



**JKO v KOO (Children Miscellaneous Application E008 of 2023)
[2024] KEHC 509 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 509 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CHILDREN MISCELLANEOUS APPLICATION E008 OF 2023
RE ABURILI, J
JANUARY 31, 2024
IN THE MATTER OF CHILDREN’S ACT, 2022 AND RULES
AND
IN THE MATTER OF SKO & NOO (“CHILDREN”)**

BETWEEN

JKO APPLICANT

AND

KOO RESPONDENT

RULING

1. The applicant herein is JKO. By her application brought by way of notice of motion dated November 14, 2023, she seeks orders for stay of proceedings in Nyando SPM Children’s Court Case number E012/2023 pending the hearing and determination of this application and that the said Children’s matter as filed by the respondent herein be withdrawn and be transferred to Nairobi Children’s Court for hearing and final determination.
2. The grounds upon which the application is predicated are that in the said Nyando Children’s Case, the minors are listed as witnesses yet the said minors and the respondent herein who is their father, reside in Nairobi where the cause of action arose.
3. The application is also supported by the applicant’s sworn affidavit which reiterates the grounds and annexes the documents filed by the respondent in the Nyando Children’s matter including the plaint where he has sued the applicant herein being the children’s biological mother, seeking for child maintenance.
4. Opposing the application, the respondent filed grounds of opposition dated December 14, 2023 contending that the application is misconceived and bad in law, that it lacks in merit and does not



lie, that it is incurably defective, is a serious abuse of the court process, the affidavit in support of the application is defective, that the applicant has not demonstrated sufficiently the need to have the matter transferred considering that the same was pending a ruling on the application for interim maintenance on December 14, 2023 and the applicant is resident of Nyando Sub County within Kisumu County, that the application is made in bad faith and merely intended to frustrate proceedings that have reached advanced stage and that the applicant has not met the threshold required in law to merit the orders sought.

5. The application was argued orally by way of submissions on January 23, 2024 after the court granted an interim stay of proceedings in the Nyando Children's Court.
6. In support of the application, Ms Dulo counsel for the applicant relied wholly on the brief affidavit sworn by the applicant emphasizing that the children who are listed as witnesses in the Nyando Children's Case are residing with the respondent herein in Nairobi and that the respondent is an officer of this court.
7. On behalf of the respondent, Mr. MC Ouma advocate submitted relying on the grounds of opposition adding that the best interests of the children override all issues especially technicalities.
8. That the applicant resides and works at Sondu Miriu which is within the jurisdiction of Nyando law courts where the suit was filed on behalf of the children and that it is therefore convenient for her to attend court. That in the said suit, which is for maintenance of the children, interim maintenance orders were made but the enforcement thereof was stayed because of the interim orders of this court staying the said proceedings. That the applicant does not dispute parental responsibility over the children yet she is frustrating the children and enforcement of maintenance orders issued against her. That the children are in school but that the father is the only one struggling to maintain them hence exposing the children to unnecessary suffering which is not fair.
9. In a rejoinder, Ms Dulo submitted reiterating her earlier submissions adding that the applicant only secured the job in Nyando last year and that that is when she moved to Nyando. Further, that the ruling on maintenance was only made a day after this court granted the interim stay of proceedings, insisting that the cause of action arose in Nairobi. Further, that the applicant and respondent herein were separated ten years ago with the applicant retaining physical custody of the children of the marriage, subjects of the Nyando case. That since the children are listed as witnesses, they need to give evidence in Nairobi.

Determination

10. I have carefully considered the Notice of Motion, the brief affidavit in support of the grounds, the grounds of opposition and the rival oral submissions. The issue for determination is whether the Applicant has satisfied the conditions to warrant transfer of the Children's case filed by the respondent from Nyando Law Courts to Nairobi Children's Court for hearing and final determination.
11. Section 15 of the *Civil Procedure Act* provides for places of suing and more specifically as regards the residence of the defendant or as to where the cause of action arose. The section stipulates as follows:
 - “ 15: Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-
 - a. the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit actually



and voluntarily resides or carries on business, or personally works for gain; or

- b. any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the Court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution or;
- c. the cause of action wholly or in part arises.”

12. The Applicant in her supporting affidavit does not say much about her relationship with the children and the respondent but in the annexed documents which are pleadings before Nyando law Courts, and in the submissions by her counsel and counsel for the respondent, it clearly emerges that she is separated from the respondent for over ten years and that indeed, the respondent is the person who has the physical custody of the children and providing for them.

13. In addition, her counsel submits and it is not controverted that she only secured a job in Nyando at Sondu Miriu last year. It therefore appears that it was not until the applicant secured a job in Nyando that the respondent filed suit against her for maintenance of the children only in October 2023 and sought for interim maintenance orders which were granted on 14th December 2023 but cannot be enforced because of a stay of proceedings order issued by this court. indeed, every parent has a parental legal duty to maintain their children, whether they are married to each other or not.

