



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

MISCELLANEOUS APPLICATION NO. 31 OF 2020

IN THE ESTATE OF PETRO OKUMBE OUKO.....DECEASED

AND

DR. JAMES OUKO OKUMBE.....APPLICANT

-VERSUS-

DR. JOSHUA ABONGO OKUMBE.....RESPONDENT

RULING

1. By a Notice of Motion dated 4th May 2020, the applicant herein **DR. JAMES OUKO OKUMBE** seeks for orders:-

(1) that the Succession Cause No. 430 of 2018 filed at Bondo Principal Magistrate's Court be transferred to the High Court at Siaya for determination.

(2) Costs of the application be provided for.

2. The application is premised on the grounds that the parties hereto are petitioners and co administrators in Bondo Principal Magistrate's Court Succession Cause No. 430 of 2018 in the matter of the estate of Petro Okumbe Ouko (Deceased).

3. That they were jointly issued with a grant of letters of administration intestate on 29/1/2019 as co-administrators. That the deceased was their father and that based on the results of the Valuation Report by Odongo Kabita & Co. Valuers, the value of the property known as LR No. Bondo/Nyangoma/1381 make a total of Kshs. 17,000,000 thereby exceeding the pecuniary jurisdiction of the Magistrate's Court.

4. Further, that there are also several other properties that have been excluded from the list of properties forming part of the estate of the deceased herein with an aggregate valuation of about Kshs. 60,000,000 (sixty million).

5. In addition, it was asserted that the Principal Magistrate's Court in which the Petition was filed lacks the requisite pecuniary jurisdiction to preside over and dispose of the Succession Cause herein since the value of the estate is in excess of the permitted Kshs. Ten million (10,000,000).

6. Further, that the applicant filed a fresh petition at the Siaya High Court vide **Succession Cause No. 3 of 2019** which was struck out and that the court directed that the applicant ought to have filed an application before the High Court seeking for the transfer of the Bondo Succession Cause to the High Court for hearing and final determination; and that there is need for transfer of the Succession Cause from Bondo PM's court to the High Court at Siaya for hearing and final determination.

7. The application is further supported by the affidavit sworn by **DR. JAMES OUKO OKUMBE** the applicant herein, reiterating the grounds and adding that the documents submitted in court before the grant was issued to the parties hereto jointly showed that the deceased's estate was only comprised of one parcel of land known as **LR Bondo/Nyangoma/1381** which has both the deceased's person's and the applicant's homestead.

8. That after valuation of the said property, it was found to be valued at Kshs. 17,000,000 as per the annexed copy of Valuation Report dated 7/2/2020.

9. That further investigations at the Lands Office revealed that there are several properties which ought to form part of the estate of the deceased namely: LR Bondo/Nyangoma/5053; Commercial Plot No. 14 Wagusu; Wagusu Beach Migwena sub-location, which properties were excluded from the estate including agricultural land in Wagusu Beach - Migwena sub-location with an aggregate value of Kshs. Sixty million (Kshs. 60,000,000).

10. That when the applicant realized this, he filed an application before Bondo PM's court seeking to have the court recuse itself from hearing the Succession Cause for want of pecuniary jurisdiction and that the court instead stayed the succession proceedings pending a formal application to transfer the matter to the High Court.

11. That the applicant filed a fresh Petition before this Court vide HC Petition No. 3 of 2019 which was struck out and that this Court stated that the applicant ought to have filed an application for transfer of the proceedings to this Court hence this application.

12. That the PM's court only has pecuniary jurisdiction of Kshs. 10,000,000 hence the Bondo P&A Cause should be transferred to the High Court for hearing and determination. Copy of the said Ruling is annexed to the affidavit.

13. The Respondent **DR. JOSHUA ABONGO OKUMBE** filed Replying affidavit opposing the application for transfer of succession proceedings from Bondo PM's Court to the High Court and contended that their late father's estate comprises LR Bondo/Nyangoma/1381 as shown by copy of certificate of official search.

14. Secondly, that **LR Bondo/Nyangoma/5053** is registered in the name of the Respondent and Title Deed issued on 3.3.2017 following successful completion of adjudication process; That Plot No. 14 Wagusu was allocated to the Respondent by Siaya County Council and registered in the Respondent's name, not in the name of the deceased Petro Okumbe Ouko, as shown by annexed Transfer form and letter dated 17.7.1983 hence the two named properties are not available for distribution in the estate of the deceased Petro Okumbe Ouko in Succession Cause No. 430/2019 at Bondo PM's Court. Finally, that details of Plot No. Wagusu Beach - Migwena sub location have not been disclosed.

