



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. CIV. APPLICATION NO. 512 OF 2016

JA.....APPLICANT

VERSUS

NCW.....RESPONDENT

RULING

1. The applicant, JA, has filed a Notice of Motion dated 25th November, 2016 seeking for orders that:-
 - (1) The court be pleased to transfer Tononoka Children Case No 315 of 2016 to the Chief Magistrate's Court Butere, Kakamega county.
 - (2) Upon prayer 1 being granted, the said suit be tried, conducted and determined by the Chief Magistrate Court at Butere.
 - (3) Costs of this application be in the cause.
2. The grounds in support of the application are that:-
 - (1) There would be occasioned miscarriage of justice if the matter is tried in the original court since it is instituted very far from the applicant's place of residence.
 - (2) That the applicant is very sickly and aged and that the continued hearing of the suit in the original jurisdiction may lead to his quicker demise.
 - (3) It is in the interest of justice that the matter is transferred and tried at a different subordinate court near the applicant's home.
 - (4) The balance of convenience and administration of justice leans towards transfer of the suit to Butere Chief Magistrate's Court.
 - (5) The circumstances warrant the case to be transferred to the Butere Chief Magistrate's court
3. The application is opposed by the respondent, NCW through his replying affidavit in which he deposes that he is the father to the minor, the subject matter in Tononoka Children Case No.315 of 2016. That the minor is aged 8 years. That he has been living with the minor in Mombasa with her mother until when the mother died in July 2016. That when they travelled up-county for burial in Butere, the minor's

maternal grandfather, the applicant herein abducted her from him. That he had been living in Mombasa with the minor's mother as husband and wife. The child had been attending school in Chanamwe, Mombasa. That after the abduction he filed suit at Tononoka Court against the applicant herein seeking for a declaration that he has parental responsibility for the minor and prayed for legal custody, care and control of the minor to vest in himself.

The respondent attached to his replying affidavit the child's birth certificate and a letter from her school in Mombasa. He submitted that the applicant has not proved that he is sickly to the extent that he cannot travel to Mombasa for the hearing of the case.

4. The application by applicant was supported by his affidavit in which he depones that he resides at Butere in Kakamega County. That the minor is the child of his daughter who died in Mombasa but buried at his farm in Butere. That the respondent is a stranger to him since the purported marriage between him and his daughter was not reported to him. That the respondent did not consult him before filing the case in Mombasa. That he is sickly and suffering from a chronic condition which cannot allow him to travel far. That the child is already enrolled at a public school in his village and that the continued hearing of the suit at the original court will inconvenience her studies.

The applicant attached to his application a photocopy of a medical report and a letter from the school that the minor is currently attending.

5. The question before the court is whether the applicant has adduced sufficient grounds for the court to order that the child's case be transferred from Tononoka Court in Mombasa to Butere Court in Kakamega County. The court has taken judicial notice that Kakamega is very far from Mombasa, a distance of not less than 800km.

6. The application is based on the grounds that the applicant is sickly and aged and that it will occasion him a lot of hardship to travel the long journey to Mombasa for the case and then travel back to Kakamega.

7. The applicant has not disputed that the child was attending school in Mombasa before her mother passed away. He has not disputed that the respondent was taking care of the child before his daughter passed away. The so called medical report that the applicant attached to the application is faint and hardly legible. In the premises, there is no medical report from a doctor showing that the applicant is suffering from a decapitating chronic disease that cannot enable him to travel for long. When the applicant appeared before me, I did not observe any ailment on him that I can say can prevent him from travelling for long. He seems to have filed the application to serve his own convenience. The applicant has not proved that he is sickly to the extent that he cannot travel to Mombasa to attend the case.

The **Article 53(2)** of the Constitution of Kenya 2010 provides that:

"A child's best interests are of paramount importance in every matter concerning the child."

8. Before the death of her mother, the child herein was living in Mombasa with her parents. She was attending school in Mombasa. The applicant has not disputed that he abducted the child from the respondent and put her in school in Butere, Kakamega. The best interests of the child in such a matter demands that the child continues living in Mombasa where she has lived all along and that the case proceeds at Tononoka Court in Mombasa.

9. For the above said reasons, I find no merits in the application dated 25th November, 2016. The same is dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 16th day of March, 2017.

J. NJAGI

JUDGE

In the presence of:

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Court clerk