



REPUBLIC OF KENYA



**Gesura & another v Ondara (Miscellaneous Succession Application  
1 of 2023) [2023] KEHC 25800 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25800 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
MISCELLANEOUS SUCCESSION APPLICATION 1 OF 2023**

**AC MRIMA, J**

**NOVEMBER 30, 2023**

**BETWEEN**

**KWAMBOKA GESARE GESURA ..... 1<sup>ST</sup> APPLICANT**

**LYDIAH NYANCHAMA MORARA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JANETH MOGOTU ONDARA ..... RESPONDENT**

**RULING**

**Background**

1. The Notice of Motion application, subject of this ruling, is dated 14<sup>th</sup> January 2023. It is supported by the Affidavit of KwambokaGesare Gesura and the Supplementary Affidavit of LydiaNyanchama Morara deposed to on 14<sup>th</sup> January 2023 and 14<sup>th</sup> March 2023 respectively.
2. The application seeks the following Orders: -
  - (1) Spent
  - (2) That pending the hearing and final determination of this application there be a stay of proceedings in Mavoko CMC Succession Cause No. E006 of 2022.
  - (3) That this Honourable Court be please to transfer Mavoko CMC Succession Cause E006 of 2022 to Kitale Chief Magistrate Court and the same to be consolidated with Kitale CMC Succession Cause No. 118 of 2022 for hearing and final disposal.
  - (4) That the costs of this application be provided for.
3. From the grounds in support of the application, the Applicants claimed to be the biological mother and the widow of Evans Onganga Nyariaro (hereinafter 'the Deceased') respectively.



4. The 2<sup>nd</sup> Applicant claimed to have had three children with the deceased.
5. They contended that the deceased hailed from Trans-Nzoia County and upon his death, his remains were interred at Cherangany in the said County.
6. In the Supporting Affidavit, Ms. Gesura deposed that they petitioned for Letters of Administration Intestate in respect to the Estate of the Deceased on 25<sup>th</sup> July 2022 through Kitale CMC Succession Case No. 118 of 2022.
7. It was her case that on 12<sup>th</sup> December 2022, they discovered that Janeth Mogotu Ondara, the Respondent herein, had secretly instituted a Petition at Mavoko Law Courts where she obtained a Grant to their exclusion and the children of the deceased.
8. In the Supplementary Affidavit, Ms. Morara deposed that the consolidation will ensure that the matters relating to the estate of the deceased are decided conclusively and that there will be no conflicting decision.
9. It was her case that the issue of beneficiaries has no bearing to the issue of consolidation and transfer.
10. She deposed further that the Deceased was the proprietor of Plot No. 6614/3 situated within Cherangany within Trans-Nzoia which constitutes the greater part of the Estate of the Deceased a fact that justified transfer of the matter to Kitale.
11. It was her case that the Deceased never married or cohabited with the Respondent and there were no customary rites undertaken as alleged.
12. She deposed that the deceased had an illicit affair with Respondent out of which they had one child and that Ruth Nyabonyi is not a child of the deceased.
13. It was her case that the doctrine of first-in-time does not apply where one approaches Court with unclean hands.
14. It was her case that in view of the fact that she is a vegetable vendor, she is unable to meet travel expenses to Mavoko Law Courts.
15. In conclusion, she deposed that majority of the beneficiaries live in Kitale.
16. The Applicants, therefore, contended that transferring the Succession Cause at Mavoko to Kitale Law Courts for the purposes of being heard together with Kitale CMC Succession Cause No. 118 of 2022 will achieve the overriding objective of the Civil Procedure rules and justice for all the parties and save judicial time.

**The submissions:**

17. In their submissions dated 15<sup>th</sup> March 2023, the Applicants submitted that under Sections 17 and 18 of the [Civil Procedure Act](#), a Court has power to withdraw and transfer suits from one subordinate Court to another or to itself for hearing and final determination.
18. The Applicants relied on *GKK v ANK & Another* (2021) eKLR where it was observed that the onus of proving the transfer is on the party applying for a case to be transferred.
19. It was submitted that pursuant to Section 49 of the [Law of Succession Act](#) and the fact that the deceased worked in Nairobi, he was interred in Trans-Nzoia County where he held parcel of land No. 6614/3 which constituted the greater part of his estate.