15. The respondent further deposed that vide Bondo PM's court Civil Suit No. 2 of 2019 the applicant had filed suit claiming that the applicant had acquired the named properties from the estate of the deceased which suit was dismissed vide an annexed Ruling dated 5/5/2019.

16. That in fact the applicant constructed a palatial home on the land parcel No. Bondo/Nyangoma/1381 before succession proceedings are finalized and that the Bondo PM's court in the succession cause declared him an intermeddler in the estate of Petro Okumbe Ouko.

17. Further, it is deposed that the alleged valuation was done to enhance the value of the estate by virtue of a house constructed on the deceased's parcel of land No. Bondo/Nyangoma/1381 and that the value of the said house is not even disclosed.

18. That the valuation by Horizon Valuers Ltd commissioned by the Respondent estimates the current value of the said parcel of land to be only 3.7 million including improvements thereon but excluding Kshs. 11.7 million, the latter being the value of the applicant's palatial home illegally constructed on the said land hence the estate of the deceased is within the pecuniary jurisdiction of Bondo PM's Court.

19. The Respondent deposed that the applicant is untruthful for not disclosing the value of the palatial house if he claims it is part of the estate of their deceased father.

20. According to the Respondent, the application is brought in bad faith and without due regard to the other beneficiaries of the estate and with the intention of delaying the distribution of the estate in order for the applicant to complete the illegal construction of his residential house on the deceased's estate.

21. Parties' advocates filed written submissions canvassing the application, reiterating the grounds and depositions in their respective affidavits.

22. On the question of jurisdiction the applicant's counsel submitted citing the owners of **Motor Vessel Lilian 'S' Vs Caltex Oil Kenya Ltd [1989]KLR case where** it was held inter alia that where a court takes it upon itself to exercise jurisdiction which it does not possess, its decisions amount to nothing.

23. Counsel for the applicant submitted that under Section 7(1) of the Magistrates' Courts Act, the Principal Magistrate's Court has pecuniary jurisdiction of upto Kshs. 10 million in Succession matters and that the applicant had demonstrated that the value of the estate of their late father exceeds the pecuniary jurisdiction of the said Magistrate's Court and that in the said land parcel No. **Bondo/Nyangoma/1381** is his home. He urged this court to allow the application.

24. On the part of the Respondent, it was submitted wholly relying on the detailed affidavit sworn by the Respondent on 18/5/2020 contending that the applicant is an intermeddler as declared in Bondo PM's Court Civil Suit No. 2 of 2019 and that the other properties named and alleged to exceed Kshs. 60 million are not part of the deceased's estate. Further that in any case, the applicant had not even disclosed the value of his residential house illegally constructed on the land subject of succession proceedings.

DETERMINATION

25. I have carefully considered the application herein, grounds and supporting affidavit as well as the Replying affidavit and the respective parties' written submissions canvassing the application.

26. The main issue for determination is whether this application has any merit.

27. The motion is brought under Section 48 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules as well as Section 7(1) of the Magistrates' Courts Act.

