



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS APPLICATION NUMBER 21 OF 2019

LC (Suing as the Guardian Ad Litemand mother of WK and AK.....RESPONDENT

VERSUS

EKT.....APPLICANT

RULING

1. The application before me is the notice of motion dated 25th October, 2019. It is brought under **Sections 3, 3A, 15 & 18 of the Civil Procedure Act, Order 51(1) of the Civil Procedure Rules.**

It seeks orders:-

- a) THAT this Honourable Court be pleased to transfer KAPSABET PRINCIPAL MAGISTRATE'S COURT CASE NUMBER 31 OF 2019 of Nakuru Chief Magistrate's Children Court for hearing and determination of the suit.**
- b) THAT the cost be provided for.**

2. It is premised on the following grounds:

1. **THAT** the Applicant and the minor children reside at [Particulars Withheld] Estate, Nakuru within Nakuru Municipality.
2. **THAT** the minor children school at [Particulars Withheld] Academy in Milimani Estate within Nakuru Municipality.
3. **THAT** it will be paramount and the best interest, welfare and primary consideration of the children if the case now pending in Kapsabet Principal Magistrate's Court be transferred to Nakuru Chief Magistrate's Court for hearing and determination of the suit.
4. **THAT** the Respondent will not suffer any form of prejudice if the orders sought are granted.
5. **THAT** the case be assigned a new case number once transferred to Nakuru Chief Magistrate Children's Court for hearing and determination.
6. **THAT** it is in the interest of justice that the court treat the best interest of the subject children as the first paramount consideration and court be pleased to grant the orders sought to expedite the hearing and determination of the suit.

It is also supported by the affidavit of EKT.

3. The application is opposed by the replying affidavit of LC sworn on 6th November, 2019.

4. When the matter came for hearing interpartes before me, in the best interests of the child I sought the social inquiry reports as provided for under **Section 78 of the Children Act** from the relevant Sub-County Children offices.

5. The gist of the matter is that both the applicant and respondent are husband and wife. They were blessed with two (2) children; WK aged 1 year 3 months and AK 4 years old.

6. Sometime in May this year, the two had disagreements as a result of which the applicant went to the parent's home in Kapsabet with the two (2) children.
7. In September, 2019, she filed a suit **Kapsabet Principal Magistrate's Court Children's Case Number 3 of 2019** seeking maintenance for the two (2) children at the sum of Kshs. 50,000/= per month together with school fees and costs.
8. In response, the applicant filed this Miscellaneous Application under Certificate of Urgency.
9. In his supporting affidavit he depones that the WK was a pupil at [Particulars Withheld] Academy before his mother took him away and school fees had already been paid. That the filing of the suit in Kapsabet Law Courts was mischievous, and an outright attempt to frustrate him. That since the matrimonial home is in Nakuru, it was only fair that the matter be filed in Nakuru.
10. The respondent in opposition deponed that it was the applicant who had forcefully chased her out of the matrimonial home and she had no fixed abode. That she had secured admission for WK at [Particulars Withheld] Highlands School from January, 2020. That she had secured a rental house for Kshs. 12,000/= at Kapsabet. That it was in the best interests of the minors that the case be heard in Kapsabet.
11. I have carefully considered the application before me. I have considered the affidavits, and each of the reports filed from Nandi and from Nakuru.
12. The only issue for determination is whether the suit at Kapsabet Law Courts ought to be transferred to Nakuru Law Courts.
13. **Section 18** of the **Civil Procedure Act** gives this court the power to withdraw and transfer a case instituted in the subordinate court. **Section 15** of the **Civil Procedure Act** provides that suits are to be instituted either where the defendant resides or where the cause of action arose. It is only in causes of action for compensation for wrong done to the person or movables that the plaintiff can choose where to file the suit. See **Section 14 Civil Procedure Act**. The provision of **Section 15** are couched in mandatory terms:

“S. 15. Other suits to be instituted where defendant resides or cause of action arises 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.”