20. In conclusion, it was submitted that consolidated and transfer would have the effect of meeting the ends of justice and that the Respondent would not be prejudiced since all beneficiaries of the estate will be considered.

**The Respondent's case:**

21. Janeth Mogotu Ondara responded to the application through her Replying Affidavit deposed to in 2<sup>nd</sup> February 2023.
22. It was her case that she is the surviving Spouse of the deceased whom they lived together as husband and wife in Pipeline Nairobi from the year 2013 until 5<sup>th</sup> April 2020 when they moved to Mavoko Municipality.
23. She deposed that her marriage with the deceased was blessed with two children, Ruth Nyabonyi Nyariaro and Angel Kemunto Nyariaro.
24. It was her case that before meeting his death in a road accident in Embakasi, her husband worked for Kenya Red Cross in Nairobi and as such, the Applicants are misleading the Court in claiming that the deceased resided in Kitale.
25. She deposed that the 1<sup>st</sup> Applicant was her mother-in-law and the 2<sup>nd</sup> Applicant was the deceased girlfriend with whom they bore one child, Joseph Nyariaro Ongaya and parted ways in the year 2011/12.
26. She claimed that she is the deceased legal wife. She stated that her dowry was paid on 13<sup>th</sup> April 2020 posthumously in the presence of the deceased's parents.
27. She stated that according to Kisii customs, the deceased could not be buried until he paid dowry and that according to Section 66 of the [Law of Succession Act](#), preference should be given to her as a surviving spouse to administer the estate.
28. It was further her case that she petitioned for Letter of Administration as per the provision of Section 49 of the [Law of Succession Act](#) as read with Rule 7(3) of the Probate and Administration Rules, which provide that Petition for Grant of Letter of Administration may be filed within the area of Magistrates Court in which the deceased was his last known place of residence.
29. She deposed that the 1<sup>st</sup> Applicant variously undermined her status as the wife of the deceased including writing to the Chief a letter that left out her children as beneficiaries and her status as the wife of the deceased.
30. It was her case that she petitioned for letters of administration and her matter was gazetted on 17<sup>th</sup> June 2022 and the Grant issued on 5<sup>th</sup> July 2022.
31. In highlighting faults in the Applicants' application for Grant of Letters of Administration in Kitale Succession Cause No. 118 of 2022, it was her case that she instituted Succession Cause No. E006 of 2022 on 7<sup>th</sup> June 2022 four months before the Applicants herein instituted theirs. She deposed that the doctrine of the first-in-time applies.
32. She deposed further that the Applicants' letter to the Chief is doctored to include children who are not beneficiaries of the deceased.
33. She further highlighted that the Death Certificate attached to the Petition has inconsistencies including the fact that it captures the death of the deceased as 14<sup>th</sup> April 2020 whereas his death was on 12<sup>th</sup> April 2020.



34. She deposed that the documents adduced in Kitale CMC Succession Cause No. 118 of 2022 are forgeries and an elaborate scheme by the 1<sup>st</sup> Applicant to disinherit her.
35. It was her case that she does not have a source of income and it would be expensive for her to travel to Kitale for the proceedings. She further claimed that due to the ongoing squabbles by the 1<sup>st</sup> Applicant, she is unable to cater for her children's school fees.
36. She deposed that the deceased was solely responsible for the Children upkeep and education and as such require his estate to be distributed.
37. She urged the Court to dismiss the application with costs.

