



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

MISC. SUCCESSION CAUSE NO.E001 OF 2021

OSHE AMBA TOGE.....APPLICANT

VFRSUS

HIRBE AMBA TOGE.....RESPONDENT

RULING

1. The applicant herein has filed an application dated the 9th March 2021 seeking for prayers that this honourable court be pleased to transfer Succession Cause No. E012 of 2020 from the Kadhi's Court at Moyale to the Kadhi's Court at Marsabit for trial and disposal. The grounds in support of the application are that the applicant works with the National Police Service currently based at Garissa making it difficult for him to seek leave to travel all the way to Moyale. That the advocates for the applicant have their principal place of business at Marsabit. That it will cause great inconvenience, hardship and expense to the applicant and his advocates if the matter was to be heard in Moyale. That there is a major conflict amongst the beneficiaries of the deceased and the applicant is apprehensive that his presence in Moyale will be recipe for conflict as his previous visit to Kadhi's Court at Moyale resulted to him being assaulted by the rest of the beneficiaries. That the witnesses to the will of the deceased are apprehensive that they might be a target if they avail themselves in court for the purpose of testifying and adducing evidence. Further that the respondent is intermeddling with the estate by proceeding with construction even after she was prevailed upon by the applicant and the elders to stop. That the applicant is apprehensive of the impartiality of the Kadhi who is handling the matter at the Kadhi's court at Moyale.

2. The application was supported by the affidavit of the counsel appearing for the applicant, **Mr. Halake Diida**.

3. The application was opposed by the respondent through her replying affidavit sworn on the 16th March 2021 in which she states that she is the petitioner in Moyale Kadhi's Court Succession Case No. E012 of 2020. That the applicant is her son while the deceased herein was her husband. That the notice of motion is bad in law in that the supporting affidavit is sworn by the applicant's advocate instead of the applicant which makes the matters deponed by the advocate in so far as they touch on factual allegations to be plain hearsay. That the law requires for succession matters to be lodged in a court where most of the deceased's properties are located. That the properties of the deceased are in Moyale and there is none in Marsabit. That all the siblings of the applicant live in Moyale. That it is preposterous for the applicant to suggest that it is convenient for him to travel from Garissa to Marsabit than for him to travel from Garissa to Moyale. That the application is punitive to the respondent in terms of costs of travel and subsistence. That the only deduction that can be made of the applicant's quest for change of venue is that he is a forum shopper.

4. It was further deponed that there is no substantiation of impartiality on the part of the judicial officer handling the matter. That the mere act of apprehension of impartiality is not sufficient. That there was no evidence of the applicant being assaulted by the other beneficiaries at Moyale court.

Submissions –

5. The applicant was represented by the firm of **Halake Rambo Muthoga & Muiruri Advocates** while the firm of **Maingi Kamau & Co.Advocates** appeared for the respondent.

6. The advocates for the applicant in their submissions reiterated the averments in the supporting affidavit to the application.

7. The advocates for the respondent submitted that the supporting affidavit by the advocate for the respondent dwells on issues of fact that are in contestation contrary to Order 19 of the Civil Procedure Rules 2010 and The Advocates Practice Rules. That the same ought to be struck out. They made reliance on the case of **Republic vs Cabinet Secretary, Ministry of East African Community and Regional Development; Ewaso Ngiro North Development Authority & Another (Interested Parties); Exparte Omar Mohamed Sheikh (2018)eKLR** where it was stated that:

“As to the propriety of the Affidavit in support of the Motion dated 11th December 2018, the exparte Applicant submits it contains contested matter of fact that would call for the Advocate to be a witness and thus the Affidavit should be struck out.

The Ex parte Applicant relies on the case of Regina Waithira Mwangi Gitau Vs Boniface Nthenge (2015)eKLR in which this issue was discussed as here under;

“On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular. In Simon Isaac Ngugi Overseas Courier Services (K) Ltd 1998 eKLR and Kisya Investment Ltd & others Vs Kenya Finance Corporation Ltd, it was held that -

“.....it is not competent for a party’s advocate to depose to evidentiary fact at any stage of the suit.”

In addition, rule 9 of the Advocates Practice Rules prohibits advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocate’s affidavit creates a legal muddle with untold consequences.

However, where an affidavit by an advocate raises issues of law and fact which are within his knowledge having been an advocate handling the suit on behalf of the party on whose behalf the affidavit is sworn there is absolutely no mistake or error in the affidavit that can render it defective.”

Further, the advocate avers in the affidavit that he is acting on information whose sources he has not disclosed. His averments in the affidavit thus amount to hearsay as submitted by Counsel for the Ex parte Applicant.

I am persuaded that the supporting affidavit by Ernest Mutinda Kioko counsel for the Applicant/Respondent offends both the provisions of Rule 9 of the Advocates Practice Rules and the Rules of Evidence. I accordingly strike it out.”

8. It was submitted that the employment inconvenience of the applicant and the convenience of his advocate is no basis of transferring a suit from one territorial jurisdiction to another. That the other beneficiaries are residents of Moyale. That the transfer of the suit from Moyale to Marsabit will cause greater inconvenience and expense to the respondent and the other beneficiaries than will be caused to the applicant. That no material has been placed before the court to demonstrate the existence of assault on the applicant and threat to witnesses.

9. It was further submitted that the allegation of impartiality has not been demonstrated and neither has the test laid down by courts for such been met. The advocates relied on the case of **Kaplana H. Rawal v Judicial Service Commission & 2 others** (2016)eKLR where it was held that:

The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.”

Analysis and Determination-

10. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions. The High Court has power to withdraw and transfer a case instituted in a subordinate court to another court under the provisions of section 18 of the Civil Procedure Act which provides as follows:

“...the High Court may at any state –

(a) Transfer any suit, appeal or other proceeding 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)

(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).....

11. The power to transfer a case should however be exercised judicially and only where the circumstances of the case so warrant so as to

facilitate a just and efficient resolution of the dispute. The court cannot transfer a case on flimsy and baseless allegations. A clear basis has to be laid out before such an application can be allowed.

12. The reasons given by the applicant for transfer of the case from Moyale to Marsabit include complains of the distance of the said court from his base at Garissa; the convenience of his advocate who is based at Marsabit; the threat to his life and his witnesses by the other beneficiaries and intermeddling with the estate by the applicant. In my considered view, none of these is a valid reason for the transfer of the case from Moyale to Marsabit. It is not in dispute that the properties of the estate in this matter are in Moyale and that all the other beneficiaries reside in Moyale. The law requires for a suit to be filed where the property is situated. Moreover, the convenience of the applicant or his advocate can never by itself be a ground for a transfer of a case. There is no evidence that if the applicant's witnesses testified in Marsabit as opposed to Moyale that this will prevent them being targeted by the other side. If the applicant fears being attacked by the other beneficiaries if he attends court at Moyale he has the option of applying to the court to provide adequate security on his day of appearance. Similarly, if the respondent has intermeddled with the estate there are other legal options available to the applicant that he can employ to stop the intermeddling. The transfer of the matter will not solve the issue of intermeddling with the estate. The grounds for transfer stated above are not merited. I am in agreement with the submissions by the advocates for the respondent that the transfer of the case to Marsabit will cause greater inconvenience and expense to the respondent and the other beneficiaries than it would cause the applicant.

13. The other ground cited by the applicant is the impartiality of the judicial officer handling the matter at Moyale. The test in determining whether a judicial officer is biased in a case is as was stated by the Court of Appeal in the case of **Philip K. Tonui & Another vs Judicial Service Commission & Another** (2016)eKLR where it was held that:

“in determining the existence or otherwise of bias, the test to be applied is that of a fair minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias”.

14. The burden of proof lies on the applicant to establish the facts upon which the application is based. In **Kapana Rawal vs Judicial Service Commission** (supra) the court stated that:

“It cannot be gainsaid that the applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. It is not enough to just make a bare allegation. Reasonable grounds must be presented from which an inference of bias may be drawn.”

15. The only issue raised by the applicant to imply bias by the Kadhi's court is the manner in which the Kadhi dispensed with an interlocutory application that was before him. There is no substantiation on the manner in which the Kadhi dealt with the application. There is then no basis of determining that there is a real possibility of bias on the part of the Kadhi. The ground of bias is a red-herring and is accordingly dismissed.

16. The last issue is whether it was proper for the Counsel for the applicant to swear the supporting affidavit in support of the application. The respondent made a response to the supporting affidavit by the counsel for the applicant and contested most of the issues raised therein. She took issue with the counsel for the applicant swearing the supporting affidavit on matters that are in contestation.

17. **Rule 9 of the Advocates (Practice) Rules** allows an advocate to swear affidavits on matters concerning his client only on formal or non-contentious matters of fact. **Order 19 Rule 3** of the Civil Procedure Rules 2010 requires the contents of affidavits to be confined to only matters that are in the personal knowledge of the deponent. The only issues in the supporting affidavit that were in the personal knowledge of the counsel for the applicant is his place of business and the current residence of his client at Garissa. Otherwise the rest of the affidavit contained matters of fact that were not in the personal knowledge of the counsel for the applicant and which matters were contested by the respondent. It is only the applicant who could swear on the truthfulness of the matters raised therein. In the absence of an affidavit by the applicant himself, the end result is that there is no valid affidavit to support the application by the applicant.

18. The upshot of the foregoing is that there is no merit in the application dated 9th March 2021. The same is accordingly dismissed with costs to the respondent.

DELIVERED, SIGNED AND DATED AT MARSABIT THIS 30TH DAY OF JUNE 2021.

JESSE N. NJAGI

JUDGE OF HIGH COURT

In the presence of:

Mr. Halake for Applicant

Mr. Behailu for Respondent Through video link

Parties:

Applicant - absent

Respondent - absent

Court Assistant – Godana

30 Days R/A.