



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NO. 20B OF 2018**

**IN MATTER OF THE ESTATE OF PATRICK WAHOME GAKURU (DECEASED)**

**WANGUI MWAURA.....APPLICANT**

**VERSUS**

**CATHERINE KIRUMBA KAREMU.....1st RESPONDENT**

**GAKURU WANGAI WAHOME.....2<sup>nd</sup> RESPONDENT**

**RULING**

1. The Applicant, Wangui Mwaura, filed a Summons General dated the 11<sup>th</sup> January, 2019; the application was brought under the provisions of Article 47 of the Constitution of Kenya 2010, Section 3A of the Civil Procedure Act, Order 46 Rule 5(2) of the Civil Procedure Rules and any other enabling provisions of the Law.

2. The application is premised on the grounds on the face of the application and the Supporting Affidavit of Wangui Mwaura and prayed for the following Orders;

(i) That the Succession Cause Number 20B of 2018 herein be hereby transferred to the High Court Family Division at Milimani Law Courts;

(ii) The costs of the application be the costs in the cause.

3. The parties canvassed the application by filing and exchanging written submissions and proceeded to highlighting the submissions; hereunder are the parties rival submissions;

**APPLICANT'S SUBMISSIONS**

4. The applicant submitted that before the institution of this cause the applicant had moved the High Court at Nairobi vide Misc. App.No.157 of 2017 and the court determined the applicant and her son's rights to participate in the funeral of the deceased;

5. The 1<sup>st</sup> respondent subjected herself to the jurisdiction of the Nairobi court and never objected to it and had even entered into a consent with the applicant herein that the applicant's son be included as a dependant of the deceased once the DNA results confirmed that he was a child of the deceased;

6. That the respondents in direct contravention of the consent petitioned for letters of administration without including the applicant's son as a dependant; that the cause was instituted in a jurisdiction that would make it costly, time consuming and inconvenient for the applicant to successfully prosecute the matter; thereby causing suffering and injustice to the applicant;

7. The applicant therefore prays for an order for the transfer of the succession cause from Nyeri High Court to High Court Family Division Nairobi;

**RESPONDENT'S SUBMISSIONS**

8. In response it was submitted that the applicant filed an Objection to the issuance of the Grant; and before the hearing of the objection the applicant filed this instant application seeking to have the matter transferred from Nyeri to Nairobi;

9. The respondent states that the application is premature as the objector ought to have first listed the objection for hearing to determine her interest in the cause; that strictly speaking she was not yet a party to the cause; the applicant must first await the determination of her legitimacy to be ascertained by the court and in the event the objection is rejected then the transfer to Nairobi would result in injustice to the petitioners/respondents;

10. That the provisions of the law that were relied upon by the applicant do not donate powers to this court to grant the orders of the nature being sought by the applicant; that Article 47 of the Constitution deals with fair administrative actions in civil matters; the Article envisages civil actions against administrators and government officials and is not applicable to judicial officers; the Article does not deal with court procedure in succession matters; in addition Order 46(6)2 of the Civil Procedure Code deals with the appointment of arbitrators and also does not deal with the procedure of transfer of cases; therefore the summons is evidently not well founded on any legal basis;

11. Counsel reiterated that the objection must first proceed to hearing expeditiously to its logical conclusion and a determination made; and counsel prayed that the application be disallowed for being incompetent, bad in law and an abuse of due process.

#### **ISSUES FOR DETERMINATION**

12. Taking into consideration the above submissions this court has framed only one issue for determination;

(i) Whether the cause should be transferred from Nyeri High Court to the Family Division High Court, Milimani, Nairobi;

#### **ANALYSIS**

13. The applicant is seeking to transfer the cause from Nyeri High Court to the Family Division of the High Court Milimani; and is brought under the provisions of Article 47 of the Constitution which deals with fair administrative actions in civil matters; the Article envisages civil actions against administrators and government officials and it is indeed not applicable to judicial officers; and the Article does not also deal with court procedure in succession matters;

14. The application is also premised under the provisions of Order 46(6)2 of the Civil Procedure Code which deals with the appointment of arbitrators and also does not deal with the procedure of transfer of cases; it therefore follows that the application is not well founded as it is brought under the wrong provisions of the law;

15. The above notwithstanding upon perusal of the court record it is noted that the Petition for the Letters of Administration is yet to be gazetted in the Kenya Gazette; this means that the applicant can be best described as an intended objector or one in waiting which would then mean that the applicant is not yet a party to the cause; the applicant must first await the determination and ascertainment of her legitimacy by the court which will permit her to be enjoined in the proceedings;

16. In the circumstances the application for the transfer of the cause is found to be incompetent and premature as it is brought by a person who is yet to be a party to the proceedings;

#### **FINDINGS AND DETERMINATION**

17. For the forgoing reasons the application for transfer is found to be incompetent and premature and it is hereby struck out;

18. There shall be no order as to costs.

Orders accordingly.

**Dated and Signed at Nyeri this 21<sup>st</sup> day of November, 2019.**

**HON.A.MSHILA**

**JUDGE**