



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS CIVIL APPLICATION NO. 15 OF 2012

(IN THE MATTER OF THE ESTATE OF KARURI ZAKAYO(DECEASED))

JOSIAH M.R. KARURI.....PETITIONER/APPLICANT

VERSUS

SIMON GICHANGI KABUGI.....PROTESTOR/RESPONDENT

RULING

By a miscellaneous application dated 20th day of April, 2012 and filed in court on the even date, the applicant sought to have Succession Cause No. 13 of 1986 filed in the magistrates' court at Kerugoya Law courts transferred to the High Court at Nyeri for determination. The sole ground upon which the application was made was that under **section 48** of the **Law of Succession Act (Cap. 160)**, the Magistrates' Court in which the petition was filed lacked the requisite jurisdiction to preside over and dispose of the succession cause.

The application was not opposed and on 25th of September, 2012, counsel for the applicant filed a letter of consent in which both parties mutually agreed that the cause filed in the magistrates' court should be transferred to this Court, sitting at Nyeri for determination.

I declined to adopt the consent as the order of the court when parties appeared before me on 20th of May, 2015, for the simple reason that, having admitted that the court in which the petition was filed was without jurisdiction, the petition was a nullity *ab initio* and it could not be transferred to the High Court. It did not matter that parties had consented for such transfer since it is trite that parties cannot consent to confer jurisdiction where none exists.

Subsequently, and in particular on 22nd July, 2015, the applicant filed a motion seeking to set aside the order nullifying the petition and in the same breath pursued his earlier prayer that the succession cause in the magistrates' court be transferred to this court. The basis of this application was that evidence was now available to demonstrate that even the magistrates' court itself acknowledged that it did not have jurisdiction to determine the succession cause. What the applicant referred to as the 'new evidence' was in fact a record of proceedings in the magistrates' court which culminated in the order of the court washing its hands off the matter for want of jurisdiction.

It follows therefore that the only question for determination in the motion before court is whether a petition filed in the magistrates' court contrary to **sections 48** and **49 of the Law of Succession Act**, can be transferred to the High Court. In other words, where petition, or a suit for that matter, has been filed in a court without jurisdiction, can it be transferred to a court of competent jurisdiction?

Consequences of filing a suit in a court deficient of jurisdiction to determine it is not a novel question; it has arisen in several cases before and the consistent answer has always been that an order to transfer a suit from one court to another cannot be made unless the suit has been filed in a court with competent jurisdiction to determine it in the first place. Ringera, J. (as he then was) made reference to these cases in his ruling **Nairobi Miscellaneous Application No. 308 of 2002, Charles Omwata Omwoyo versus African Highlands & Produce Company Limited (2002) eKLR**. The application before the learned judge was the transfer of suit from the resident magistrates' court in Nairobi to the same court in Kericho where, apparently, the defendant resided and for that reason, where, following the provisions of **section 15 of the Civil Procedure Act (cap. 21)**, the suit ought to have been filed in the first place. The question, therefore, was whether the High Court had jurisdiction to transfer a suit from a court which is seized of it but has no jurisdiction to determine it to a court vested with jurisdiction.

The learned judge made reference to **Kagenyi versus Misiramo & Another [1968] E.A. 48**, where Sir Udoma Udoma C.J. held in relation to **Section 18 of the Uganda Civil Procedure Act**, which provision is in *pari materia* with **section 18 of our Civil Procedure Act**, that an order for the transfer of a suit from one court to another cannot be made unless the suit has, in the first place, been brought to a court which has jurisdiction to try it. In that case, more like in the present case, the appellant had sought to transfer a suit from the Magistrate's Court to the High Court on the basis that the claim exceeded the pecuniary jurisdiction of the lower court.

The learned judge also cited with approval the case of **Mendonca v Rodrigues [1906-1908] 2KLR 51**, where Hamilton J. held that the High Court does not have power to order a transfer of the suit on the ground of want of jurisdiction only. The case involved a dispute which was outside the local limits of the jurisdiction of the lower court in which it had been filed.

The principle in these decisions, according to the learned judge, is that the High Court cannot exercise its discretion to transfer a suit from one court to another if the court in which the suit is filed lacks the requisite jurisdiction to try it irrespective of whether that jurisdiction is pecuniary or geographical or both.