28. What is not in dispute is that the applicant and Respondent are both sons of the deceased Petro Okumbe Ouko and that they are co-administrators of the estate of the deceased Petro Okumbe Ouko in **Bondo PM'S Court Succession Cause No. 430 of 2018**.
29. It is also not in dispute that in the said Petition wherein a grant was issued to the parties herein jointly on 29th January 2019, the Petitioners herein now co administrators listed Asset **LR No. Bondo/Nyangoma/1381** as the only asset comprising the estate of the deceased and which land is registered in the name of the deceased Petro Okumbe Ouko.
30. It is further not in dispute that the estate has not been distributed among all the beneficiaries of the estate, which beneficiaries, a part from the parties hereto, have not been named or disclosed.
31. Further, I observe that the applicant has not disclosed to this court the estimated value of the deceased's estate as at the time they jointly petitioned for grant in **Bondo PM Succession Cause No. 430 of 2018** and no documents filed in that Succession Cause in petitioning for grant have been annexed to the affidavit in support of the application herein.
32. It is further not in dispute that the applicant herein, while the said succession proceedings were pending before Bondo PM's Court, he filed another succession cause before this Court, being **High Court Succession Cause No. 3 of 2019** which was struck out for being an abuse of court process as the parties could not have Succession causes pending in two different courts over the same intestate estate.
33. This Court then observed that it could only have entertained an application for transfer of the succession cause to the High Court. I must however make it clear that that was not an order of this court that Bondo Succession proceedings be transferred to this court for disposal and if that were the case then there would be no need for this application seeking for transfer of **Bondo PM Succession Cause No. 430 of 2019**.
34. The application herein is vehemently opposed and in the Replying affidavit sworn by the Respondent, it is hotly contested that the land subject of the grant already issued in their favour exceeds Kshs. 10 million as alleged by the applicant.
35. Whereas the applicant has annexed a Valuation Report showing the value of the land subject of succession proceedings in the Bondo Principal Magistrate's Court to be Kshs. 17 million, the Respondent also filed a counter Valuation Report which shows that the land in question including all developments but excluding a palatial home constructed allegedly illegally by the applicant is valued at Kshs. 3.7 million.
36. The other properties listed by the applicant which are allegedly part of the estate of the deceased and which were allegedly discovered later are said to be valued at over Kshs. 60 million. However, the Respondent annexed documents showing that the properties in question do not form part of the deceased's estate and that neither are they available for distribution because they are not registered in the deceased's name but in the Respondent's name.
37. Commencing with the question of the value of the estate, it should be noted that when filing succession proceedings, no valuation report is necessary. The value of the estate is usually given as estimation which then guides the court on jurisdiction to determine the succession proceedings.
38. However, where it becomes trite clear that the pecuniary jurisdiction of the court is exceeded by the value of the estate, then such court cannot determine such succession proceedings. The court would have to down its tools as stipulated in Section 7(1) of the Magistrates' Court Act and as espoused in **Motor Vessel Lilian 'S' Vs Caltex Oil Kenya Ltd** (supra case) where the Court of Appeal made it clear that jurisdiction is everything, without which, a Court of Law acts in vain.
39. In the instant case, both the Applicant and Respondent consented to filing of succession cause before Bondo PM's court and obtained a grant which has not been revoked. The said grant has not been confirmed to pave way for distribution of the estate of the deceased among the beneficiaries of the estate and the parties hereto are among those beneficiaries. There is no evidence suggesting that they are the sole beneficiaries of the said estate as none of the succession documents supporting the petition have been placed before this court.
40. In my humble view, if the parties failed to disclose the correct value of the estate of the deceased at the time of petitioning for grant and waited until the grant was issued to administer a particular specific asset of the estate of the deceased person, they cannot turn around to approach this court to sanitize that which was unsanitary. The unsanitary part of it is that this court is being asked to call into this court irregular proceedings for purposes of regularizing them and not for the purpose of quashing them. That is not the spirit and letter of Article 165(5) and (6) of the Constitution on the exercise of supervisory jurisdiction of this court. The law is clear that where proceedings are conducted without jurisdiction, this court would only intervene under Article 165 of the Constitution to quash and not to sanitize them. On the other hand, this court can entertain an appeal arising from such proceedings where a subordinate court proceeds to entertain proceedings in the absence of jurisdiction to do so, and not to intervene by way of transfer of proceedings, where there are issues of jurisdiction of the subordinate court being raised.
41. In other words, where there is outright claim of want of jurisdiction, this court has no jurisdiction to transfer a matter to this court for determination. The parties must bear the consequences of filing a matter before a court which has no jurisdiction and that court has the necessary competence to make a determination on whether it has jurisdiction to hear and determine the matter before it or not. This not being an appeal or judicial review proceedings, this court would be usurping the powers of the Magistrate's Court if it determined that the said court has no jurisdiction and that the proceedings pending before it should be transferred to this court for hearing and final determination, on the basis of want of jurisdiction.
42. On whether this court can transfer a suit or proceeding to itself where there is an allegation that the subordinate court has no pecuniary or other jurisdiction to hear and determine the same, this court is guided by the most recent decision in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR** citing many other decisions of the Court of Appeal where the Court of Appeal stated:

“Decided cases on this issue are legion and we cannot cite all of them. The case of Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

“It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. CIVIL APPEAL NO. 6 OF 2018 PHOENIX EAST AFRICA ASSURANCE CO.LTD v. S.M. THIGA T/A NEWSPAPER SERVICES is therefore a nullity as it was based on a nullity. We have said enough to demonstrate that this appeal has merit. We allow it with costs to the appellant.”

43. The above decision cited other Court of Appeal decisions where it was held:

“In another locus classicus in this subject, this Court pronounced; Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989):

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

“These words were echoed by this Court in Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR in the following words:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

44. Secondly, albeit the applicant claims that the estate of the deceased is valued at over 60 million including other parcels of land named in the affidavit in support of this application, he never bothered to annex evidence of ownership of those other landed properties and after the Respondents filed copies of search certificate and transfer letter and form for the other two named properties, it became apparent that the said properties are registered in the Respondent’s name, not in the deceased’s name. Further, no details are given for one **other property**.

45. Property not registered in the name of the deceased cannot be listed as part of his estate for distribution. If the Applicant believes that the Respondent ‘grabbed’ those properties from the estate of the deceased or illegally obtained the titles to the said properties, there are legal avenues for reclaiming such properties but not through succession proceedings.

