



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISCELLANEOUS CIVIL APPLICATION NUMBER 14 OF 2018**

**J J K.....APPLICANT**

**VERSUS**

**E M K.....RESPONDENT**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 10/9/2018 in which J J K (applicant) seeks orders;

**a) Spent**

**b) Spent**

**c) THAT this Honourable Court do transfer BUTALI CHILDREN CASE NO. 16 OF 2018, E M K (Suing as guardian at Litem of B M M... 5 YEARS and T J M... 3 YEARS –VS – J C K, from the Senior Principal Magistrate’s Court at Butali to the Chief Magistrate’s court at Nakuru for disposal and final determination.**

**d) THAT the costs of this application be in the main cause.**

2. The application is supported by an affidavit and based on seventeen (17) grounds as seen on the face of the application.

3. The gist of the applicant’s case as gleaned from the affidavit and grounds adduced is that the respondent has filed a children’s case being **Butali Children Case Number 16 of 2018**. The filing of the case at Butali is challenged on grounds that the applicant is a resident of Eminning, Mogotio Constituency and therefore the Court with jurisdiction to hear the matter is Nakuru Law Courts.

4. It is urged that the minors, the subjects of the suit, are of tender years whose custody ought to be with their mother as by law.

5. The applicant is bound to suffer undue hardship and expenses if the matter is heard at Butali.

6. The application is opposed. The respondent in a replying affidavit avers that his ancestral home is at Malava within the jurisdiction of Butali Senior Resident Magistrate’s Court and hence the Court is competent to hear the matter.

7. He adds that his business at Mogotio collapsed and he was forced to relocate to Malava. He has since enrolled the children at [particulars withheld] Junior Academy and he has paid 3<sup>rd</sup> term fees in full.

8. It is urged that Butali Court is the nearest court from where the children are staying. It is only the applicant who is living at Mogotio.

**SUBMISSIONS**

9. In brief oral submissions, Mrs. Mukira for the applicant stated that one of the minors P M who was formerly at [Particulars withheld] Academy, Mogotio is not at school since he was taken away by the respondent when the father was given access in August never to be returned. The minor was to resume school on 27/8/2017. Efforts to reach the respondent were in vain.

10. The respondent moved Butali Court for custody. It is the applicant’s prayer that the proceedings at Butali be transferred to Nakuru Law Courts.

11. Counsel adds that there is acknowledgment by the respondent that the matrimonial home is at Mogotio. The claim that the respondent relocated with the children to Malava should be an issue for determination by the trial court.
12. Counsel submits that the issue at hand is one of jurisdiction. It is not denied that the minors resided at Mogotio.
13. Counsel relied on the decisions in **N.G.M. vs. AG [2015] eKLR** and **J.M. vs A. N. J. N [2017] eKLR**.

#### **ANALYSIS AND DETERMINATION**

14. I have had occasion to consider the application, the affidavit in support and the submissions on record. I have in the same breadth considered the replying affidavit which was solely relied on.
15. The fact of the matter is that the estranged couple resided at Mogotio at all material times and that is where they had established their matrimonial home.
16. They were living with the children at Mogotio and there is evidence that minor P M was enrolled at [Particulars withheld Hill Side Academy in class PP2.
17. At this juncture, this court is not the appropriate forum to adjudicate on the circumstance of the removal of the children from Mogotio to Malava and the appropriateness of that act or lack of it. That is a matter better left to the trial court seized of the Children Case Number 16 of 2018.
18. Before me is the single question of jurisdiction and specifically a determination of where the children case should be heard. Should it be heard at Malava or Nakuru? Has the applicant satisfied the conditions to warrant transfer of the suit from Butali Senior Resident Magistrate's Court to Nakuru Chief Magistrate's Court?
19. **Section 15** of the **Civil Procedure Act** provides;

**“Sec. 15: 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 carried 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 carried 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.”**

20. The applicant (the defendant) resides at Mogotio. This was a fact within the knowledge of the Respondent. The minors in issue resided in Mogotio before they were moved to Malava by the respondent. The cause of action arose at Mogotio. If any inquiry by the Court was to be needed e.g. about their schooling, the living environment or ability of the parents to support them, the answers would be found where the children resided. This would include, if found necessary by the trial court, visitation to the school(s) or residence.

21. The appropriate court to try the matter therefore should be a court with close proximity to Mogotio.

22. The decision in **N.G.M vs. AG [2015] eKLR** in a useful guide in these circumstances. *Justice J. A. Makau* held;

**“I have considered the Applicant's application and I am satisfied the suit pending at Tononoka Court Mombasa, Children's Case No. 70 of 2015 ought to have been filed at Meru Chief Magistrate's Court as the Defendant at the time of filing the suit was residing at Meru; that no leave of the Court was sought to file the suit at Children's Court at Tononoka, Mombasa; nor did the Defendant acquiesce to the institution of the suit at Mombasa; I am satisfied that if the matter continues at Children's court at Tononoka Court, Mombasa, the Applicant and her two minor children; one of whom is breast feeding and the other is a nursery school going pupil will be prejudiced and will suffer injustice as the Applicant is no longer residing at Mombasa. The transfer of this matter would in my view facilitate just, expeditious, proportionate and affordable resolution of the dispute between the two parties. The suit will be timely disposed of at a cost affordable by the respective parties as by maintaining the case at Mombasa, it would mean the Applicant will have to travel with the two minor children and may be with a friend to help her in taking care of the two minors; whereas if the Respondent would travel to Meru he won't be faced with such challenges.”**

23. The choice of Nakuru as the suitable place of trial initially raised the courts anxiety since the applicant is clear that the parties resided at Mogotio.

24. Such anxiety, however, has been dispelled by the fact that the respondent indicates that he now resides at Malava. Taking judicial notice of the general geographical setting of the country, I am persuaded that Nakuru would be a more convenient place for hearing suitable to the respondent (who would presumably be travelling from Malava) and the applicant (who would presumably be travelling from Mogotio).

25. I am satisfied that the applicant meets the threshold for the transfer of the case from Butali to Nakuru. I make the following orders;

**1. The children's case number 16 of 2018 pending at the Senior Resident Magistrate's Court, Butali is withdrawn from the said court and transferred to Nakuru Chief Magistrate's Court for hearing and disposal.**

**2. The costs of this application to abide the outcome of the main suit.**

**Dated and Signed at Nakuru this 9th day of October, 2018.**

**A. K. NDUNG'U**

**JUDGE**