



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
MISC.APPLICATION NO. 8 (B) OF 2017
IN THE MATTER OF THE ESTATE OF MASUDI JUMEA MAKAME (DECEASED)

AND

SOFIA WAMUYU WANGOMBE.....APPLICANT

VERSUS

REHEMA MASUDI JUMEA.....RESPONDENT

RULING

This application was filed through a certificate of urgency dated 1st September 2017 of S. K. Amani Advocate and Notice of Motion of the same date under s.18 of the CPA Cap 21 of Laws of Kenya and other enabling provisions of the law.

The applicant sought the following orders: -

1. *That this application be certified urgent and the same be heard ex-parte in the first instance.*
2. *That pending the hearing of this application there be a stay of proceedings in Succession cause No.8 of 2017 at the Kadhi's court.*
3. *That the file Succession Cause No.8 of 2017 at the Kadhi's court be transferred to the High Court family division.*
4. *That a mention date be given for directions on the same.*
5. *That the costs of this Application be borne by the petitioners.*

The grounds for the application were that: -

- a) *THAT the magistrate at the Kadhi's court is biased.*
- b) *THAT the magistrate did not ask the petitioner's witnesses to leave court and proceeded to blame the same on the Applicant's counsel when the counsel raised an objection.*
- c) *THAT the magistrate did not allow the Applicant's advocate to cross examine of the petitioner's witnesses.*
- d) *THAT the petitioner and the magistrate were seen conducting private conversations in the chambers after the hearing on the 16th day of August 2017.*
- e) *THAT the Applicant has seen a possibility that injustice is likely to be occasioned if the file is not transferred.*

It is supported by the affidavit of Sofia Wamuyu Wang'ombe, the applicant who filed Succession Cause No.8 of 2017 before Principal Kadhi's court Nyeri.

From the proceedings dated 3rd October 2017 the matter proceeded before the Hon. Principal Kadhi on 17th August 2017. The next hearing date was to be 7th September 2017. The application was placed before me on 5th September 2017 during the Court recess.

I observed that the issues raised were serious, and certified the application as urgent. I gave directions that before any substantive orders would be made, the applicant was to file a further affidavit annexing the proceedings, as I was of the view that the record of the court would speak for itself. The applicant was also to serve the other party and fix the matter for hearing in the registry.

The minutes in this file show that it is on 30th November 2017, when the applicant's counsel came to fix the application for hearing. The date that was taken was 5th July 2018, Seven months away! The matter did not proceed and it is not until 3rd December 2018 that the matter showed up before me for the 2nd time.

The Applicant's counsel was seeking another hearing date for that application of 1st September 2017. There was now counsel for the respondent and counsel agreed to canvass the application by way of written submissions. The matter was fixed for mention on 15th January 2019 to confirm compliance. The respondent's counsel had not been served with the applicant's submission and a further mention date of 30th January 2019 was agreed upon by which time service would have been effected and respondent would have filed their response. On 30th the submissions were all in and date for ruling was fixed.

I have carefully considered the record of the proceedings before the Hon. Principal Kadhi. The issue is whether this court can issue the orders sought herein. Section 18 of the CPA provides for the **Power of High Court to withdraw and transfer case instituted in subordinate court** in the following terms;

(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.

I noted from the record that the further affidavit annexing the proceedings was filed on 30th November 2017 because the proceedings were ready, and certified by the Hon. Principal Kadhi on 3rd October 2017.

In that affidavit the counsel deponed that the “*flippant remarks*” and the oral application to have the matter transferred to the Family Division were missing from the proceedings but that the applicant had no objection to the matter being transferred to the High Court.

But, as I was writing this ruling it emerged that the actions of counsel for the applicant revealed a gross abuse of the process of the court. This is founded on the following observations: -

i) The manner in which the application was filed and conducted reek of bad faith and abuse of the court process. The orders of this court of 5th September 2017 were very clear. They were merely directional and I made on that day. From that that the matter came before me on 3rd December 2018, when again, only directional orders were made.

ii) Apparently on 7th September 2017 the parties before the Hon Kadhi's court. I was taken back by what transpired there. The record, which is acknowledged by the counsel for the applicant states;

“Mathee holding brief for Miss Mathenge. The advocate request (sic) to transfer the case to High Court. It was heard on 1st September 2017 and the orders were granted.