However, when he had occasion to consider section 15 of the Civil Procedure Act visa-vis section 3(2) of the Magistrates Court, Cap. 10 (repealed) in **Mohamed Sitaban Vs George Mwangi Karoki CA No. 13/2002** Justice Ringera noted that, considering **section 3(2) of the Magistrates Court Act** conferred jurisdiction upon the Resident Magistrates' throughout the republic of Kenya, it did not matter where in Kenya a suit had been filed, and more importantly, it could not be nullified on account of having been filed in the 'wrong' geographical jurisdiction. The learned judge said:

“Section 3 (2) of the Magistrate’s Courts Act provides that a court of the Resident Magistrate (which is defined to include a Senior Principal Magistrate’s Court) has jurisdiction throughout Kenya. Such a court is not the subject of the local jurisdiction contemplated by Section 15 of the Civil Procedure Act. In my opinion, Section 15 of the Civil Procedure Act applied only to courts lower than the Resident Magistrates’ Court. I am fortified in that view by the fact that the Magistrate’s Courts Act, Cap 10 of the Laws of Kenya, was enacted in 1967 long after the Civil Procedure Act.

The legislature was therefore aware of the provisions of Section 15 of the Civil Procedure Act and the hallowed rule of Statutory construction that where two provisions in different statutes conflict, the provisions in the latter statute is deemed to amend the earlier provision must be applied. Accordingly, I find that the Bungoma court had jurisdiction to entertain the suit and the rule that suit filed in a court without jurisdiction is a nullity and cannot be transferred is inapplicable in the circumstances of this case. There may be sound administrative reasons for filing suits in administrative Districts in which the Defendant resides as the cause of action but those reasons cannot oust the statutory jurisdiction”.

What this means is that the jurisdiction of the resident magistrate's court is not limited in space but traverses any sort of boundaries within the republic, whether they be administrative, political or geographical. This might appear to be a departure from the position the learned judge himself took in

Charles Omwata Omwoyo versus African Highlands & Produce Company Limited (ibid) where, as noted, he was of the view that according to **section 15** of the **Civil Procedure Act**, the institution of a civil suit is restricted to the geographical jurisdiction of a particular resident magistrates' court and therefore it was not possible to transfer it from one territorial jurisdiction to another.

Be that as it may, the guiding principle on jurisdiction still remains that a suit filed in a court without jurisdiction is a nullity ab initio and for that very reason it cannot be transferred to a court of competent jurisdiction because there is, in effect, nothing to transfer in the first place. It may be argued that this 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. I am, however, hesitant to accept the argument whether or not a court is seized of jurisdiction to dispose of any particular matter is a question of technicality, procedural or otherwise. In my humble view, it is a question that goes to the very core of the court's authority; that is, it either has the authority to determine the suit before it or it does not. Where the latter is the case, the court cannot take any further step purporting to sanitise what in effect is a non-existent suit; all it can do is to declare it to be what it is—a nullity.

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.

Coming back to the question at hand, the boundary separating the jurisdiction of the resident magistrates' court from that of the High Court in matters succession is distinctly marked and delineated by **sections 48 and 49** of the Act; prior to their amendment by the **Magistrates' Courts' Act, 2015**, these sections of the law provided as follows:

48. (1) 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 may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:

Provided that for the purpose of this section in any place where both the High Court and a resident magistrate's court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.

(2) For the avoidance of doubt it is hereby declared that the Kadhis' courts shall continue to have and exercise jurisdiction in relation to the estate of a deceased Muslim for the determination of questions relating to inheritance in accordance with Muslim law and of any other question arising under this Act in relation to such estates.

49. The resident magistrate within whose area a deceased person had his last known place of residence shall, if the gross value of the estate of the deceased does not exceed one hundred thousand shillings, have in respect of that estate the jurisdiction conferred by section 48:

Provided that -

(i) the magistrate may, with the consent or by the direction of the High Court, transfer the administration of an estate to any other resident magistrate 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;

(ii) if the deceased had his last known place of residence outside Kenya, the High Court shall determine which magistrate shall have jurisdiction under this section;

(iii) every resident magistrate shall have jurisdiction, in cases of apparent urgency, to make a

temporary grant of representation limited to collection of assets situated within his area and payments of debts, regardless of the last known place of residence of the deceased.

