



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS SUCCESSION APPLICATION NO. 5 OF 2017

IN THE MATTER OF THE ESTATE OF ELIJAH MUTISO (DECEASED)

IN THE MATTER OF AN APPLICATION FOR A LIMITED GRANT OF REPRESENTATION

BY TITUS MBUVI MUTISO & CHARLES MUTISO SYOVO

1. CHARLES MUTISO SYOVO

2. TITUS MBUVI MUTISO.....PETITIONERS/APPLICANTS

RULING

1. By a miscellaneous application dated 29th June, 2017 and filed in court on 12th July, 2017, the applicant sought to have **Succession Cause No. 55 of 2016** filed in the Chief magistrates' court at Machakos Law courts transferred to this court for determination. The sole ground upon which the application was made was that two of the beneficiaries have refused to execute the letter of consent so as to issue a limited grant of letters Ad Litem thus it is prudent that this matter be transferred to the High Court for determination.

2. The application was opposed by Julius Kiseke Mutiso, a beneficiary of the estate of the deceased and who filed a replying affidavit. He stated that the Magistrates court has sufficient powers to determine and finalize the matter, thus the application is a waste of court's time and should be dismissed.

3. It follows therefore that the issue that this court has to consider is firstly whether or not the court in which the suit had initially been filed namely Chief Magistrates Court had the requisite jurisdiction to hear and determine the same. Secondly, whether the Applicant has presented sufficient reasons to warrant transfer of suit from Machakos Chief Magistrate's to Machakos High Court. Thirdly, whether the respondent/beneficiary stands to be prejudiced by the said transfer.

ANALYSIS

4. The power bestowed upon the High Court to transfer suits of a Civil nature is provided for in Section 18 of the Civil Procedure Act that stipulate thus:

“(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”.

5. A suit ought to be instituted in a court of the lowest grade that is competent to try it. This is provided in **Section 11** of the CPA that provides thus:

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts:

Provided that—

i. if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and

ii. nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same district”

6. In the case of **Victoria Katuku (Suing as the legal Representative of the Estate of Eunice Mueni Muthamba v Jessinkay Enterprises & 2 others [2017] eKLR**, the Learned Judge in stating the principles upon which the court will exercise its discretion as regards the transfer of cases quoted the Ugandan case of DAVID KABUNGU =VS= ZIKARENGA & 4 OTHERS KAMPALA HCCS NO. 36 OF 1995 (unreported) in which Okello J stated as follows:-

“Section 18(1) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even *suo moto* by the court without application by any party. The burden lies on the Applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction It is a well-established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the

application ought to be granted. There are also authorities that the principal matters to be taken into consideration are balance of convenience, questions of expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer could be refused....."

7. Looking at the Plaintiff's Petition dated 6th June 2016 it is clear vide annexure CMS1 thereof that the property of the deceased is located in Mitaboni Location and therefore it is safe to conclude by dint of Section 15 of the Civil Procedure Act, the matter is correctly before Machakos Law Courts. This now calls to mind a determination of the first issue namely whether Machakos Chief Magistrate's Court had the requisite pecuniary or territorial jurisdiction. The Applicant and the Respondent indeed confirm that Machakos was the proper place to have filed the suit. In any event, the amendment to the Magistrates Courts Act in 2015 gives the said court jurisdiction to handle a matter of upto Kshs 20,000,000/-. It is trite law that jurisdiction is everything and goes to the root of any matter that a court of law is seized and therefore if a court lacks jurisdiction to hear and determine a matter then it is not possible for it to seek to transfer that which it does not have power to do so. It follows therefore that suit had been filed in a court with jurisdiction and thus the plaintiff's prayer before this court is ripe for determination.

8. As regards the issue of sufficiency of reasons to warrant transfer, I note the Applicant seeks that this court hear this matter because the beneficiary has declined to sign a consent, and the beneficiary has deponed that he is apprehensive of the applicant's motives hence has rightly declined to so sign. The Applicant has not given any plausible explanation as to why they seek the transfer despite bringing the application under Sections 1A, 1B, 3A, 11 and 18 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. In light of the beneficiary's apprehension as mentioned above, I find that the Plaintiffs claim that no prejudice will be occasioned to the Defendants is not convincing. It is obvious that the beneficiary may be prejudiced by an attempt to short-circuit their consent that is an issue pending in the lower court. The lower court is vested with powers to compel the parties before it to comply with its orders failure which punitive sanctions could be made. In any event a complete refusal by any of the parties to participate in the trial entitles the court to make such orders as are expedient to meet the ends of justice and to prevent the abuse of court process as provided under Rule 73 of the Probate and Administration Rules. It is only after the lower court rules on the matter that the Applicant could move to this court on appeal if aggrieved by such ruling or order.

DETERMINATION

9. For the foregoing observations, it is the finding of this court that the Plaintiff's Application dated 29th June, 2017 lacks merit. The same is ordered dismissed with no order as to costs.

It is so ordered.

Signed, Dated and delivered at Machakos this 19th day of **December, 2018**

D. K. KEMEI

JUDGE