



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 29 OF 2014

IN THE MATTER OF: A S V (the “Minor”)

AND

IN THE MATTER OF: NAIROBI CHILDREN’S CASE NO. 815 OF 2014

AND

IN THE MATTER OF: ENFORCEMENT OF THE RIGHTS

**AND WELFARE OF THE CHILD UNDER SECTIONS 4, 7 AND 13 OF THE CHILDREN’S
ACT, 2001**

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA,

**2010, THE CHILDREN’S ACT, 2001 AND THE CIVIL PROCEDURE ACT, CAP 21 LAWS OF
KENYA**

S M H V..... APPLICANT

VERSUS

A Y D S.....RESPONDENT

RULING

Before court is a Notice of Motion dated 9th July, 2014 seeking the following order

“(2) THAT Nairobi Children’s Case No. 815 of 2014 be transferred to the Children’s Court at Tononoka, Mombasa and upon the said transfer, the file be placed before the magistrate at the Children’s Court in Mombasa together with Mombasa Children’s Case No. 231 of 2014 for appropriate directions as to the hearing of both matters.”

The application was supported by the affidavit of S M H V sworn on 9th July, 2014.

The application for the transfer of the case was opposed by the respondent A Y D S through a replying

affidavit dated 18th July, 2014. The application was argued on 22nd July, 2014. **MR. ABEID** Advocate appeared for the applicant whilst **MR. KISILU** acted for the respondent. I have carefully considered all the affidavits on record, the annexures thereto as well as the oral submissions made by counsel. A little bit of back ground is necessary.

The main issue for determination here is the locus or venue for hearing of the Children's case. The applicant and the respondent were at one time married to each other but divorced by way of a Decree Nisi issued in HCCC 55 of 2010 on 18th November, 2011. Their union resulted in one child a daughter **A S V** who was born in Mombasa on 7th September, 2006. Following the divorce the couple entered into a parental responsibility agreement by which the child was to remain in Mombasa in the custody of the applicant. Pursuant to this agreement the child did remain in Mombasa and attended the [particulars withheld] Academy. The respondent after the divorce moved to Nairobi where she currently lives. On 12th June, 2014 the respondent travelled to Mombasa and took the child back with her to Nairobi. The respondent avers that she did this due to complaints of mistreatment and neglect from the child. On 16th June, 2014 the respondent filed a case in the Children's Court in Nairobi seeking to be awarded custody of the child and maintenance. The court in Nairobi directed that the status quo regarding custody be maintained. The very next day on 17th June, 2014 the applicant filed Children's Case No. 231 of 2014 at Tononoka Children's Court seeking the restoration of custody of the child to himself and seeking orders that the child be returned to Mombasa in order to continue with her schooling. **Hon. Koech** the Senior Resident Magistrate made orders that the child be returned to Mombasa. These orders were later stayed. The applicant then filed this Notice of Motion seeking the transfer of the Nairobi Children's Case to Mombasa for hearing and determination.

This is an unfortunate scenario where two parents are at war with each other and it is the innocent child who bears the brunt of this war. The child was born in Mombasa and upto a few months ago (specifically April, 2014) she lived in Mombasa. This was in pursuance of a parental responsibility agreement reached by the couple when they divorced, but which the respondent now three years later attempts to repudiate. It is clear that the respondent's action in whisking the child away to Nairobi and immediately filing a petition for custody was done in order to manipulate the legal process and in an attempt to place herself in a favourable position in the custody battle. If as she alleges the child had been subjected to abuse and/or neglect then the prudent thing would have been to approach the Children's Department in Mombasa or the police in Mombasa or even to file a suit in the Children's Court in Mombasa where the child had lived her whole life.

The question this court has to determine is whether or not to transfer the Nairobi Children's case to Mombasa for hearing and determination. As I stated earlier this is a child who has lived in Mombasa her whole life. She is now 8 years old. In determining questions of custody the Children's Court will require social and school reports. These can only be obtained from Mombasa Children's Department and from the [particulars withheld] Academy in Mombasa. Likewise persons who ordinarily interacted with the child e.g. house helps, friends, relatives, etc. will be required to give an input into any social enquiry report. These persons are all in Mombasa where the child has lived. I am mindful of the fact that there exists a possibility (though not a certainty) that the child herself may be required to testify before the magistrate. If this is the case then arrangements may be made to have the child travel to Mombasa (at the respondent's expenses) during a convenient time e.g. during school holidays. The location where this child has lived her life is Mombasa and as such any dispute regarding custody of the child ought to be heard and determined in Mombasa. I therefore direct that Nairobi Children's Case No. 815 of 2014 be transferred to Tononoka Children's Court in Mombasa and be consolidated with Mombasa Children's Case No. 231 of 2014 for hearing and final determination.

I note that the child is currently in Nairobi with the respondent. It would be unnecessarily disruptive to have her move back to Mombasa at this point in time. I therefore direct that the current status quo be maintained pending any further orders of the Children's Court. This being a family matter each side to meet its own costs.

Dated and delivered in Mombasa this 10th day of September, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Abeid for Applicant

Mr. Bwire for Respondent

Court Clerk Mutisya