14. What type is a suit for the maintenance of children?
15. The respondent filed a plaint at Kapsabet Law Courts as provided for by **Order 4 of the Civil Procedure Rules**, hence it falls squarely under the provisions of **Sections 15** of the **Civil Procedure Act**; meaning that the suit ought to have been filed either where the defendant ordinarily resides or where the cause of action arose.
16. In this case the defendant ordinarily resides in Nakuru and the cause of action arose in Nakuru as well, hence the proper place to file suit would have been in Nakuru Law Courts.
17. The plaintiff is not seeking for compensation for any wrong committed against her, or the children but for an order for maintenance. Hence **Section 14** of the **Civil Procedure Act** is not applicable.
18. Be that as it may this being a children matter, the court is guided by a third guiding principle which takes precedence over the provisions of **Section 14** and **15** of the **Civil Procedure Act**. The best interests of the child. This is provided for under **Article 4** of the ACRWC, **Section 4** of the **Children Act** and **Article 3** of the UNCRC.
19. Would it be in the best interest of the child to transfer the matter to Nakuru Law Courts?
- i) The issues being raised by the parties, their quarrels over the applicants phone contents, and the respondent allegations of having been thrown out by the applicant are contentious facts that would require support by evidence but which are at the core of the current family situation.
 - ii) There is no evidence even in the affidavits that before the month of May 2019, the applicant had neglected to provide for his children. In fact in her replying affidavit the respondent simply states that the applicant has neglected the family since they left his home in May 2019.
 - iii) At **paragraph 8** she states that; *“I know of my own knowledge that upon being whisked away the applicant has never bothered*

about our whereabouts with the minors". This averment contradicts the statement in the Children Officer's report that upon being chased away, the respondent went to the home of the applicant's parents where the applicant followed and drove them out of the home.

iv) These are serious allegations that ought to have been supported by the evidence of her own parent and the parents of the applicant. There is nowhere in her averments respondent has demonstrated that her life or the lives of the minors are indeed in danger, the emphasis is on the fact that the older minor has secured a school in Kapsabet.

v) The two (2) reports by the Department of Children Services do not demonstrate a dangerous situation but a simmering situation that could escalate to the detriment of the children unless it is arrested at this early stage by the parties herein dealing with it through mediation. This is because as a children's court I am alive to the fact that though there may be no apparent danger to the children or the mother to the children, anything could be the matter and an order for transfer would mean that the respondent would be forced back to the matrimonial house without the underlying issues being resolved.

Hence, though it may be in the best interests of the children to return to their comfortable home and school, the underlying issues between their parents make it clear that it may not be in their best interests for their parents to be under the same roof before their disagreement is resolved.

vi) Hence my view is that though it would be lawfully sound to have the matter transferred to the Nakuru Law Courts as provided for under **Section 15** of the **Civil Procedure Act** considering the allegations and counter allegations of disagreement between the two (2) parties this court would be "forcing" the respondent to return to her matrimonial home through the back door. This court would have no control over the repercussions.

20. **Article 159** makes it mandatory for the court in appropriate cases to pursue alternative forms of dispute resolution. **Article 53** as read together with **Section 23** of the **Children Act** provides for the child's right to protection against abuse, neglect and all forms of violence among others but also to parental care and protection which includes equal responsibility from the mother and father to provide for the child.

21. In view of the foregoing both the applicant and respondent have an equal responsibility to provide parental care and protection to their children. They have created a scenario where this has been disrupted, they have a duty to put it back together or create a common safe space for the children to enjoy their rights to hire with and be cared for by both parents. **Section 6(1)** of the **Children Act**.

22. I do not think it is in order for a parent who had a disagreement with the other parent to simply "whisk" the children away from their home to another jurisdiction and proceed to set up a new life in that jurisdiction at the expense of the other parent without due process. Removing the child from his school and setting him up in a new school renting new premises, and seeking maintenance when there has been no neglect is not the solution. The parties must first attempt to resolve their differences while simultaneously ensuring that the rights and welfare of their children are safeguarded.

These differences occurred in May, by September there was a suit. The boy has been out of school for two (2) terms. The parents herein must converse in the interests of their children.

23. Clearly as matters stand now, it is not in the best interests of the children to transfer the matter before the Kapsabet Children's Court to Nakuru Children's Court. That order will be held in abeyance.

Similarly the proceedings in Kapsabet Children's Court Case Number 31 of 2019 will be stayed pending the orders of this court.

24. In the meantime;

- i) **The parties will undertake mediation with their counsel, a children officer and their parents or their counsel with their parents only with regard to the issues denying the two (2) children the care and protection of both parents.**
- ii) **The applicant will provide reasonable maintenance for the children as this issue is dealt with.**
- iii) **The applicant to initiate the talks within seven (7) days hereof.**
- iv) **A report be made to this court on 19th December, 2019 of the progress made.**
- v) **Mention on 19th December, 2019 for directions.**

Dated, delivered and signed at Nakuru this 9th day of December, 2019.

Mumbua T. Matheka

Judge

In the presence of

Mr. Terer for applicant

N/A for respondent/counsel

Court Assistant Martin