REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL MISC. APPLICATION NO. 19 OF 2016

S M N…..…….....APPLICANT

VERSUS

P M G…….....….....RESPONDENT

R U L I N G

1. By way of Notice of Motion dated the **27th** day of **June, 2016** the Applicant seeks an order of this Court transferring **Kitui Children's Court Case No. 13 of 2016** to **Nairobi Children's Court** for trial and determination.

2. The application is premised on grounds that: The Applicant, Respondent and infant reside in Nairobi. The Respondent has instituted the suit jointly with his mother and grandmother to the infant whereby they want to remove the infant, an eleven months old child from custody of the Applicant.

3. The application is supported by an affidavit sworn by the Applicant who depones that the infant is eleven (11) months old and still suckling. She resides and works for gain in Nairobi and the father of the infant also resides and works in Nairobi. His Co-plaintiff in the matter is his mother who resides in Kitui and her *locus standi* in Children's Case is questionable. Filing the suit in Kitui instead of Nairobi is to torture the Applicant. It will be in the interest of justice to have the matter transferred to **Nairobi Children's Court.**

4. The Respondent filed grounds of opposition where he stated that the parties come from Kitui and have a permanent home at **[particulars withheld] Village 2½km** from the Court; The **Kitui Children's Court** has the requisite jurisdiction to hear and determine the Children's Case; The cause of action arose at **[particulars withheld] Village** and later at Kitui Police Station within the jurisdiction of the **Kitui Children's Court;** One of the Plaintiffs in the Kitui Children Case has been left out therefore may be condemned unheard; Nairobi is only a temporary residence for the parties in the cause.

5. In addition the Respondent filed a replying affidavit where he deponed *inter alia* that issues that necessitated the filing of the Children's Case in Kitui arose at **[particulars withheld] Village** which is **2½km** from the Court house and at Kitui Police Station as clearly enumerated in Paragraphs 10, 11, 12 and 13 of the Plaint. The Applicant has abandoned the child twice at **Machakos** and **Kaveta** necessitating filing of the custody case, witnesses in the matter hail from Kitui. The case has commenced in **Kitui Children's Court** which will expeditiously and conveniently deal with it.

6. In a reply thereto the Applicant averred that **Section 12** of the **Civil Procedure Act** demands that a case involving an infant should be instituted in a Court within the local limits of whose jurisdiction the Defendant actually and voluntarily resides or carries on business or personally works for gain.

7. The application was canvassed by way of written submissions that I have taken into consideration.

8. The application is brought pursuant to **Section 18(1)(i)(ii)** of the **Civil Procedure Act** which provides thus:

> ***"(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—***
>
> ***(i) try or dispose of the same; or***
>
> ***(ii) retransfer the same for trial or disposal to the court from which it was withdrawn."***

This is a matter where there are two (2) Plaintiffs in the Children's Case. The Applicant chose to bring the application against only one of them and disregarded the other. Even after the issue was pointed out in the Respondent's reply, the Applicant argued in the rejoinder that the other Applicant, the grandmother of the child has no *locus standi* as the Co-plaintiff of the Respondent herein. It was stated that it was immaterial whether or not the case is transferred to Nairobi without her response. Further, it was argued that the High Court could use its inherent power to transfer the case to ensure that there is no abuse of due process of the court.

9. Such a matter came up in the case of **Joseph Mururi vs. Godfrey Gikundi Anjuri (2012) eKLR** where **Makau, J.** had this to state:

> ***"It is therefore clear from the above mentioned section (Section 18(1) of the Civil Procedure Act) that the High Court has on an application by any of the parties after due notice to the parties and after hearing such of them as desires to be heard on its own motion without such notice may at any stage order withdrawal of any suit pending in any court subordinate to it and thereafter try to dispose of the suit or transfer the same for trial or disposal to any court subordinate to it and competent to try and dispose of the same."***

10. This is not a matter that this Court has moved *suo moto.* The Court has been asked to invoke its inherent jurisdiction to transfer the case by one of the parties in the matter. It was therefore important for the other party to be notified. Further it was important for all parties to be heard.

11. An argument raised by the Applicant that the grandmother of the infant lacks *locus standi* is yet to be determined. It is clear that a suit has never been defeated by virtue of misjoinder of a party **(See Order/Rule 9 of the Criminal Procedure Rules).** Therefore having come on record as a party in the matter she should have been given notice of the existence of the application.

12. The importance of a person being given a hearing was stated in the case of **Onyango vs. Attorney General (1986 – 1989) E.A. 456** where **Nyarangi J.A.** asserted thus at page 459:

> ***"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly." At page 460 the learned Judge went ahead to state "A decision in breach of rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."***

13. In another case of **Mbaki and Others vs. Macharia and Another (2005) 2 EA 206, 210,** the Court of Appeal stated as follows:

> ***"The right to be heard is a valued right. It would offend all motions of justice if the rights of a party were to be prejudiced or affected without the party being afforded to be heard."***

14. From the aforegoing, granting orders sought without hearing the 2nd Plaintiff in the Children's Case

will be denying her a right to be heard which would offend the notion of justice.

15. Without delving into the merit of the application this calls upon this court to strike out the application which I hereby do with no orders as to costs.

16. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **23rd** day of **February, 2017.**

L. N. MUTENDE

JUDGE