



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS APPLICATION NUMBER 20 OF 2019

IN THE MATTER OF THE ESTATE OF AHMED ALI (DECEASED)

FAUZI SAID ALI.....1ST APPLICANT

KHALID SAID AHMED ALI.....2ND APPLICANT

VERSUS

ILHAM ABDALLAH MOHAMED.....RESPONDENT

R U L I N G

1. The Notice of Motion before me is brought under **Section 3A, Section 18 of the Civil Procedure Act, Order 42 rule 6, Order 51 of the Civil Procedure Rules 2020 and all the enabling provisions of the law.**

It seeks orders;

1. Spent.

2. THAT this Honourable Court be pleased to stay proceedings in the main suit Nakuru Kadhi's Court Miscellaneous Application Number 3 of 2016 – In the Matter of the Estate of Said Ahmed Ali (deceased), Fauzi Said Ali (deceased), Fauzi Said Ali & Another v Ilham Abdallah Mohamed, pending the hearing and determination of this application inter parties.

3. THAT this Honourable Court be pleased to order that Nakuru Miscellaneous Application Cause Numbe 3 of 2016 – Kadhi's Court; In the Matter of the Estate of Said Ahmed Ali (deceased), Fauzi Said Ali & Another v Ilham Abdallah Mohamed be transferred to Kadhi's Court at Busia for final hearing and determination.

4. THAT costs of the application be in the cause.

It is based on the grounds on the face of the application:-

1. THAT Nakuru Miscellaneous Application Cause Number 3 of 2016, is currently proceeding at the Nakuru Kadhi Court and the same will be coming up for hearing on 14th October, 2019.

2. THAT the applicants wish to have the entire suit transferred to the Kadhi's Court in Busia for final hearing and determination thus filing this application.

3. THAT the deceased herein was born, lived his entire life and died domiciled in Busia County.

4. THAT all the deceased's property are within Busia County namely:- Land Parcels South Teso/Angoromo/1286, South Teso/Angoromo/1150, South Teso/Angoromo/996, South Teso/Chakol/953, South Teso/Chakol/967, L.R. No. South Teso/Chakol/995, Busia Township/401, L.R. Bukhayo/Bugenge 5106 and not the territorial jurisdiction of the Honourable Kadhi in Nakuru.

5. THAT furthermore, almost all beneficiaries to the deceased's estate including the creditors all reside in Busia County.

6. THAT it is in the interest of justice that the proceedings before the Honourable Kadhi's Court be stayed as the prayer for transfer of the suit is determined.

7. THAT it is only fair and just that orders sought herein be granted for the expeditious disposal of the matter.

8. THAT the respondent will not suffer great prejudice if the application is allowed as prayed and the ends of justice will be best served if the application is granted and matter heard on merit.

2. It is also supported by the Affidavit of Jared Sala Advocate sworn on 11th October, 2019 which reiterates the grounds on the face of the application. Annexed to the Affidavit are the Pleadings, Notice of Motion in **Miscellaneous Application 3 of 2016** at Kadhi Court in Nakuru in **Re the late Said Ahmed Ali**. The Notice of Motion is dated 29th February, 2016. It is supported by the affidavit of Fauzi Said Ali.

3. The respondent Ilham Abdalla Mohammed filed Grounds of Opposition dated 23rd October, 2019 and a Replying Affidavit sworn on 21st October, 2019. The Grounds of Opposition are:-

1. THAT the High Court of Kenya at Nakuru issued orders to transfer the Miscellaneous Application Cause Number 3 of 2016 relating to the Estate of the deceased herein from Eldoret to Nakuru on 30th October, 2014. This Honourable Court therefore, has no jurisdiction or powers to vary, review and/or set aside orders of another court of equal status.

2. THAT this application is a non-starter as it flouts the provision of Order 32 rule 2 of the Civil Procedure Rules that requires such applications to be filed by all the three administrators as co-administrators.

3. THAT there is unreasonable delay in the applicant's application since the proceedings being sought to be transferred were initiated by the applicants themselves in the year 2016 and have been ongoing and no party has ever complained that they incur unreasonable expenses to prosecute the case.

4. THAT the proceedings at Kadhi's Court in Nakuru are almost over and what is pending is valuation of the Estate and distribution only and any orders to transfer the case to another court amounts to abuse of Court process and violates the spirit of expeditious disposal of cases.

5. THAT the applicant's application seeks to delay this matter that has been ongoing since the year 2008 which exposes the Estate of the deceased to risk of wanton destruction.

4. In the Replying Affidavit, the respondent depones that;

3. THAT this succession cause began 11 years ago when we filed a petition for grant of letters at the High Court in Busia being Succession Cause Number 186 of 2018.

4. THAT on 30th November 2009 the High Court of Kenya at Busia issued a grant of letters of administration appointing, the 1st applicant herein, his sister Hawa Said Ahmed and myself are co-administrators of the Estate of the deceased **[annexed is a copy of the grant of letters of administration marked as IM -1]**.

5. THAT during the pendency of the Succession Cause in Busia, the Applicants filed another succession case at Kadhi's Court in Eldoret being Miscellaneous Application 13 of 2013 for distribution of the estate of the deceased which application was heard and determined by the Kadhi Court in Eldoret **[Annexed are copies of the pleadings in Eldoret Kadhi Court Marked as IM-2]**.

6. THAT being dissatisfied with the said judgment, the applicants filed an appeal against the said judgment being High Court Civil Appeal Number 130 of 2019 challenging the judgment of the Kadhi's Court at Eldoret.