That is all.

Court: Mention on 14th September 2017”

Further on 14th September 2017, the record shows that Mr. Ombongi was holding brief for Miss Mathenge. He stated.

“I did not know whether the orders have been filed to the court file (sic). We would like the file transferred to the High Court.

That’s all

Court: No objection. This file be transferred to High Court”

First of all, on the proceedings of 7th September 2017, no orders were granted by this court transferring the matter to the High Court on 1st September 2017. In fact, this court never handled the said matter on 1st September 2017. So, which High Court heard the matter on 1st September 2017 and granted the orders of transfer? And if so, why did counsel bother to have the matter placed before me on the 5th of September 2017? I dare say counsel deliberately misled the court that orders were granted on 1st September 2017.

iii) All this while from the time counsel for the applicant came to fix this matter for hearing, to the time of filing submissions and taking dates for ruling, between November 2017 and 30th January 2019, counsel was aware she had the orders of transfer issued by the Hon. Principal Kadhi, albeit un procedurally. Why then keep the charade, come before this court seeking orders of transfer, then go before the same court being maligned before me for bias and seek the same orders?

The only conclusion I can draw from all this is because there was no substance in the application in first place, the proceedings are clear the Hon. Principal Kadhi conducted the matter and gave a further hearing date. Counsel was aware that the appropriate procedure was to file an application before the Hon Kadhi seeking his recusal. From there she would have the right of appeal. The allegation made in the further affidavit sworn on the 27th November 2017 that ‘*the magistrate’s flippant remarks and the oral application to have the matter transferred to the High Court Family Division are missing from the proceedings*’ is a very serious one as it touches on the integrity of the judicial officer, something which cannot be treated with the flippancy exhibited by counsel. Such issues ought to have been raised in a formal application before the judicial officer for him to pronounce himself, before the same could be brought before this court. There is nothing on the record to show that such an application was made, nothing sworn by the party to support the claims made by counsel, hence nothing for this court to act upon especially in light of counsel’s conduct of the matter.

The orders issued by the Hon Principal Kadhi ‘transferring ‘this matter to the High Court were based on a lie. That this court had already issued the orders under s. 18 of the CPA on the 1st September 2017. To allow such orders to subsist would be to subvert the due process of the law. No other reason was given for seeking the application to have the matter transferred to the High Court. In any event such an application could not lie before the Hon. Principal Kadhi as he has no jurisdiction to transfer a matter from himself to the High Court. The only reason for the said transfer was the lie that the High court had already made the order.

Coming back to the submissions: I have seen the issues raised in the submissions by counsel. The respondent relies on **Yasin Jama & Others vs. Trustees of Kikoni Muslim Union & Others (2012) eKLR**. This case deals with a totally different scenario about a dispute about property and issue of jurisdiction and I found it unrelated to the issue at hand.

The applicant relies on **MMO vs FAH (2017) eKLR** which was an appeal emanating from the decision of the Wajir Kadhi’s Court, a matrimonial cause, where the matter was heard in the absence of the other party and a judgment entered against him. That was the basis for the appeal finding that there was a mistrial. In **Barnaba Kipsongok Tenai Vs. Republic (2014) eKLR** , there was evidence of the ‘quarrelling’ of counsel for the appellant by the trial court and the appellant felt that denied him a fair hearing. An application for recusal was heard and dismissed, hence the appeal. Clearly none of the cases addresses the issue of transfer of a case from the Kadhi’s court to the High Court but both are appeals from scenarios that took place in the subordinate court.

In the long run, I have considered the application, the authorities, proceedings in the Hon. Principal Kadhi’s court. I find this application to be an abuse of the court process to have no substance. I dismiss the same with costs.

The order of transfer issued by the Hon. Principal Kadhi on 14th September 2017 is and is hereby set aside.

The matter to be returned to the Court for hearing and determination.

Dated, delivered and signed at Nyeri this 14th March 2019.

Mumbua T. Matheka

Judge

In the presence of: -

Court Assistant: Juliet

Parties

Ms. Muthoni for Ms. Amani for the Applicant

Mr. Asimwe for Mr. Abubakar for the Respondent.

Mention before the Hon Principal Kadhi for directions on the 27th March 2019.

Mumbua T. Matheka

Judge

14/3/19