



**In re Estate of Joseph Musembi (Deceased) (Miscellaneous Succession  
Application 3 of 2022) [2023] KEHC 1051 (KLR) (20 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1051 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS SUCCESSION APPLICATION 3 OF 2022  
SM GITHINJI, J  
FEBRUARY 20, 2023  
IN THE MATTER OF THE ESTATE OF JOSEPH MUSEMBI  
(DECEASED)**

**BETWEEN**

**KELVIN MUNGA JULIUS (ADMINISTRATOR OF THE ESTATE OF JOSEPH  
MUSEMBI) ..... APPLICANT**

**AND**

**FLORENCE NICOLE NJENGA ..... RESPONDENT**

**RULING**

1. The Applicant herein has filed a Notice of Motion Application Under Section 18 (1) B (II) ,3A of the [Civil Procedure Act](#) and Order 51 of the Civil Procedure Rules seeking the following orders; -
  1. Spent
  2. That this Honourable Court be pleased to transfer CMCC/ SUCC CAUSE NO E26 of 2021 In the Estate of Joseph Musembi at Malindi to the Senior Principal Magistrate’s court at Kilifi before Honourable Kituku for its hearing and determination.
2. The Application is supported by the grounds on the face of it and an affidavit sworn by Angeline Adhiambo Omollo, sworn on October 11, 2022. She deponed that the Applicant herein without any prior knowledge instituted a Petition through Malindi Magistrate’s Court Succession Cause No E26 of 2021 in which grant and certificate of confirmed grant were issued on March 19, 2021 and April 16, 2021 respectively. She also deponed that there exists a similar matter before the Senior Principal Magistrate’s court at Kilifi being Succession Cause No 19 of 2007 and the Applicant herein seeks the matter filed in Malindi be transferred to Kilifi for consideration to avoid duplicity of actions. She contends that the cause of action arose at Kikambala and therefore this matter ought to be heard at Kilifi.



3. The Respondent in response filed both Grounds of Opposition as well as Replying Affidavit sworn by Florence Nicole Njenga on October 19, 2022. The Grounds of Opposition are to the effect that the application is an abuse of the court process, as is intended to allow the applicant to transfer a suit from one court to another with the sole aim of concealing from this court matters which the said court should first address in E25/2021 which is pending an application for annulment before the lower court.
4. In the Replying Affidavit, Florence Nicole Njenga deposed that the alleged petitioner is a stranger and not a heir to the estate of Joseph Musembi Kimuyu. She asserted that the petition filed in Malindi E26 of 2021 was filed using illegitimate documents by the Petitioner, for instance the death certificate alleged to be that of Joseph Musembi was issued on June 18, 2022 whereas the correct death certificate was issued on May 3, 2005.
5. She also asserted that there is an application for revocation of the grant pending before the lower court which was listed for hearing on October 5, 2022. She further asserted that a petition in respect of the Estate of the late Joseph Musembi Kimuyu had been filed in Kilifi in 2007 in Succession Cause No. 19 of 2007 and a grant of probate issued on July 17, 2008.
6. Parties filed written submissions with the applicant filing his on November 8, 2022. Counsel identified two issues for determination; 1<sup>st</sup> whether Succession Cause No E26 of 2021 ought to be transferred to the Senior Principal Magistrate's Court at Kilifi for hearing and determination and 2<sup>nd</sup> whether the applicant's application is frivolous, vexatious and an abuse of the court process. Counsel submitted that Section 18 (1) (b) of the *Civil Procedure Act* gives the Court the general power to transfer suits and that this power may be exercised at any stage of the proceedings.
7. Counsel generally relied on the case of Kithita Ngeana vs Mwaniki Kisume HCC Civil Case No 2 of 2016 at Kitui. Counsel submitted that there exist similar matters before the Senior Principal Magistrate's Court at Kilifi ELC No. E31 of 2021, Succession No 19 of 2007, Succession No. 26 of 2021 at Malindi Law Court and Succession No 1 of 2021 at Malindi Court. According to counsel, the applicant before this court is the same applicant in Kilifi and Malindi Court and as such, transfer of the suit will avoid duplicity of actions on the intended application for site visit.
8. The Respondent on the other hand filed submissions on November 7, 2022. Counsel submitted that the application is an abuse of the court process as the application is aimed at concealing the fact that the proceedings in Succession Case No E26 of 2021 was marred with fraud. It is her submission that the correct certificate of death of Joseph Musembi Kimuyu was issued to one of his daughters on May 3, 2005 and was issued at Kilifi District Registry under serial number B 751500 under entry No 14040004 having died on January 7, 2004 of natural cause.
9. She further submitted that the transfer will deny the Respondent a chance to be heard and that it is paramount that the issues raised in summons for annulment be addressed first. According to her, the estate of Joseph Musembi Kimuyu was administered in 2007 and is now at the center of various litigation in different causes. Counsel relied on Succession No 29 of 2017 Formerly Milimani 629 of 2010(Estate of Penina Waithera Williams Deceased).