14. Section 18(1)(b)(ii) of *Civil Procedure Act* provides that:

“ 18.

- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage;
 - (b) Withdraw any suit or other proceedings pending in any Court subordinate to it, and thereafter
 - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same.”

15. As provided in section 15 of the *Civil Procedure Act*, a suit may be instituted in a place where the cause of action arose or where the defendant resides. In this case, from the pleadings filed, it is clear that the applicant herein being the defendant in the suit, resides in Nyando where the suit was filed.

16. However, the cause of action of what appears to be alleged neglect of parental responsibility, arose in Nairobi where the respondent as well as the children reside and the respondent is in physical custody of the children and from his averments in the plaint filed before Nyando Law Courts, the applicant herein allegedly deserted the matrimonial home over 10 years ago in 2013 leaving the respondent to single handedly care and provide for the children, some of whom are now adults.



17. This Court is obligated under Section 8 of the *Children's Act*, 2022, while considering any disputed matters involving children to give primacy to the best interest of children.

18. The section provides that:

“8.

(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

(a) the best interests of the child shall be the primary consideration;

(b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

(2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child; and

(c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.”

19. The above provision is in consonance with Article 53(2) of the *Constitution* which stipulates that:

“A child's best interests are of paramount importance in every matter concerning the child.”

20. While exercising its discretion set out in Section 18 of the *Civil Procedure Act*, the Court will be mindful of the balance of convenience, questions of expense, interests of justice and possibilities of undue hardship that may be occasioned to the parties. In this case, the children reside and continue to reside in Nairobi with their father who is now their primary care giver for the last ten years, their mother having left the matrimonial home and by their father seeking for maintenance or contribution from their mother, he has committed no offence at all since the applicant mother to the children is gainfully employed and has a legal and moral duty to provide for her children as well.

21. It is not lost to this court and the applicant herein must be reminded quite tersely that she cannot escape her parental responsibility by having the Children's case transferred to Nairobi and neither can the respondent equally escape that responsibility by filing suit in Nyando law Courts which is closer to where the applicant resides and works for gain.

22. Both parties hereto are reminded that under section 11 of the *Children's Act*, 2022,

(1) Every child has the right to parental care and protection.



- 2) Except as is otherwise provided under this Act, every child has the right to live with his or her parents.
23. In addition, under section 31 and 32 of the *Children's Act* 2022, 32. (1) Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an equal basis, and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility whether or not the child is born within or outside wedlock.
24. However, it is not true that because the applicant resides and works in Nyando, then the suit involving the children who reside in Nairobi with their father and exclusively now for over ten years, must be filed in Nyando. I say so because Children's matters are handled in privacy, and albeit the children who are listed as witnesses can travel to Nyando Law Courts to testify against or for their parents, it is more convenient for the children to testify from Nairobi than travel to Nyando Law Courts to give evidence or whenever the court wishes to have the children attend Court. It is also less cumbersome for the children and therefore the applicant can travel to Nairobi to attend to the case or even attend virtually unless required to attend physically by the court.
25. In addition, if any orders of maintenance are issued by the Children's Court at Nyando, those orders will be complied with unless set aside, and the Children's Court at Nairobi will ensure compliance with the said orders.
26. In my humble view, the transfer of the Nyando case to Nairobi Children's Court will facilitate just, expeditious, proportionate and affordable resolution of the dispute between the two parties. The suit will be timely disposed of at a cost affordable by the respective parties as by maintaining the case at Nyando, the respondent herein and the children who are witnesses will have to travel, whereas if the applicant travels to Nairobi, she is alone and it will be less expensive. I hasten to add that the cause of action arose in Nairobi where the children reside with the respondent, their father.
27. This Court has jurisdiction under section 18 of the *Civil Procedure Act*, on an application by any of the parties or of its own motion without a notice by the parties at any stage, to withdraw any suit or other proceedings pending in any Court subordinate to it and transfer the same for trial and disposal to any Court subordinate to it and competent to try or dispose of the same.
28. Therefore, after careful consideration of the Applicant's application, I am satisfied that the application meets conditions laid down to warrant transfer of the suit to a Court subordinate to this Court for trial and disposal. I therefore find the application to be meritorious and allow the same. I order as follows:
- a. The Nyando Children's case No. E012 of 2023 is hereby withdrawn and transferred to Nairobi Children's Court for hearing and final determination;
 - b. Any orders issued by Nyando Children's Court shall be enforced by the Children's Court at Nairobi
 - c. Each party to bear their own costs of this application.
29. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE

