



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO. 8 OF 2019

NICHOLAS SHIVAJI AMUTAVI.....APPLICANT

VERSUS

BEATRICE ACHITSA BIHEMBO.....RESPONDENT

RULING

1. The cause herein was initiated by a Motion dated 29th March 2019, seeking that Hamisi PMSC No. 96 of 2018 be transferred from the Hamisi court to the High Court for hearing and disposal. The application has been responded to by the respondent, who has not dwelt on the principal issue of transfer, but on the merits of the dispute between her and the applicant.

2. The factual basis of the application is set out on the face of the application, as well as in the affidavit in support. The matter is at the stage of confirmation, and the applicant herein, and others, have filed protests to the proposed confirmation, ostensibly on grounds that the grant was obtained fraudulently and through concealment of facts from the court. Their argument is that since the grant in Hamisi PMSC No. 96 of 2018 had initially been made by the High Court, before the cause was transferred to the Hamisi court, the magistrate's court had no jurisdiction to revoke the said grant. I have seen the grant on record. It was issued by the High Court. The transfer of the cause to the magistrate's court created a situation where the magistrate's court has before it, a grant that was issued by the High Court. It feels that cannot revoke, nor confirm it.

3. I do not think that the magistrate's court should be worried about the proceedings that were conducted by the High Court and the orders made by that court. The same should not present any challenge to the magistrate's court. Once the High Court ordered transfer of the cause to the magistrate's court, the magistrate's court adopted the same wholly, that is the previous proceedings, and the orders made by the higher court. When the magistrate's court eventually gets seized of the matter, it adopts the proceedings and orders and by the magistrate's court, and they become orders of the magistrate's court, capable of being vacated or set aside or reviewed by the magistrate's court.

4. The magistrate's court should not at all feel like its hands are tied, and that it is in some sort of straitjacket, for it is not possible that in the same cause a portion of the proceedings should be treated as High Court proceedings and the other portion as magistrate's court proceedings. There can only, and, indeed, there is only one set of proceedings, that are being conducted by the magistrate's court. Whatever the High Court did in the matter, before the transfer, cannot be isolated and treated as High Court proceedings that the magistrate's court cannot touch. There are no High Court proceedings in that file, all the proceedings are now magistrate's court proceedings, which the magistrate's court can deal with in any manner consistent with its jurisdiction. The magistrate's court now has jurisdiction, under section 48(1) of the Law of Succession Act, Cap 160, Laws of Kenya, as amended by section 23 of the Magistrates Courts Act, No. 26 of 2015, to revoke grants made in the succession causes that they are seized of. That would mean that the Hamisi court could quite properly revoke the grant made in made in Kakamega HCSC No. 187 of 2016, as the transfer of the cause to the Hamisi court brought that grant within its jurisdiction. It could revoke it or make such other orders as may bring the grant in line with the cause at the magistrate's court.

5. The cause had been transferred to the magistrate's court because the pecuniary jurisdiction of the magistrate's court had been increased to a level that the Hamisi court could handle. Secondly, the property in question is situate within the local limits of the jurisdiction of the Hamisi court, and transfer was intended to ensure access to justice, by taking the matter to the court nearest to the parties and the disputed property. A transfer of the cause herein, back to the High Court, merely because the grant the magistrate's court is having in its file had been issued by the High Court, would defeat those objectives.

6. I believe justice would be served if I decline the transfer of the cause, so that the same remains at the Hamisi court, but instead revoke the grant made in Kakamega HCSC No. 187 of 2016, on the ground set out in section 76(e) of the Law of Succession Act, Cap 160, Laws of Kenya, that the grant has become useless and inoperative following the transfer of the cause to the Hamisi court. Such order would also obviate the need to keep shuffling the cause in Hamisi PMSC No. 96 of 2018 from one court to the next, which, no doubt, causes inconvenience and hardship to the parties.

7. In the end, the orders that shall I shall make are as follows:

(a) That I decline to grant the order sought for transfer of Hamisi PMSC No. 96 of 2018 to the High Court at Kakamega

for disposal;

(b) That I shall, instead, revoke the grant made in Kakamega HCSC No. 187 of 2016, for the reasons that I have stated in paragraph 5 of this ruling;

(c) That I direct that a fresh do issue to Beatrice Achitsa Bihembo, out of Hamisi PMCSC No. 96 of 2018;

(d) That the Hamisi court shall thereafter proceed to handle the matter within the jurisdiction that is conferred upon it by the Magistrates Courts Act, No. 26 of 2015, and the Law of Succession Act; and

(e) That each party shall bear their own costs.

8. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF MARCH, 2020

W. MUSYOKA

JUDGE