### **Analysis and Determination**

10. I have considered the application dated October 11, 2022, the response as well as the written submissions by counsels and the issue that emerges for determination is whether the applicant has set out a case deserving transfer of Succession Cause No E26 of 2021 to the Senior Principal Magistrate's Court at Kilifi for hearing and determination.



11. The provision of law that is relevant with respect to this application is Section 18 of the *Civil Procedure Act* which provides as follows: -

“Power of High Court to withdraw and transfer case instituted in subordinate court

- 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—
  - a transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
  - b withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
    - i try or dispose of the same; or
    - ii transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
    - iii retransfer the same for trial or disposal to the court from which it was withdrawn.
- 2 Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

12. The applicant herein contends that they instituted a Petition through Malindi Magistrate’s Court Succession Cause No E26 of 2021 in which a grant and certificate of confirmed grant were issued on March 19, 2021 and April 16, 2021 respectively. Similarly, that there exists a similar matter before the Senior Principal Magistrate’s court at Kilifi being Succession Cause No. 19 of 2007 and the Applicant thereby sought the matter filed in Malindi transferred to Kilifi and thereafter consolidated to avoid duplicity of actions.
13. The Respondent on the other hand alleges that the alleged petitioner is a stranger and not a heir to the estate of Joseph Musembi Kimuyu. There is an assertion that the petition filed in Malindi E26 of 2021 was filed using forged documents by the Petitioner and as such they have filed an application for revocation of the grant pending before the lower court which was listed for hearing on October 5, 2022.
14. I am guided by the decision in the case of David Kabungu Vs Zikarenga HCCC No 36 OF 1995 that; -

“Section 18 (1) (b) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is well established



principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused... Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused...”

15. In my mind, the applicant has not complained of any likely bias against him by the Malindi court or that he is likely to suffer any difficulties or hardships if the succession case filed at Malindi Court where it's pending an application for revocation of the grant is heard to finality. The fact that the Applicant asserts that they were not aware that another succession suit had been filed at Kilifi Court is not sufficient reason to institute another succession suit ten years under different persons who may not be beneficiaries in the Estate of the deceased. As has been considered above, a mere balance of convenience in favour of the proceedings in another court is not sufficient ground to transfer a suit from one court to another.
16. In my view, the allegations by the Respondents cannot be wished away and it would only be proper if the application before the Malindi Succession case that is pending the hearing of an application for revocation of grant is heard and determined.
17. Having taken into account the circumstances surrounding the two succession cases and taking into account the provisions of Section 18 of the *Civil Procedure Act*, I am not persuaded that the Applicant has presented before this court tangible and sufficient grounds to justify orders for transfer of this case from Malindi to Kilifi.

I find no merit in this application and it's hereby dismissed with costs.

**RULING READ, SIGNED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2023.**

.....

**S M GITHINJI**

**JUDGE**

**IN THE PRESENCE OF; -**

**1. Miss Omolo for the Applicant**

