



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC P&A NO. 451 OF 2017

IN THE MATTER OF THE ESTATE OF ASHBY MASILA MUIA (DECEASED)

JOSEPHAT MWANIA MUIA PETITIONER/RESPONDENT

VERSUS

LOICE ATIENO ODUK.....OBJECTOR/APPLICANT

RULING

1. The Applicant lodged Notice of Motion dated **25/08/2017** for orders that Makueni High Court Succ. 451/2017 be transferred to High Court at Kisumu for hearing and determination.
2. The same is based on S. 3, 3A, 15 a & b, 18 CPR 2010 and all enabling provisions of the law.
3. The application is anchored on the grounds that:-
 - i. The Deceased lived and worked for gain at KPLC in Kisumu.**
 - ii. The Respondent succession No. 42/016 at Makueni without instant Applicant's knowledge.**
 - iii. The Applicant, Respondent and other beneficiaries reside in Kisumu.**
 - iv. The Deceased owned parcels No. LR Kisumu/Kanyakwar "A"/403 and Kisumu/Korando/4933.**
 - v. The court in Kisumu has jurisdiction over the subject matter.**
4. The Application is supported by the affidavit of Loice Atieno Oduk sworn on 25/08/2017 which reiterates the content in the grounds.
5. The Respondent has opposed the Application and he has sworn Affidavit on 23/10/2017. He avers that the deceased was his brother and had his house at their home with his deceased wife in Kawala in Makueni Division.
6. He (deceased) was buried at Luluka village. His only survivor is his son, Brian Muema Masila.
7. He thus avers that the instant court lack jurisdiction to issue orders sought.
8. The parties agreed to canvass the Application via Written Submission which they filed and exchanged.
9. The Applicant/Objector submits:-
 - That Succession proceedings in respect to the Estate of the deceased ought to have been filed in Kisumu and not Makueni.
 - Therefore, the Succession Cause ought to be transferred to the High Court at Kisumu for hearing and determination.
 - Section 49 of the Law of Succession Act provides that ***"the Magistrate's court within whose area a deceased person had his last known place of resident shall, if the gross value of the estate of the deceased does not exceed the pecuniary limits set out in section 7(1) of the Magistrate's Courts Act, 2015, have in respect of that estate the jurisdiction conferred by section 48....."***

- The position of the law therefore is that a Petition in respect of the Estate of a deceased person is supposed to be filed in the Magistrate's Court within whose local limits the deceased had his last known place of residence if the value of the Estate does not exceed the pecuniary jurisdiction of the said Court.

- The deceased herein Ashby Masila Muia was domiciled in Kisumu immediately prior to his death. The succession cause in respect of his Estate therefore ought to have been filed in Kisumu. The averments by the Petitioner that Succession matters are filed in the nearest Court which has jurisdiction to the home of the deceased are misinformed.

- The fact that the deceased passed away in Nairobi does not mean that a Succession cause in respect of his Estate could have been filed in Nairobi. The deceased had only gone to Nairobi for treatment at Aga Khan University Hospital but he unfortunately passed away while there.

- In addition, the deceased owned Land Parcel Numbers Kisumu/Kanyakwar A/403 and Kisumu/Korando/4933 which are situated in Kisumu. The deceased had other assets which are also situated in Kisumu.

- Proviso (i) to Section 49 of the Law of Succession Act is to the effect that ***the magistrate may, with the consent or by the direction of the High Court, transfer the administration of an estate to any other Magistrate's Courts where it appears that the greater part of the estate is situated within the area of that other magistrate or that there is other good reason for the transfer.***

- Applying the proviso above captioned to this case, the Honourable Court ought to transfer this matter for hearing and determination in the High Court at Kisumu.

- The objector relies on re estate of **Erastus Muriungi Ngaruthi (Deceased) [2015] eKLR** in which the Learned Judge held: ***"where the grant sought to be revoked or annulled was issued by a Magistrate the application in my view should be filed to the High Court registry situated nearest the Magistrate's Court registry and by way of miscellaneous application."***

- This Honourable Court being the High Court has the jurisdiction to hear and determine the summons for annulment of Grant filed by the Objector. The Objector only has an issue with the territorial jurisdiction of this Court to hear and determine this matter for the reasons explained earlier in these submissions.

- The Objector is therefore asking this Court to transfer the matter to the High Court in Kisumu whose jurisdiction is equal to the jurisdiction of this Court.

10. The Respondent submits that:-

- It is clear that the Law of Succession is a complete code in itself and the provisions of the civil procedure do not apply except as provided for in The Law of Succession. I rely on the decision in **KERUGOYA HC SUC NO. 180 OF 2014**.

- Under Succession Act, the court lacks jurisdiction to transfer a succession cause to another High court save as provided for under Section 47; transfer within courts under it.

- Further, the Applicant does not seek to transfer the main cause being Makueni PPCC Succ. No. 42 of 2017. If the court were to allow the application, it means the related matters will proceed concurrently in two different jurisdictions and if one were to appeal from the main cause to Makueni High Court, which is the court that has jurisdiction, the matters will be heard by two courts of competent jurisdiction concurrently with a possibility of diverging views which will be an embarrassment to court. He cites the case of **NAIROBI HCC NO. 588 OF 2005**.

- The Applicant herself filed the main miscellaneous application in this court. She cannot now purport to say otherwise. She chose this forum.

- A succession matter, if it were to be filed only where deceased had property, then we will have several succession matters wherever he had property. One will be filed in Nairobi, Kisumu, Makueni. The deceased had interest in all those towns. There is no allegation that the subordinate court does not have jurisdiction. There is no denial it is within his division where he was born and buried next to his wife. The issue of locus of the Applicant will be challenged at the right time. She has exhibited forged documents.

11. After going through the pleadings, affidavit and the submissions, the court finds the following issues arise.

1. Whether the Application has merit?

12. It is not disputed that the Applicant is wife of the deceased who lived with her in Kisumu vide certificate for marriage annexed. He has property in Kisumu and resided and worked therein.

13. There is no explanation as to why the Respondent brother of the deceased sought to lodge succession cause in Makueni and failed to disclose same to the Objector.

14. It is not denied that the greater part of the deceased estate is in Kisumu.

15. By dint of the provisions of S. 49 of the Succession Act Cap 40, the succession cause ought to have been filed in Kisumu.

16. The provisions of S.49 Cap 160 L.O.K. empowers court to transfer the matter herein as prayed to Kisumu in view of the circumstances of the matter and the parties.

17. Thus court makes the following orders:-

i. Application is allowed as prayed.

ii. Costs in the main cause.

SIGNED, DATED AND DELIVERED THIS 12TH DAY OF APRIL, 2018.

C. KARIUKI

JUDGE

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