#### **The Submissions:**

38. The Respondents filed written submissions dated 13<sup>th</sup> March 2023. They reiterated Section 66 of the Law of Succession Act as regards the priority the Respondent ought to be given in administering the Estate.
39. She claimed that the Respondent was the wife the deceased through cohabitation. Support to that end was drawn from the Court of Appeal in Phyllis Njoki Karanja & 2 Others v Rosemary Mueni Karanja & Another.
40. With respect to the transfer of the matter to Kitale, the Respondent submitted that it would defeat the ends of justice. It was her case that according to Rule 7(3) of the Probate and Administration Rules as appreciated alongside the decision in Re Estate of Robert John Sumbi (Deceased) [Succession Cause E1564 of 2021) eKLR] the Succession Cause filed in Mavoko was in its rightful area of jurisdiction.
41. On the doctrine of 'the-first-in-time', the Respondent submitted that though prevalent in land disputes, she urged the Court to apply it herein. It was submitted that she had made great strides in prosecution the matter in Mavoko Law Courts and was in the final stages of confirmation of grant.
42. In urging the Court not to consolidate the two suits, the Respondent submitted that allowing it would be tantamount to inviting the Court to advance an illegality. It was submitted that Kitale Succession Cause 118 of 2020 was secretly filed and has many fraudulent representations and inconsistencies therein.
43. In conclusion, the Respondent submitted that it is in the interests of justice that the application is dismissed with costs.

#### **Analysis:**

44. The only issue that lends itself for determination is whether the application is merited.
45. Before delving into the substance of the application, a look at the law that donates power to this Court to transfer cases is of paramount importance.
46. The transfer of cases from one Court of the Magistracy to another is a supervisory function of the High Court codified in Article 165(6) and (7) of the Constitution in the following terms: -
  - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
  - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice



47. Pursuant to the foregoing, Section 17 of the *Civil Procedure Act* (hereinafter ‘the CPA’) provides as follows: -

17. Power to transfer suits which may be instituted in more than one court:

Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed.

48. Where a contest arises as to which Court of the magistracy shall hear and determine such a dispute, Section 17 mandates the High Court to decide which Court to take over the conduct of the matters.

49. The import of Section 17 of the CPA is an acknowledgement by the law that there are instances where a dispute may properly be instituted in two or more different Courts of the Magistracy.

50. Section 18 of the CPA further provides for transfer and withdrawal of cases before the Magistracy. It provides as under: -

18. 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

51. It can be distilled from the foregoing provisions that, whereas Section 17 of the CPA caters for transfer of cases in instances where one suit is capable of being instituted in two or more Courts, Section 18 of the CPA provides for the general power of the High Court to withdraw and transfer a case from to another Court irrespective of whether such suit may be instituted in more than one Court.

52. In applying any provision of the CPA, this Court is reminded of the objective of the CPA as provided for in Section 1A (1)(2), 1B(1)(a), (b), (c) and (d) in the following manner: -



1A. Objective of Act:

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

1B. Duty of Court:

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
  - (a) the just determination of the proceedings;
  - (b) the efficient disposal of the business of the Court; (c) the efficient use of the available judicial and administrative resources;
  - (c) ...
  - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties;
  - (e) the use of suitable technology

53. Having appreciated the factors which this Court ought to generally consider in transfer of cases in civil law litigation, the Court now turns to the [\*Law of Succession Act\*](#).

54. The place of instituting a succession matter is provided for in Section 48 in the following manner: -

49. Territorial jurisdiction of magistrates:

The Resident Magistrate within whose area a deceased person had his last known place of residence shall, if the gross value of the estate of the deceased does not exceed one hundred thousand shillings, have in respect of that estate the jurisdiction conferred by section 48:

Provided that—

- (i) the magistrate may, with the consent or by the direction of the High Court, transfer the administration of an estate to any other resident magistrate where it appears that the greater part of the estate is situated within the area of that other magistrate or that there is other good reason for the transfer;
- ii. if the deceased had his last known place of residence outside Kenya, the High Court shall determine which magistrate shall have jurisdiction under this section;
- iii. every Resident Magistrate shall have jurisdiction, in cases of apparent urgency, to make a temporary grant of representation limited to



collection of assets situated within his area and payments of debts, regardless of the last known place of residence of the deceased.

55. The foregoing section must be appreciated alongside Section 48 of the [Law of Succession Act](#). The provision grants the Magistracy jurisdiction in succession disputes in the following manner: -

48. Jurisdiction of magistrates

(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this Act, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76 of this Act and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings

Provided that for the purpose of this section in any place where both the High Court and a Resident Magistrate's Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.

56. A holistic reading of Sections 48 and 49 of the [Law of Succession Act](#) lead to the inevitable conclusion that the place of instituting a succession matter is a deceased's the last known place residence. The exception to the foregoing general position is, where there is proof that the greater part of the deceased's estate is situated within the area of that other magistrate or that there is other good reason for the transfer.