46. In addition, the applicant who is a co administrator with the Respondent can adduce evidence during distribution of the estate to show that the Respondent (assuming that is the position), was given his share of his father’s estate prior to the demise of the deceased (*Gift inter vivos*). Outside those principles, any court of Law would be exceeding its jurisdiction if it purported to assist any party administer an estate of a living person and further purport to merge property of the living persons and of the dead. That is totally unacceptable.

47. That leaves us with LR Bondo/Nyangoma/1381. It is alleged that its value exceeds 17 million which exceeds the 10 million pecuniary jurisdiction of the Principal Magistrate’s Court. It is trite that Section 7(1) of the Magistrates’ Courts Act limits the pecuniary jurisdiction of the Magistrates’ Courts to Kshs. 10 million and this Section must be read with Section 23 of the Magistrates’ Court’s Act on the jurisdiction of the Magistrate’s courts in Succession proceedings.

48. As earlier stated, it is not indicated to this Court as to the estimated value of LR Bondo/Nyangoma/1381 given to the Magistrate’s Court when filing the Petition. However, subsequently, the Applicant who is a co-administrator with the Respondent in the Bondo Succession Cause caused the said property to be valued and vide a report dated filed herein, the land which is registered land measures 2.42 hectares (6 acres) and free from any encumbrance has two homesteads, one for parents of the parties hereto and another homestead for Hon. James Okumbe the Applicant herein. The Applicant’s homestead comprises an incomplete maisonette but no value is given to the maisonette

meaning no valuation was done for the house which is still undergoing construction. Instead, the valuer placed the value of land to be Kshs. 1,900,000/= and improvements to be valued at Kshs. 15,000,000 totaling Kshs. 17,000,000.

49. On the part of the Respondent, he annexed copy of Valuation Report dated 18/5/2020 done by Horizon Valuers Ltd, showing that the estimated value of the land is Kshs. 1,800,000, parents' homestead improvements are estimated at Kshs. 1,900,000/=, whereas the applicant's house under construction is valued at Kshs. 11,700,000/=. It is also stated that the open market value is Kshs. 15,400,000/=.

50. Photographs of the said land and developments on it including the applicant's newly constructed house are annexed.

51. From the above two valuation reports, it is clear that the new developments on the land subject of the succession proceedings are not the property of the deceased Peter Okumbe Ouko and therefore cannot be subject of distribution to all the beneficiaries of the estate of the deceased.

52. What would be available for distribution is the value of the land as a whole with its developments carried out by the deceased and not the applicant's palatial home.

53. What that translates into is that the value of the estate in my humble view, for purposes of the intended distributions, remains exclusive of the applicants' house, as may be valued later by a valuer jointly appointed by the administrators.

54. As matters stand, there is no evidence that the LR Bondo/Nyangoma/1381 being the estate of the deceased Peter Okumbe Ouko, exceeded or was estimated to be valued at or near to Kshs. 10,000,000.

55. In my humble view, it is an overestimation of the estate of the deceased's estate yet, from the pleadings and deposition hereto, there is no indication from the applicant that he would be willing to make his palatial home available for distribution to other beneficiaries as forming part of the estate of his late father. In my humble view, the overstatement of the value of the deceased's estate will not assist the applicant in any way. I note that he has already been restrained from intermeddling with the estate of the deceased.

56. I further find no prejudice occasioned or anticipated to be occasioned to him. It is my humble view, this application, like the other Succession Cause which was struck out by this court is an abuse of court process.

57. For all the above reasons, I find the application for transfer of Bondo PM **Succession Cause No. 430 of 2018** to the High Court for hearing and determination not merited.

58. I dismiss this application and for avoidance of doubt, this court has not determined the jurisdiction of Bondo PM's court to hear and determine the Succession Cause pending before it as that court has the power to determine whether or not it has the necessary jurisdiction to hear and determine the proceedings before it. As and when it does so, the parties will be guided on the next cause of action available in law.

59. Accordingly, the application for transfer of Bondo Succession Cause No 430 of 2018 to the High Court at Siaya for hearing and determination is hereby dismissed.

60. Each party to bear their own costs of these proceedings. However, the Applicant is warned against filing frivolous applications before this court over the estate of his late father.

Dated signed and Delivered at Siaya, this 15th Day of June 2020 vide skype in the presence of Mr. Onyatta and Mr. Amondi Advocates.

Amended at Siaya this 19th Day of June 2020 through the slip rule, correcting the inadvertent exchange of names of the Applicant with those of the Respondent owing to the errors in the pleadings.

R.E ABURILI

JUDGE