Case No. 20 of 2019** since there is no appeal before the High Court against the said orders; and that the powers of this Court are limited to determining

whether or not an order of transfer of the case under **Section 18** of the **Civil Procedure Act, Chapter 21** of the Laws of Kenya, would issue.

[4] Granted the nature of the Preliminary Objection, directions were given on **13 March 2019** that it be disposed of first; for, as was explicated by the Court of Appeal in **the Owners of Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd [1989] KLR 1**, the question of jurisdiction is a critical one, and must be resolved *in limine*. The Court held that:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[5] The Preliminary Objection was therefore argued on behalf of the Respondent by **Mr. Kimuli**, whose contention pursuant to **Section 12(3) of the High Court (Organization and Administration) Act**, was that the High Court with corresponding jurisdiction over the Nairobi Children's court is the High Court of Kenya, Nairobi; and that it would not only be illogical, but also unwarranted that the Nairobi Children's Case to be transferred to this Court for purposes of the hearing of the instant application; taking into account the logistical considerations entailed thereby.

[6] On his part, **Mr. Magare** for the Applicant argued that since this Court is vested with countrywide jurisdiction in line with **Article 165(3)(a)** of the **Constitution**, there can be no question as to the jurisdiction of this Court to hear and determine the application and grant the orders sought thereby. He pointed out that it was the Respondent that approached the wrong court in the first place, by filing the dispute before the **Children's Court, Nairobi**; and that it would be preposterous for a matter to be filed in Nairobi, far away from the proper court and then expect the parties to follow the matter there, in spite of the clear provisions of the law and the attendant costs. He accordingly urged the Court to dismiss the Preliminary Objection.

[7] There can be no doubt that by dint of **Article 165(3)(a)** of the **Constitution**, the High Court has unlimited original jurisdiction in criminal and civil matters, subject of course to **Article 165(5)** of the **Constitution**. However, it is also a truism that that nation-wide jurisdiction provided for in the Constitution can be limited by statute. In the work, **The Major Law Lexicon, Volume 4**, jurisdiction is defined thus:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics..."

[8] Similarly, in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** the Supreme Court reiterated that:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

[9] It is for this reason that, for administrative purposes, and to ensure a structured approach in the expeditious, proportionate and affordable resolution of disputes, each High Court station has a clearly defined supervisory jurisdiction for purposes of appeals, bail applications and references. Hence **Section 12(3)** of the **High Court (Organization and Administration) Act** provides that:

"The filing of appeals, bail applications, and references from subordinate courts, tribunals and other bodies or authorities within the regions designated by the Chief Justice under the Rules, shall be made at the High Court station with the corresponding supervisory jurisdiction."

[10] And, according to the Schedule appended to the **High Court (Organization and Administration) (General) Rules, 2016**, the Children's Court, Nairobi, falls under the supervisory jurisdiction of the High Court, Nairobi. I note that the provision is specific to appeals, bail applications and references; whereas the application dated **13 February 2019** is essentially for transfer. However, applying the *ejusdem generis* rule of statutory construction would mean that it is only logical that an application for transfer such as this, be similarly dealt with by the High Court station with corresponding supervisory jurisdiction of the lower court. In this respect, **Stroud's Judicial Dictionary 3rd Edition**, states that:

"Where a statute, or other document, enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things – the word 'other' will generally be read as 'other such like', so that the persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to, or different from, those specifically enumerated."

[11] Thus, I would agree that, although this Court has the jurisdiction to grant the orders sought in the application dated **13 February 2019**, for good order, the application ought to have been filed in the Nairobi Registry. Accordingly, and in the interest of justice, rather than strike out the application, I would order that this matter be transferred to the Family Division of the High Court, Nairobi, for hearing and determination.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4TH DAY OF APRIL 2019

OLGA SEWE

JUDGE