



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
MISC. CIVIL APPLICATION NO. 83 OF 2013
(FROM NAIROBI CM CHILDREN'S CASE NO. 302 OF 2008)

M KAPPLICANT/DEFENDANT

VERSUS

S S S..... RESPONDENT/PLAINTIFF

R U L I N G

In this ruling, I will refer to M K as applicant and S S as respondent.

Before me are two applications. One is a Notice of Motion filed by the Applicant M K dated 22nd August, 2013 filed on his behalf by J. B. Shilenje & Co. advocates. The substantive orders sought in the application are as follows –

- **That the Honourable Court be pleased to transfer Nairobi Children's case No. 302 of 2008 from Nairobi Children's court to Kakamega Children's court.**
- **Other relief that this honourable court may deem just to grant.**

The application has grounds on the face of the Notice of Motion. The main ground is that the applicant resides within Kakamega County and suffers from a medical condition which does not permit him travel over 100 kilometres at a time. Secondly, that he wishes to attend all hearings of the case in the children's court.

The application was filed with a supporting affidavit annexing a copy of medical notes on his treatment at Kakamega Highway hospital.

The application is opposed. The respondent S S filed a replying affidavit she swore on 23rd October 2013. She deponed, *inter alia*, that the children's case should not be transferred to Kakamega as the children are in Nairobi. In addition, the applicant has disobeyed existing orders of the children's court, requiring him to pay Kshs.15,000/= per month for the upkeep of the children yet he wants the case transferred. She also deponed that a Notice to Show Cause had already been filed against him and was pending hearing in the Children's Court at Nairobi.

The second application is a Notice of Motion filed by the respondent S S on 24th October, 2013 under Order 51 rule 1 (3) of the Civil Procedure Rules, as well as Section 1A, 1B, 3 & 3A of the Civil Procedure Act and **Section 92, 93, 97 and 98** of the Children's Act. The main prayers in the application are that -

- **This court do issue directions regarding the notice to show Cause why the defendant (M K)**

should not be committed in civil jail for failure to pay school fees as ordered in the Nairobi Children's case No. 302 of 2008.

- **That costs be provided for.**

The application has grounds on the face of the Notice of Motion. The grounds are two. Firstly, that a Notice to Show Cause had been issued against the defendant/applicant for failure to pay school fees. Secondly that one of the minors was in Std. 8, and the school he attended had threatened to lock him out of the National Examinations.

The application was filed with a supporting affidavit sworn on 23rd October, 2013. It was deponed that the applicant and respondent were married in 1998 under Luhya customary law and had two issues of the marriage. That the applicant chased S and the children from the matrimonial home. The respondent therefore filed Nairobi Children's case No. 302 of 2008. That though orders were made for the applicant to pay school fees, he had declined to do so in the previous school.

At the hearing of the applications, the applicant was represented by Mr. Osango Advocate. The respondent argued both applications in person.

I will start with the application of S (respondent), which was filed through the Notice of Motion dated 23rd October 2013. The application asks for directions regarding the Notice to Show Cause which had been filed in Nairobi Children's case No. 302 of 2008. In my view, since the Notice to Show Cause was filed before the Children's court, it is for that court to give directions regarding the progress, hearing, and disposal of that application. This court is the wrong forum. It is not in a position to give those directions. This court can only deal with decisions that have been made by the Children's Court after a party is dissatisfied with those decisions. There being no complaint regarding the manner in which the proceedings in the children's court have been conducted or the decisions therein, this court is ill placed to give any directions. This court cannot give directions on the progress and disposal of an application filed in the Children's Court. The application therefore lacks merits and I dismiss the same.

I now turn to the Notice of Motion by the applicant for the transfer of the Children's case dated 22nd August 2013.

Under Section 18 of the Civil Procedure Act (Cap 21), this court is vested with powers to withdraw and transfer any case instituted in a subordinate court, either on application or on its own motion. The discretion conferred by law is unlimited. However, such discretion must to be exercised on sound judicial reasoning and taking into account the prejudice which may be suffered by the parties involved. It cannot be exercised whimsically.

The applicant has stated in the application that he suffers from a medical condition which makes it imprudent for him to travel the distance to Nairobi from Kakamega, which is more than 300 kilometres one way. He has said that he wants to attend all hearings of the case in the Children's Court. He says that there is a Children's Court operating at Kakamega. He is the person who is meeting the burden of paying for the maintenance and education of the two children.

The respondent opposes the application. She says that she lives in Nairobi. She doesn't have permanent employment. The two children also live with her in Nairobi. She has emphasized that the applicant has defaulted in paying school fees for the children and there is already pending a Notice to Show Cause against the applicant, in the children's Case at Nairobi. Because she is not in regular employment, she will find it difficult to travel to Kakamega for the hearing if the case is transferred.

I have weighed the conflicting positions. This is a children's matter, and the Children's Act as well as the Constitution of Kenya 2010, require that courts take into account the best interests of the children, when making decisions affecting them. It is the parents of the children herein who are contesting in this matter. The children are victims of circumstances.

I note that though the respondent says that the two children are in Nairobi, the documents filed show that

they are in schools in Machakos area, while she is lives in Nairobi. It is apparent that she lives with the children in Nairobi only during school vacations and possibly during brief half-term breaks.

Since the applicant is the person bearing the burden of paying for maintenance and school-fees for the children, I am of the view that his request to be present during the hearings of the children's case is justified. He has given medical reasons, which I have no reasons to doubt. Considering all the facts and circumstances of this case, I am persuaded to allow his application and transfer the case from the children's court in Nairobi, to the Children's Court in Kakamega. However, the applicant will pay the transport costs for the respondent, whenever the case comes up for hearing at Kakamega, which I will specify hereafter. Consequently, I order as follows -

1. The Notice of Motion dated 23rd October 2013 filed by the respondent (S S S) is dismissed, as directions will be given in the Children's Court.
2. The Notice of Motion dated 22nd August 2013 filed by the applicant (M K) is allowed. I order that the Children's Case No. 302 of 2008 at Nairobi be and is hereby transferred to the Children's Court at Kakamega for further progress and hearing.
3. The applicant (M K) will pay the transport expenses for the respondent (S) to attend court at Kakamega every time the matter comes up for hearing, which I hereby fix at Kshs.2,000/= per round trip.
4. As this is a family matter, the two parties will bear their respective costs of the two applications.

Dated and delivered at Kakamega this 13th day of February, 2014

George Dulu

J U D G E