



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**MISCELLANEOUS CIVIL CASE 11 OF 2019**

**VIJINIA WANTHIGA MBITL.....PETITIONER**

**VERSUS**

**NTHIGA M'MBANYA KIVEVIA.....PROTESTOR**

**R U L I N G**

**A. Introduction**

1. This is a ruling on the application dated 30<sup>th</sup> January 2019. The applicants sought the following orders: -

**a) That Succession Cause No. 175 of 2017 at the Principal Magistrate's Court at Siakago be transferred to the Chief Magistrates Court at Embu for hearing and determination**

**b) Costs be provided for.**

2. The applicant, through his advocate, raised a preliminary objection in **Succession Cause No. 175 of 2017** at the Resident Magistrate's Law Court in Siakago on the basis that the court lacked pecuniary jurisdiction. Upon valuation of the suit property as directed by court, the report revealed that the parcels number EVURORE/NTHAMBO/1778 and 1779 were valued at Kshs. 12,000,000/= and Kshs. 4,500,000/= respectively.

3. The parties agreed to have this application determined based on their affidavits.

**B. Applicant's Case**

4. It is the applicants case that based on the results of the valuation report by Epiconsultants Limited, the value of the suit property make a total of Kshs. 16,500,000/=, the Senior Resident's Magistrate Court lacked jurisdiction to hear and determine the matter.

5. The applicant thus sought the transfer of the suit from the Principal Magistrate's Court at Siakago to the Chief Magistrates Court at Embu for hearing and determination

**C. Respondent's Case**

6. It is the protestor's case that the Siakago law court is a Senior Principal Magistrate's Court with a pecuniary jurisdiction of Kshs. 15,000,000/= as provided in **Section 7 (1) of the Magistrate's Court Act** and thus fit to handle the suit.

7. He further states that the instant application by the petitioner is a delay tactic as it is the petitioner who filed the original suit in Siakago and relies on the case of **Bonface Waweru Mbiyu v Nancy Njeri [2005] eKLR** where he states it was held that where a matter is filed in a wrong court, such matter has no capacity to be transferred to any other court.

8. The protestor further states that the valuation report relied on by the petitioner constituted expert evidence that this court was not bound by as was held in the East African Court of Appeal Case of **The Collector v Kassam Shivji Bhimji & 2 Others Civil Appeal No. 58 and 60 of 1959 (1959) E.A. 1063** where the court held the same sentiments on expert evidence.

9. He further stated that the subject matter was located in Ishiara and that the Siakago Law Courts were in the right vicinity and convenient for the protestor who was an elderly man.

**D. Analysis & Determination**

10. I The applicant filed the succession cause in the Principal Magistrates Court in Siakago and asserts that subject to a valuation carried out after her counsel raised a preliminary objection in the lower court, the lower court lacks pecuniary jurisdiction to handle the suit as the value of the suit amounts to Kshs. 16,500,000/=. She thus seeks transfer of the suit from the Principal Magistrate's Court to the Chief Magistrate's Court in Embu. The protestor opposes this on the grounds that it is a delaying tactic and that such transfer if granted would inconvenience him as he is an elderly man and further the suit property is located in Ishiara which is close to Siakago.

11. It follows therefore that the only question for determination in the motion before court is whether the Siakago Principal Magistrate has jurisdiction to hear Succession Cause No. 175 of 2017 and whether the applicant has established a case for transfer of the cause to Embu Chief Magistrate's court.

12. It may be argued that filing a succession cause in the wrong court is a technicality which the court can properly ignore in the spirit of **Article 159 (2) (d) of the Constitution** which implores the courts to administer justice without undue regard to procedural technicalities.

13. This principle of law on transfer of suits for want of jurisdiction is not restricted to suits filed under the Civil Procedure Act and the rules made thereunder alone; it is a universal principle that straddles all manner of suits, disputes or such other matters brought before court, regardless of the form they take, where the question of the court's jurisdiction to determine them is bound to arise.

14. The jurisdiction of the subordinate courts in succession matters is provided under **Section 48 of the Law of Succession Act**. Before the amendment effected under **Act No. 26/2015** to bring it in tandem with the pecuniary limits set under **Section 7(1) of the Magistrates' Courts Act, 2015** the jurisdiction was Kshs 100,000/-.