7. THAT in its judgment dated 30th October 2014 the High Court sitting in Eldoret set aside the judgment of Kadhi and ordered for the matter to be transferred to Kadhi Court Nakuru for fresh distribution **[Annexed is a copy of the judgment marked as IM - 3]**.

8. THAT pursuant to the High Court judgment the applicant filed another succession case at Nakuru Kadhi Court being Miscellaneous Application Number 3 of 2016 which proceedings they now want to transfer to Kadhi's Court at Busia.

9. THAT the proceedings at Kadhi's Court Nakuru has substantially been concluded and all the parties have testified what is pending is valuation and final distribution of the said estate and orders thereto already issued **[Annexed is a copy of order from Kadhi marked as IM-4]**.

5. Annexed to the affidavit is:-

(i) Grant of Letters of Administration of Estate intestate in **Busia High Court Succession Cause Number 186 of 2008** issued on 30th November, 2009 in the estate of Said Ahmed Ali. The personal representatives are;

- Ilham Abdallah Mohamed

- Hawa Said Ali
- Fauzi Said Ali

(ii) Chamber Summons dated 1st September, 2009 before the **Kadhi's Court Eldoret Miscellaneous Application 13 of 2009**. The applicants there are the applicants here.

(iii) Judgment in **Fauzi Said Ali & 3 others vs. Said Ahmed Ali (Deceased) & Another [2014] eKLR**.

6. The applicants counsel filed submissions on 11th December 2009. I did not see any from the respondents hence my assumptions that they intend to rely on the Grounds of Opposition and Replying Affidavit.

For the applicants it was submitted issues for determination were three:-

- (i) Whether this court has jurisdiction to determine this application.*
- (ii) Whether the application flouts the provisions of order 32 rule 2 of the Civil Procedure Rules.*
- (iii) What elements are to be satisfied before proceedings are stayed.*

Having perused the affidavits annexures and submissions, I think those are the issues that pop out.

7. On jurisdiction

The respondent's argument is that this matter was transferred to the Kadhi's Court in Nakuru by the High Court sitting in Busia, hence this court had no jurisdiction to vary, review or set aside the orders of a court of equal status. To this end, the respondent relied on the decision of this court in **Fauzi Said Ali** above. In that case the judge stated:-

“The distribution of the estate shall be done by the Kadhi's Court Nakuru and not in Eldoret...”

For the applicant, counsel's arguments appear not to have taken into account the above order by THIS COURT. He argues about, the deceased having been domiciled in Busia, all his property being in Busia etc. He relies on **Section 18 of the Civil Procedure Act, the Lilian “S” Case (1989) IKLR, John Beercoft Sanders** treatise in ‘*Words and Phrases legally defined Volume 3 at page 113*’ and the case of **Re Estate of Erastus Muriungi Ngaruthi [2015] eKLR**, where the High Court sitting in Meru found that since the deceased's assets were located in South Imenti, the magistrate at Chuka Law Courts did not have jurisdiction.

8. **Section 18 of Cap 21** states;

“S.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.”

9. This court already pronounced itself on this issue. **Section 18(1)** states clearly that the High Court may, “...of its own motion...at any stage” transfer, withdraw and transfer, basically do all the things under **Section 18**. In the appeal case, **Fauzi Said Ali** the High court transferred the case to Nakuru from Eldoret. The court was alive to all the issues raised herein, as will clearly be seen from the said judgment. This is an application for review, and even if it was, it would have to be filed before the High Court sitting in Eldoret, but not before this court. The applicants had that opportunity to go back to Eldoret or appeal against the said decision, but chose not to.

10. That brings me to the issue of elements for stay, delay generally. The order transferring this case to Nakuru was made by the High Court sitting in Eldoret on 30th October, 2014, the matter before the Kadhi Court Nakuru, **Miscellaneous Application 3 of 2016** was filed in 2016. Even before this matter was filed before the Kadhi's Court the applicant had all the time to file for review. What is disturbing however is that it is the applicants in the **Nakuru Kadhi's Miscellaneous Application 3 of 2016** who have brought this application for transfer! They abided by the order of the High Court filed the matter before Kadhi's Court Nakuru, in 2016 and now, three years later, when the matter is at its tail end, they want a transfer. They cannot be allowed to do that as it appears as if there is something they wish to circumvent or they are forum shopping, the order was made, they complied, and they cannot be heard now to ask for a transfer. They must wait for the case to end, and if they are aggrieved they can proceed to seek other orders.

For now they are estopped from seeking the orders they are seeking.

In support of their position to stay the proceedings, the applicant relied on;

1. Global Tours and Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000.

2. Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR.

Quoting from **Kenya Power** where it was held;-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

“To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

a) Whether the applicant has established that he/she has a prima facie case arguable case,

b) Whether the applicant was filed expeditiously and

c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”

Once again I must state herein, in this case the issues being raised here were dealt with in the appeal case, and in any event these authorities support the case from the respondent, not to stay the proceedings before the Kadhi's Court, because they are properly there vide an order of this court. It is a waste of judicial time considering that the applicants, are the same persons who have been litigating before these courts since 2009, more specifically before the same court, since 2016. The application has been brought after an unreasonable delay!

11. Clearly therefore even without going into the other issues raised by the two (2) parties, this court has already pronounced itself on the issue of the forum where the matter is being heard. The application is an abuse of this court process and must be denied.

12. The same is dismissed with costs to be assessed by the Deputy Registrar to the respondent.

Delivered, Dated and Signed at Nakuru this 23rd day of April, 2020.

Mumbua T. Matheka

Judge

In the presence of:- Via Email by consent of

Ali & Company Advocates

Sala and Mudany Advocates

Edna Court Assistant