



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC. CIVIL MISC. NO. 90 OF 2018

E M K.....APPLICANT

-VERSUS-

M M M.....RESPONDENT

RULING

INTRODUCTION

1. The matter is based on allegation that Applicant and Respondent cohabited as husband and wife between 2010 and 2016 and the relationship was blessed with 2 issues (6 and 4 years) born in Makindu. Both then worked at [Particulars Withheld] County .
2. The two minors attend [Particulars Withheld]Academy at Makindu and are staying with their mother who still works at the [Particulars Withheld]County.
3. The Applicant then abandoned the minors and their mother (Respondent) and is now working and residing in Nyeri County.
4. The Respondent says Applicant has neglected the 2 minors thus prompting the filing of the suit in Makindu Law Courts.
5. The Applicant has been aggrieved by the lodging of the suit in Makindu Law Courts thus the instant Application.
6. In the Notice of Motion dated 23/02/2018 seeks thus to have the suit transferred to either Milimani Law Courts Nairobi or Nyeri Law Courts.
7. In the pleadings he has also mentioned that the suit can also go to Machakos Law Courts as both parties hail from same place and it may be fair to both sides.
8. The Application is supported by the grounds on the face of the motion and the Supporting Affidavit sworn by Applicant on 23/07/2018 and a further Affidavit sworn on 31/08/2018 reiterating the content of the grounds.
9. The Application is opposed and the Respondent has filed a Replying Affidavit sworn on 14/08/2018.
10. The parties agreed to canvass Application via Written Submissions which they have filed and exchanged.

APPLICANT SUBMISSIONS

11. It is submitted that, Section 18 of the Civil Procedure Act gives inherent power to this Honourable Court to give orders such as those sought herein.

Section 18(1)

“On the application of any of the parties and after notice to other parties and after hearing such of them as desires to be heard, or of its own Motion, the High Court may at any stage:-

a)

b) Withdraw any suit or other proceeding pending in court subordinate to it, and thereafter:-

i. Try or dispose of the same, or

ii. Transfer the same for trial to any court subordinate to it and competent to try or dispose of the same; or

iii. Retransfer the same for trial to the court from which it was withdrawn.”

12. It is contended that, the import of the foregoing statutory provision is that this Honourable Court may order transfer of any suit pending before any court subordinate to it to any other such court for trial and disposal. The law does not state any grounds on the basis which a suit can be withdrawn from one court and transferred to another, but simply mandates this court to hear any party who presents an application for such orders.

13. Thus it is argued that, a suit can be ordered transferred for various reasons, and such reasons may differ from the circumstances of one case to another.

14. The circumstances of the present case (and of the case sought be transferred) are that the Respondent is a single mother of two (2) young children, whose paternity the Applicant has vehemently denied.

15. The Applicant and the Respondent have never been married to each other. The Applicant has deponed that he has never lived with the Respondent and her children as a family, and that he has never accepted or acquired parental responsibility over the Respondent's said two (2) children. That the Respondent works and lives with her children at Makindu while the Applicant works and lives in Nyeri County. The Respondent chose to file the suit in issue at Makindu where she works and resides.

16. Section 15 of the Civil Procedure Act provides:-

Section 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 carries on business or personally works for gain; or.....”

17. In the present case, the Applicant was not residing or working at Makindu or Makueni County when the lower court suit in issue was filed in or about February 2018; neither was he carrying on business there. The Defendant has long been working and residing in Nyeri County. He (the Applicant) has no family or home in Makindu or Makueni County.

18. The Applicant, who is a civil servant, has deponed that he has take two (2) days off duty every time he travels to attend court at Makindu, hence endangering his job. He has also demonstrated that this puts him to great financial hardship.

19. The Applicant has further stated on oath that the trial court has been openly biased against him and his case, and that he does not expect fairness in the matter.

20. It is trite that justice must not only be done, but must be seen to have been done.

RESPONDENT SUBMISSIONS

21. Article 53(2) of the constitution declares that a child's best interests are of paramount importance in every matter concerning the child. In this regard;

“every child has the right to parental care and protection which includes equal responsibility of the mother and father to provide for the child whether they are married or not.....”

22. Section 5 of the Children Act makes provision for “non-discrimination” and has no reference to domicile and provides:-

“5. No child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, color social, political, economic, or other status, race, disability, tribe, residence or local connection.”

23. Further, Section 76(1) of the Children's Act states:-

“76(1) Subject to Section 4 where a court is considering whether to make one or more orders under this Act with reference to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all.”

24. It is in the best interest of the minors that the children's matter at Makindu Law Courts be allowed to proceed. The matter has advanced and it is at the pre-trial stage.

25. Matters affecting children's are to be heard expeditiously and by filing this miscellaneous application, it is clearly a sign that the

Applicant is out to unnecessary delay the determination of the children's matters this application is vexatious, malicious and an afterthought.

26. The minors and their mother, the Respondent reside within Makindu town and it will serve no justice to transfer the matter to Nyeri or Nairobi while there is a children's court at Makindu, within the jurisdiction of where the cause of action arose.

ISSUES, ANALYSIS AND DETERMINATION

27. After going through the pleadings, affidavits and parties submissions, I find the issues are;

1) Whether the application has merit and

2) What is the order as to costs?

28. The instant application is based on the premise that, Applicant works and lives in Nyeri County. Thus his interest should be taken care of. Also applicant relies on section 15 (a) CPA which stipulates that every suit to be instituted in the place

“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.....”

29. Of course this being children's matter under children's Act, the overarching consideration is the provisions of **Article 53(2) of the constitution** which declares that a child's best interests are of paramount importance in every matter concerning the child.

30. Further **Section 76(1) of the Children's Act** states:-

“Subject to Section 4 where a court is considering whether to make one or more orders under this Act with reference to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all.”

31. The court observes that, the matter has advanced and it is at the pre-trial stage.

32. Matters affecting children's are to be heard expeditiously and by filing the instant application, occasions delay of the determination of the children's matters.

33. It is not disputed that the minors and their mother, the Respondent reside within Makindu town and it will not advance the best interest of the minors to transfer the matter to Nyeri or Nairobi while there is a children's court at Makindu, within the jurisdiction of where the cause of action arose.

34. It is in the best interest of the minors that the children's matter at Makindu Law Courts proceeds expeditiously in the same law courts. On the issue of bias by the trial court, the applicant has not furnished any materials to support the allegation. In any case, there is no application for the recusal of the same court.

35. Thus the court makes the following orders;

1) The application is dismissed.

2) Parties bear their own costs.

SIGNED, DATED AND DELIVERED THIS 13TH DAY OF NOVEMBER 2018 IN OPEN COURT.

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C. KARIUKI

JUDGE