



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL APPLICATION NO. 18 OF 2017

L N R.....APPLICANT

VERSUS

L N M.....RESPONDENT

RULING

1. Vide the Notice of Motion dated 16th March 2017 made under sections 6 and 18(1)(b)(ii) of the Civil Procedure Act, the applicant, **L N R**, seeks the basic order that there be a stay of Children Case No. 85 of 2017 at Mombasa and/or a transfer of the case to Kisii CM Court for consolidation with Kisii Children Case No. 20 of 2017.

2. The grounds for the application are that the aforementioned children cases involve the same parties and the same subject matter. That, the Mombasa case was filed without jurisdiction as the respondent, **L N M**, and the subject children never resided there. That, it is in the interest of justice to have the Mombasa case heard and determined in Kisii.

These grounds are fortified by the applicant's averments contained in the supporting affidavit dated 16th March 2017.

3. The respondent opposed the application on the basis of the grounds and averments contained in her replying affidavit dated 4th April 2017 in which she contends that the applicant resides in Mombasa with the five issues of their marriage who are all minors. That, four of the children namely S, E, W and M are schooling at [particulars withheld] Academy while the youngest child is only one year old.

4. It is further contended by the respondent that the applicant has never stayed with the children as he normally visited home after two months and only for a week or two. That, it would be in the interest of the children for the Kisii Case No. 20 of 2017 to be transferred to Mombasa Tononoka Children Court and be consolidated with the Mombasa Case No. 85 of 2017.

5. At the hearing of the application, learned counsel, **Mr. Soire**, appeared for the applicant while the respondent appeared in person.

Both parties reiterated and relied on the contents of their respective affidavits and whereas the applicant urged this court to grant the orders sought, the respondent opposed such grant.

6. Upon due consideration of the application it is apparent to this court that the crucial issue for determination at this juncture is whether there should be a stay of the suit in Mombasa or whether the same should be transferred to Kisii Children's Court for consolidation with Kisii Case No. 20 of 2017.

Under S.6 of the Civil Procedure Act, no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

7. The two suits referred herein both in the Children's Court at Mombasa and Kisii are a reflection of the circumstances contemplated under the aforementioned provision of the law and in such circumstances the court is called upon to prevent an abuse of its process or the issuance of conflicting decisions revolving around the same parties and the same subject matter which would invariably result in judicial confusion and chaos.

The most effective way to prevent such a scenario would be to stay one among the two pending suits and this is in essence the scope of S.6 of the Civil Procedure Act.

8. The other alternative would be to transfer one of the suits for consolidation with the other and allow a concurrent hearing and disposal of both. The High Court has powers under S.18 of the Civil Procedure Act to transfer any suit pending in any subordinate court for trial and disposal in another competent subordinate court.

Here, we are concerned with the stay and/or transfer of any of the two subject cases and therefore the welfare of the children subject of both cases is not an issue at this juncture. It is best left for determination by the Children's Court which shall ultimately deal with any of the two cases subject of this application or both.

9. For all the foregoing reasons and in the interest of both parties the most appropriate order would be that of transfer of both suits to the Children's Court at Nairobi for consolidation and hearing. These are suits No. 85 of 2017 at Mombasa and suit No. 20 of 2017 at Kisii. Each party to bear own costs of the application.

Ordered accordingly.

J.R. KARANJAH

JUDGE

[Read and signed this 10th day of May 2017