15. The section provided:

***“Notwithstanding any other written law which limits jurisdiction but subject to the provisions of section 49, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76, and to determine any dispute under this Act and pronounce such decrees and make such orders therein as maybe expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings.”***

16. The jurisdiction of the subordinate courts in succession matters is provided under **Section 48 of the Law of Succession Act**. The section provided: -

***“Notwithstanding any other written law which limits jurisdiction but subject to the provisions of section 49, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76, and to determine any dispute under this Act and pronounce such decrees and make such orders therein as maybe expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings.”***

17. **Section 7 (1) of the Magistrates Court Act, 2015** has enhanced the pecuniary jurisdiction of magistrate.

It provides: -

***“Civil jurisdiction of a magistrate's court***

***(1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —***

***(a) twenty million shillings, where the court is presided over by a chief magistrate;***

***(b) fifteen million shillings, where the court is presided over by a senior principal magistrate;***

***(c) ten million shillings, where the court is presided over by a principal magistrate;***

***(d) seven million shillings, where the court is presided over by a senior resident magistrate; or***

***(e) five million shillings, where the court is presided over by a resident magistrate”***

18. I have perused the annexed valuation report by Epiconsults Ltd attached to this application. It gives the value of the property as Kshs. 16,500,000/=. This report was presented to the Siakago Senior Resident Magistrate in support of a preliminary objection on jurisdiction that was raised by the counsel for the applicant. The court declared that it had jurisdiction to hear the matter.

19. The applicant ought to have appealed against the order of the Senior Resident Magistrate or applied for its review instead of bringing this application for transfer. However, since the application is before this court now, I will proceed to look at its merits.

20. The valuation report is expert evidence. The Black's Law Dictionary 9<sup>th</sup> Edition defines an expert as follows: -

***A person who through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder.***

21. From that definition, expert evidence may be referred as an opinion of a person who has developed skill or knowledge in a certain subject to assist the court reach a decision on a matter.

22. It is therefore, a fact that expert evidence is not binding to the court but guides the court in reaching its finding. Section 7(1) of the Magistrates Act does not confer upon a Senior Resident Magistrate pecuniary jurisdiction of over Kshs. 7,000,000/=. If the matter was before the Senior Resident Magistrate, and considering the evidence of the valuer which was not controverted, the said court was not possessed of pecuniary jurisdiction.

23. However, Siakago court has a Senior Principal Magistrate whose pecuniary jurisdiction is limited to Kshs. 15,000,000/=. The difference in value in the report and the jurisdiction of the Senior Principal Magistrate is negligible being Kshs. 1,500,000/=. This court being seized of this matter is guided by the valuer's report which is not binding.

24. The respondent relied on the case of **The Collector Vs Kassam Shivji Bimji & 2 Others**, Civil Appeal No. 58 and 60 of 1959 (1959) EA 1063.

25. In this regard, I reach a finding that the succession cause is within the pecuniary jurisdiction of the Senior Principal Magistrate.

26. **Section 18 of the Civil Procedure Act** empowers this court to transfer cases instituted in subordinate courts but does not spell out the factors to be considered. However, the court must take into consideration, the convenience of the parties, the financial implications, the distance that the witnesses have to cover among other factors.

27. In this succession cause, the respondent states that he is an old man who will be greatly inconvenienced by travelling from his home in Ishiara to Embu to attend court in the event that the orders sought are granted. The applicant has not disputed this evidence made on oath. The properties in question are situated at Ishiara and it may be rightly assumed that most of the beneficiaries reside in the same area. Ishiara is not far from Siakago court as compared to Embu which is about 50 kilometres away.

28. The parties in this application and the beneficiaries will have to incur unnecessary expenses and consume a lot of time in attending court in Embu should the orders for transfer issue. The principle of access to justice which is a constitutional right, favours Siakago court as opposed to Embu.

29. I note that the applicant has not alleged any bias on any of the magistrates at Siakago law courts.

30. I have carefully considered the issue of pecuniary jurisdiction, the right of access to justice and all the other relevant factors in this application. I am of the considered opinion that this application must fail for lack of merit.

31. The application dated 30/01/2019 is hereby dismissed with costs.

32. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 29<sup>TH</sup> DAY OF MAY, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mumbi for Mr. Karithi A.P. for Protester**