REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Miscellaneous Application 217 of 2009

JGM ..... APPLICANT

VERSUS

BM ..... RESPONDENT

R U L I N G

JGM hereinafter referred to as "*the applicant*" filed the application dated 6th July 2009 under a certificate of urgency. The application was made pursuant to the provisions of section 18(1) (b), (2) and 63 of the Civil Procedure Act and all other enabling provisions of the law. In the main he prayed that this court be pleased to order the transfer of Eldoret Children's case number [....] **BM v/s JGM** to Karatina Senior Resident Magistrate's court for hearing and final disposal. He also asked for costs of the application.

The grounds upon which the application was anchored were that the applicant's home was within Nyeri Municipality and about 20 kilometres from Karatina Senior Resident Magistrate's Court. Yet **BM**, hereinafter referred to as "*the respondent*" filed the aforesaid suit in Eldoret about 500 kilometres away from his home. In the premises he would be greatly inconvenienced physically and financially travelling all the way from Nyeri to Eldoret to attend court. That the suit should have been filed in Nyeri in accordance with the law and the Chief Justice's recent Practice note and not at the respondent's convenience. Further since the divorce cause between the parties was pending in the Karatina court, it was only mete and just that the Eldoret suit also be heard and determined in the same court. Finally he contended that no prejudice would be suffered by the respondent if the orders sought were granted.

In support of the application, the applicant deponed that he resides in Nyeri where he practices as an advocate of the High Court of Kenya. There was a divorce cause involving the two pending in the SRM's court, Karatina, being Divorce cause number [.....]. Yet the respondent had proceeded in Eldoret children's court and filed Children's case number [....]. Both parties hail from Nyeri and accordingly there was no basis for filing that case in Eldoret. If anything it ought to have been filed in the same court in which the divorce cause is pending. It was his desire that the said case be heard and determined quickly and that can only happen if the same was transferred to the SRM's court, Karatina. It was his further contention that the filing of the children's case in Eldoret offended the Chief Justice's recent Practice note as regards place of filing suit and also the civil procedure rules as pertains to the same issue.

The respondent as expected reacted to the application aforesaid any filing a replying affidavit sworn on her behalf by one, **Alfred Nyabena**, learned counsel. He deponed where pertinent that he was the one who filed the suit in Eldoret on behalf of the respondent since the children reside in Eldoret and go to school thereat a fact well known to the applicant. That the children's interest was paramount and there was no basis for the applicant's insistence that the two suits be heard in Karatina. That it was the applicant who caused the respondent to move out of the matrimonial house and also sent away the children who currently reside in Eldoret. The respondent will suffer greatly if the case was transferred

from Eldoret to Karatina both physically and financially. The applicant's desire was inconsiderate and would prefer the respondent and the children to suffer travelling to and from Karatina. Finally he deponed that the application was made in bad faith, misconceived and prejudicial to the children's welfare and rights.

On 20th July 2009, the application came before me for hearing. **Mr Macharia** and **Miencha**, learned counsel for the Applicant and respondent respectively agreed to argue the application by way of written submissions. The same were to be filed and exchanged by 31st July 2009 when the application was scheduled to be mentioned with a view to giving a date for ruling. The applicant duly filed his written submissions on 30th July 2009. However, when the matter was mentioned on 31st July 2009, it transpired that the respondent had not filed hers. The file was however placed aside to await the appearance of the respondent and or her counsel. By 11.30 a.m. the matter was once again called out but neither the respondent nor her counsel were present. The court was in the dark as to whether they would appear if at all as they had not sent any word to the court on that score. Since the date had been taken by the parties by consent and there being no explanation for the absence of the respondent and or her counsel I opted on the application of counsel for the applicant to act on his written submissions and prepare the ruling, the absence of the respondent and her counsel notwithstanding.

I have carefully considered the application the rival affidavits plus the annextures on record, the written submissions of the applicant and the authorities cited. It is common ground on the material on record that there is a children's case filed by the respondent against the applicant in Eldoret being children's case number [....]. It is also common ground that both parties hail from Nyeri District as it then used to be, their matrimonial home was in Nyeri before the parties apparently parted company on December 2008 with the respondent moving out and thereafter relocating to Eldoret to stay with her sisters. It is also common ground that the marriage between the applicant and the respondent was celebrated in Nyeri, it is also common ground that currently there is a pending Divorce Cause between the parties in the SRM's Court Karatina and finally it is common ground that the applicant resides and carries on business in Nyeri.