57. This Court has comprehensively interrogated the application and the supporting annexures.

58. The now viable ground for consideration, having due regard to the facts of the case and the [Law of Succession Act](#), is the Applicants' contention that the Deceased has a greater portion of his estate in Trans-Nzoia County as opposed to Mavoko.

59. The rest of the depositions, arguments and counter arguments advanced including the contention as to who is the legal wife, children and beneficiaries belong in the substantive hearing of the succession case. Further, this Court notes that both parties have decried difficulty and expenses in attending the other Court.

60. Reverting to the annexures to the application, there is a copy of a Sale Agreement annexed to the Supplementary Affidavit by the 1<sup>st</sup> Applicant. It is marked as LNM-2. The Applicants contended that the Deceased acquired the property and its value justifies the transfer of the dispute to Kitale Law Courts.

61. The Sale Agreement has it that the deceased bought the subject land measuring 0.5 acres on 4<sup>th</sup> December, 2019. The consideration was Kshs. 530,000/=. However, the Applicants did not indicate the said property as among the assets of the deceased in their Petition. The Applicants only disclosed a parcel of land measuring 0.5 acres in Kisii County and the benefits from the Kenya Red Cross.

62. The Respondent did not favour this Court with a copy of the Petition to enable it know her disclosure on the assets of the deceased. Be that as it may, it is most likely that the benefits from the Red Cross may be the largest share of the estate. Further, this Court has to remember that in the event the representatives of Kenya Red Cross are to attend Court, then such expenses attach to the estate and ought to be held at the minimum.



63. Since the assets of the deceased are likely to be spread out in Nairobi County, Kisii County and Trans Nzoia County and the largest share of the estate seems to be the benefits from the Kenya Red Cross, then it is this Court's assessment that the Applicants have not met the threshold that would dislodge application of Section 49 of the Law of Succession Act as far as territorial jurisdiction of Mavoko Law Courts is concerned in this dispute. The said provision is emphatic on the place of succession as 'his last known place of residence'.
64. This Court is reminded of the decision in GKK v ANK & Another (2021) eKLR wherein it was observed thus: -

It was held in the Ugandan case of David Kabungu -vs- Zikarenga HCCC No. 36 if 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.

the burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceeding 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 which 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 principle matters to be taken into consideration are: balance of countenance, questions of expense, interest of justice and possibilities of conduct 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.”

65. In the end, this Court finds and hereby hold that the application is without merit and is for rejection.
66. Before the Court draws this dispute to a close, it remains alive to the calling in Article 159(2)(b) of the Constitution that justice shall not be delayed. To that end, this Court of its own motion, withdraws and transfers Kitale Chief Magistrates Court Succession Cause No. 118 of 2022 to Mavoko Law Courts for consolidation with Mavoko Principal Magistrate Succession Cause No. E006 of 2022 for further hearing and final determination.



67. Consolidation of the two causes is paramount going by the rendition by the Supreme Court in Petition No. 14 of 2013 Law Society of Kenya v The Centre for Human Rights and Democracy (2014) eKLR where the Learned Judges of the Apex Court discussed the concept of consolidation as follows: -

The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.....

**Disposition:**

68. As this Court comes to the end of this decision, it hereby profusely apologizes to the parties for the late delivery of this decision. The delay was caused by the misplacement of the Court file, an act which is highly regretted.

69. Deriving from the foregoing discussion, the following final orders do hereby issue: -

- (a) The Notice of Motion dated 14<sup>th</sup> January 2023 is hereby dismissed.
- (b) The Chief Magistrates Court Succession Cause No. 118 of 2022 at Kitale Law Courts is hereby withdrawn and transferred to Mavoko Law Courts for consolidation with Mavoko Principal Magistrate Succession Cause No. E006 of 2022.
- (c) Given that the matter deals with succession and in view of the looming battle ahead, each party shall bear its own costs of the application.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**A. C. MRIMA**

**JUDGE**

Ruling No. 1 delivered virtually in the presence of:

Miss. Nafula, Learned Counsel for the Applicant.

Mr. Barasa, Learned Counsel for the Respondent.

