



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 37 OF 2018

IN THE MATTER OF THE ESTATE OF ALINGATU alias ALI INGENTU (DECEASED)

MUSA ALI M'INGENTU.....PETITIONER/APPLICANT

-VS-

NURU HASSAN MOHAMMED.....CAVEATOR/RESPONDENT

RULING

1. This ruling relates to the application dated 14th August 2018 that was brought under **Section 2, 47A of the Law of Succession Act CAP 160 Laws of Kenya and Rule 49 and 73 of the Probate and Administration Rules**. The applicant, Musa Ali M'Ingentu, seeks an order for the transfer of **Meru Chief Magistrate's Court Succession Cause No. 136 of 2016** to the Kadhi's Court Isiolo for hearing and determination.

2. The grounds upon which the application is grounded, are set out in the body of the application and the affidavits of the applicant sworn on 14th August and 21st September 2018, respectively. It was contended that, the estate the subject matter of the succession cause belongs to a man who professed Islamic faith. That in the circumstances, the Kadhi's court is best suited to determine the question relating to inheritance according to Muslim Law.

3. He further contended that all the beneficiaries profess Islamic faith and there would be no prejudice if the matter is transferred to the Isiolo Kadhi's court. He concluded that despite having filed the Cause before the Chief Magistrate's Court, the Constitution provides a procedure for resolution of particular disputes, one of them being inheritance for those who profess the Islamic faith.

4. The application was opposed through a replying affidavit Nuru Hassan Mohamed sworn on 19th September, 2018. She deponed that the matter cannot be referred to Kadhi's court as some of the beneficiaries do not profess Islam. That the applicant filed the cause before the Chief Magistrates court and therefore submitted himself to the jurisdiction of that court. That if the applicant is not interested with being heard by the subordinate court then they can be heard by the high court which has jurisdiction over all matters of any religion.

5. When the application came up for hearing, the parties urged the court to determine the same on the basis of the affidavits on record. Having carefully considered the record, the issue for determination is **whether the Meru Chief Magistrate's Court Succession Cause No. 136 of 2016 should be transferred to the Kadhi's Court Isiolo**.

6. **Section 17 of the Civil Procedure Act** bestows upon this court, power to transfer suits which may be instituted in more than one court. The section provides:-

“17. Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed.”

7. **Article 170(5) of the Constitution** stipulates the jurisdiction of the Kadhis' court as follows:-

“(5) The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's court.”

8. Determination of questions of inheritance is one of the issues that a Kadhis' court is to determine. The one requirement is that all the parties must profess the Muslim religion and submit to the jurisdiction of the Kadhis court.

9. The applicant averred that all the beneficiaries profess the Muslim faith but the respondent denied this fact and averred that some beneficiaries do not confess Islam. Under **section 107 of the Evidence Act, Cap 80, Laws of Kenya**, it is he who alleges that must prove.

10. The applicant initiated the cause in the Chief Magistrate's court and was issued with letters of administration on 10th November, 2016. An application for confirmation dated 11th April, 2018 was thereafter filed. That application was still pending when the applicant lodged the present application for transfer of the Cause to the Kadhis court.

11. The applicant was categorical that the estate belongs to a Muslim man and that all the beneficiaries professed Islam. Although the respondent stated that not all beneficiaries profess the Muslim religion and submit to the jurisdiction of the Kadhis court in terms of **Article 170 (5) of the Constitution**, she did not specify who amongst the beneficiaries do not profess the Islamic faith. It is he who alleges that must prove in terms of **Section 107** of the evidence Act.

12. It is true that the applicant had lodged the Cause before the Meru Chief Magistrates court on his own volition. He had it prosecuted whereby he was appointed the administrator of the estate of the deceased way back in November, 2016. That act perse does not act as an astoppel against him from seeking to refer the matter to the correct forum. I see no prejudice to be suffered if the Cause is referred to the Kadhi's Court for determination in accordance with Muslim law.

13. In the premises, I find the application to be meritorious and I allow the same. There will be no order as to costs as this is a family matter.

Signed at Meru

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 25th day of October, 2018

A. ONGI'NJO

JUDGE