

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
MILIMANI LAW COURTS
MISC. APP. NO.81 OF 2013

J A O.....APPLICANT

VERSUS

C G M.....1ST RESPONDENT

M M.....2ND RESPONDENT

RULING

The Applicant moved this court by chamber summons under the provisions of **Section 47 of the Law of Succession Act** and **Rule 49 of Probate and Administration Rules** (this was an obvious mistake because the dispute between the Applicant and the Respondents is in respect of custody and maintenance of a child) seeking orders to the effect that the court transfers **Nairobi Children’s Case 1114 of 2012 C M –Vs- J A O and M M** from the Children’s Court to this court for hearing and final determination. The grounds in support of the application are stated on the face of the application. The application is supported by a lengthy affidavit by the Applicant. The Applicant swore a supplementary affidavit in further support of the application. The application is opposed. The 1st Respondent filed a replying affidavit and a supplementary affidavit in opposition to the application. The 2nd Respondent did not enter appearance. Neither did he file any papers in opposition to the application.

At the hearing of the application, this court heard oral rival submission made by Mr. Kariuki for the Applicant and by Miss Machio for the 1st Respondent. This court has carefully considered the said submission. It has also read the pleadings filed by the parties herein in support of their respecting opposing positions. Certain facts are not in dispute in this application. It is not disputed that there is a pending case before the Children’s Court whereby a determination is sought from that court regarding *inter alia*, the paternity of a child. The 1st Respondent has sought an order from the said court for a DNA test to be conducted on the child that is the subject of the proceedings to ascertain the biological father. From the submission made before this court, it was apparent that the Applicant and the 1st Respondent have provisionally agreed on the conduct of the DNA test. What they are not agreed is which entity will conduct the DNA test. There is also a dispute regarding whether the 1st Respondent should pay maintenance for the child pending the hearing and determination of the case. The Children Court has already issued certain preliminary orders that appear not to have pleased the Applicant. The Applicant wishes to have the case transferred from the Children’s Court to this court. Part of the complaint made by the Applicant is that the 1st Respondent is an influential member of the society and is likely to influence the process to the detriment of the Applicant. In response to this allegation, the 1st Respondent denied that he has conducted himself in any manner other than honourably in the pursuit of justice in the case before the Children’s Court. He therefore urges the court to disallow the application.

First things first. **Section 73** of the **Children Act** establishes a court to be known as the Children's Court which shall, in the first instance, have jurisdiction to hear and determine all matters relating to children. This includes cases involving children in conflict with the law. Therefore, a case involving the determination of the paternity and parental responsibility in respect of a child shall, in the first instance, be determined by the children's court. Under **Section 80** of the **Children Act**, this court will only assume jurisdiction when an appeal is filed to this court against a decision issued by the Children's Court. This court has no jurisdiction, in the first instance, to hear a case concerning children because that jurisdiction is exclusively that of the Children's Court. It appeared to this court that the reason why the Applicant desires to have the case transferred from the Children's Court to this court is the fear that that court is likely to be unduly influenced by the 1st Respondent. The Applicant has provided no evidence to support the basis of such fear. This court cannot transfer a children's case from a court with jurisdiction to this court just because one party expresses fears or apprehension that he or she may not get justice in that court. Where a party is apprehensive that any court is likely to be biased or has exhibited bias towards him or her, such party is at liberty to apply for the disqualification of that judicial officer from hearing the case. Such application can only be made before the particular court. It cannot be litigated in another court more so a court superior to that court. If this court were to entertain such application, it would deny the judicial officer whose conduct is being questioned to respond to the allegations made against him or her.

This court is not hearing an appeal. It has no jurisdiction therefore to entertain the application brought before it by the Applicant. The Applicant should ventilate all the issues relating to the substance of the matters in dispute and the trial process itself before the Children's Court. If the Applicant is aggrieved by the decision of the said court, then, and only then, shall she come to this court by way of appeal from the decision of that court. The application filed by the Applicant and which is dated 3rd September 2013 is hereby dismissed with costs with the 1st Respondent. The parties are ordered to go back to the Children's Court for hearing and determination of the dispute between them. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2013

L. KIMARU

JUDGE