



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL MISC. APPLICATION NO. 2 OF 2018

RM.....APPLICANT/DEFENDANT

VERSUS

AB.....RESPONDENT/PLAINTIFF

RULING

1. Before me is an application by way of Notice of Motion dated 8th October, 2018 filed under section 18 (1) (b) and 3A of the Civil Procedure Act (Cap. 21) and section 4 of the Children Act.
2. The application was filed under certificate of urgency and the main prayer is that Nairobi Children's Case No. 585 of 2018 be withdrawn from the said court and transferred to Garissa Children's Court at Garissa for trial and determination.
3. The application was filed with an affidavit sworn by the applicant RM, in which it was deponed that the applicant and the respondent were divorced in 2018 and that the respondent worked with [Particulars Withheld] Authority, while the applicant worked for gain in Garissa with the [Particulars Withheld] County Government.
4. No response was filed to the application. On the hearing date which was 23rd October 2018, neither the respondent nor his advocate Chege Kibathi & Co. Advocates attended court.
5. Mr. Farouk Kyalo learned counsel for the applicant submitted that both the applicant and the respondent lived in Garissa during their marriage and that currently the children of the marriage lived and were schooling in Garissa. It was his contention that since the mother of the children, who was the applicant, was also residing in Garissa, the best interests of the children would be served only if the proceedings were prosecuted in Garissa. Counsel referred to a number of documents filed which showed that the three children were schooling in Garissa, and stated that continuing the proceedings in Nairobi would be very inconvenient to the applicant as she would be forced to incur huge expenses going to Nairobi.
6. I have considered the application and the submissions of counsel for the applicant. I appreciate that this is a matter that involves children. From documents filed, the respondent went to the Children's Court in Nairobi in May 2018 through a Fast Tract Complaint, and also at the same time filed an application by way of Chamber Summons for joint custody of the children as well as visitation rights during school holidays pending the hearing and determination of the suit.
7. Having considered the issues raised herein, I am reluctant to order for a transfer of the Children's Case filed from the Children's Court Nairobi to Garissa. The first reason is that the Nairobi case and application were filed in May 2018 and this application filed 5 months later. There is nothing on record to show that the applicant who is the defendant in the Nairobi case filed any response to the plaint or the application. The applicant also does not state the current status of the case in Nairobi and whether interlocutory orders were granted in the application in Nairobi. In my view, the applicant has been too economical with facts and therefore cannot expect this court to exercise its discretion in her favour, as I do not at the moment know the consequences of ordering transfer of the Children's Case to Garissa since I don't know the current status of that case or the application filed by the plaintiff therein.
8. The second reason why I will not allow the application has to do with the service of the present application. On the 15th October, 2018. This court gave orders in Chambers on this application as follows-

(1) The application is certified as urgent.

(2) It will be served on the respondent forthwith.

(3) It will be heard interpartes on Tuesday 23rd October, 2018.

9. When the application came up for hearing on 23rd October 2018, on the same day an affidavit of service was filed. In the said affidavit of service under paragraph 2 and 3, the process server Eric O. Osingo stated that on 15th October 2018, he was handed the application for service on Chege Kibathi & Co. Advocates and that on the same day in the morning, he proceeded to Nairobi Hughes Building 3rd Floor and served the advocates who acknowledged receipt by stamping. The stamp on the documents however shows that service was done on 22nd October 2018 at 3 pm, which means the process server was not factual in his affidavit.

10. The service of the process was not thus proper as it was not done at least 3 clear days before the hearing date of the application, in this matter where there was adequate time to do so. The process server also was not truthful in what he said in the affidavit. The effect of these mistakes is to disentitle this court its discretion to exercise its powers in favour of the applicant, as there were many days between 15th and 23rd October, 2018 within which to effect proper service.

11. I thus dismiss the application dated 8th October, 2018. I make no orders as to costs.

Dated and delivered at Garissa this 6th day of November, 2018.

George Dulu

JUDGE