According to **section 23** of the **Magistrates' Courts Act**, the pecuniary jurisdiction of the resident magistrates' court has since been increased to between five and ten million shillings.

It is apparent from the foregoing provisions that while a petition may be transferred from one resident magistrates' court to another if a greater part of that estate is within the territorial jurisdiction of that other court, there is no similar express provision that provides for transfer of petitions from the magistrate's court to the High Court.

In my humble view, the omission of such an express provision for vertical transfer of the petitions is grounded on the understanding that once the estimated value of the estate is known, it should be clear to the petitioner where the succession proceedings ought to be instituted. Prior to the amendment of the Act, if the value of the estate was estimated to be above Kshs 100,000/=, it was illogical and indeed unlawful to lodge the succession proceedings in the resident magistrate's court; only the High Court had jurisdiction to entertain petitions whose estates were of such value.

In the applicant's case, the magistrates' court noted as follows:

"The court has no jurisdiction to preside over this matter because the value of the estate in question is over 100,000/=. I therefore advice(sic) the counsels(sic) for the parties to make an application at the Nyeri High Court to have this matter transferred to the said High Court for hearing and determination."

What prompted the court to make this order was the petitioner/applicant's counsel's remarks when he rose to address the court when the petition came up for confirmation proceedings on 13th April, 2012. Counsel submitted that:

"There is a protest against the confirmation and it is dated 20/7/2009. Seemingly the value of the estate is over 100,000/=. We are, therefore praying that you make an order to have this matter transferred to Nyeri for hearing and determination."

I have not had the benefit of perusing the original file in which the petition was filed and therefore I am not certain when the petitioner or his counsel became aware that the estate was worth more than Kshs 100,000/=. It might well be that they only realised this fact after the filing of the protest, meaning therefore, that the true estimate of the estate only came to light after the petition had been filed. The respondent, having himself consented to the applicant's application did not suggest anything to the contrary. In these circumstances, I am prepared to give the applicant the benefit of doubt that though he may have declared the estimated value of the estate to be within the resident magistrate's court's jurisdiction, the estate's net worth turned out to be over and above that value and that this fact only came to light after the petition was filed. It is also assumed that the declaration must have been made in good faith.

If my assumptions are correct, there is nothing that stops me from invoking the inherent powers of this Court, conferred upon it by **rule 73** of the **Probate and Administration Rules**, to review and set aside the order I made to the extent that is necessary to meet the ends of justice. Accordingly, I would have been prepared to substitute that order with the order that the succession proceedings in respect of the estate of the deceased be transferred to this court for disposal. However, I will not make that order because, as noted, the magistrates' pecuniary jurisdiction has since been increased. Unless the deceased's estate net worth is above Kshs. 20 Million, it will not make any sense to direct that the petition be transferred to this court merely for want of pecuniary jurisdiction.

I hasten to caution that although I was prepared to grant the order for the transfer of the suit to this Court, it does not necessarily follow that any petition can be transferred to the High Court from the Magistrates' Court when it should have been filed in this latter Court in the first place. I hold the view that such an

order cannot be available to a petitioner or an applicant, if it is patently clear on the face of his petition or if it can be proved, that he either knew or ought to have been aware that the estimated value of the estate was beyond the pecuniary jurisdiction of the court in which he chose to file the petition. He will also not benefit from such an order if it can be demonstrated that he deliberately chose to suppress facts material to the correct estimated value of the estate either for mischievous or fraudulent purposes, ulterior motives or such other sinister purposes that are otherwise calculated to abuse the due process of the court.

In the ultimate, I will allow the applicant's application only to the extent of setting aside my order declaring the petition in the resident magistrates' court a nullity. With the amendments of sections 48 and 49 of the Law of Succession Act, the magistrates' court at Kerugoya is now in good stead to proceed and determine the succession cause as appropriate. Costs will be in the cause.

Signed, dated and delivered in open court at Nyeri this 13th October, 2017

Ngaah Jairus

JUDGE