Of course the provisions of the procedure Act and the rules made thereunder are applicable to the proceedings before the children's court. That being the case the provisions of the Civil Procedure Act as relates to the place of suing are applicable. As a general rule, and subject to the pecuniary limitations, suits relating to, among other things, determination of any other right to or interest in immovable property must be instituted in the court within the local limits of whose jurisdiction the property is situated. All other suits must however be instituted in court within the local limits of whose jurisdiction either the defendant or each of the defendant actually resides or carries on business, or works for gain or where the cause of action wholly or partially arose. See generally section 15 of the Civil Procedure Act. The law as it is, seeks to protect the defendant as opposed to the plaintiff. Accordingly the plaintiff cannot seek to file a suit against the defendant everywhere and anywhere. The law also does not grant the plaintiff the right to sue at a place of her convenience. Rather it must be at the convenience of the defendant. The judiciary too frowns upon parties who file suits as a means of a punishing another party to the suit or as a means of shopping for justice. This is what informed the Chief Justice's Practice note on Filing of suits, applications and references in proper courts issued on 27th February 2009 in Gazette Notice No. 1756. Taking into account all the common grounds alluded to herein above and the peripheral observations I have made as aforesaid it is my view that there was no legal or factual basis for the respondent to have filed the children's case aforesaid in Eldoret. It ought to have been instituted either in Nyeri where the applicant ordinarily resides and or Karatina SRM's court within whose jurisdiction the applicant hails from.

The respondent has stated that the case was instituted Eldoret for the benefit of the children of the marriage. However as correctly observed by **Mr. Macharia**, this argument holds no water at all. As a matter of practice, children can only sue through their guardians and will generally not be required to attend court unless it is absolutely necessary. In the circumstances of this case, there is nothing to suggest that their presence will be required should the case be transferred from Eldoret. In any event it does even appear to me that though the respondent claims to be residing in Eldoret, that might not actually be the case. I have looked at the verifying affidavit sworn in support of her suit in Eldoret. She categorically

depones therein that she is a resident of Nairobi and gives her postal address as [.....] Nairobi. If this is the case, why then did she opt to file the case in Eldoret and not Nairobi if it was not intended to punish, harass and inconvenience the applicant and waste his resources as correctly submitted by **Mr. Macharia**.

Ordinarily in a contentious matter as this one, it is expected that parties and not their advocates should swear affidavits. There is no explanation as to why the advocate and not the respondent chose to swear the replying affidavit. In swearing the said affidavit, counsel clearly offended the provisions of order 18 of the Civil Procedure rules and the oaths and statutory declarations Act. Order 18 rule 3(1) in particular provides that:-

Affidavits shall be confined to such facts as the deponent is able of his own knowledge prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

It is trite law that affidavits must deal only with facts which the witness can prove of his own knowledge. However, a witness may still depone on matters of which he has information of or belief provided the sources and grounds thereof are stated. See **Halsburys Laws of England, 3rd Edition**. The counsel's affidavit in this matter runs foul of the above injunctions. He has sworn to contentious matters. He has sworn to matters of information and belief yet nowhere does he disclose the sources and grounds thereof. That being the case paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the said affidavit are liable to be struck out and indeed they are accordingly so struck out. What then is left of the applicant's application? Nothing in my view. As observed in the case of **Simon Isaac Ngui v/s Overseas Couriers (K) Ltd, HCCC No. 1632 of 1997** (UR) in a similar situation "**..... what remains are shells that cannot be of any assistance to the court .."** The same situation obtains here. Again as correctly observed in the said case "**..... I know that the striking out of any document in a matter before the court is a drastic measure but in the instant case I see no other way save to do so....."** I adopt the same reasoning herein.

Even if I had not struck the offending paragraphs in the affidavit, I would still have impugned it on the basis that by deponing on matters of fact, the learned counsel had descended into the arena of conflict and therefore could not competently play the role of a counsel in the matter. It is not competent for a party's counsel to depone to evidentiary

facts knowing very well that he will never take the witness box and be cross-examined on the same. In the case of **Kisya Investments Ltd & Others v/s Kenya Finance Corporation Ltd NBI HCCC No. 5304 of 1993** (UR), **Ringera J** as he then was had this to say:-

"**..... By deponing to such matters the advocate courts an adversarial invitation to step from his privileged position at the bar into the witness box. He is liable to be cross-examined on his disposition. It is impossible and unseemly for an advocate to discharge his duty to the court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case....."**

With respect I totally agree with these observations in the circumstances of this case. That is the situation that the respondent's counsel finds himself. It is not enviable position to find oneself

Section 18 of the Civil Procedure Act confers on the High Court the power to transfer any suit pending before the subordinate court for trial or disposal to another subordinate court competent to try it. This power is exercised either on the application of any of the parties to the suit or on the court's own motion. A transfer of a suit can however be ordered at any stage before the final determination of the same. It is therefore immaterial that the suit may have been heard interlocutorily and orders interim or otherwise issued.

In this case, I have come to the firm view that Karatina SRM's court should have been the right place to file the suit in the event that there was a children's court. Accordingly I would allow the application

dated 6th July 2009 in terms of prayer 2. I decline to make an order for costs in favour of the applicant. In the event however that there is no children's court in the SRM's court Karatina, then the same suit shall be transferred to the Chief Magistrate's Court Nyeri to be heard by the Children's court therein.

Dated and delivered at Nyeri this 2nd day of October 2009

M. S. A. MAKHANDIA

JUDGE