



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**MISCELLANEOUS APPLICATION NO. 76 OF 2012**

***(IN THE MATTER OF THE ESTATE OF MAMBO MUIRURI MUGAI ALIAS MAMBO  
MUIRURI (DECEASED)***

**ANDREW MAMBO MUTHEE.....;.....APPLICANT**

**VERSUS**

**RAPHAEL NGUGI MAMBO.....1<sup>ST</sup> RESPONDENT**

**PAUL NDUNGU MAMBO.....2<sup>ND</sup> RESPONDENT**

**RULING**

On the 20<sup>th</sup> March, 2014 the applicant argued before this court an application dated 12<sup>th</sup> June, 2012 seeking mainly for an order that **Thika Succession Cause No. 588 of 2006** pending before the magistrate's court be transferred to this court; the application was premised on **Rules 49 and 73** of the **Probate and Administration Rules and Section 18 (1) of the Civil Procedure Act**.

According to the applicant, the magistrate's court did not have jurisdiction to entertain the petition because the value of the estate as indicated in **form P & A 5** was estimated to be Kshs. 300,000/=. The respondent did not oppose the application to have the file transferred to this court.

It is apparent from the affidavit in support of the application that the grant of letters of administration intestate was made by the subordinate court on 3<sup>rd</sup> April, 2008 and on 17<sup>th</sup> March 2010 the administrator applied to court to have the summons confirmed. It is while the succession cause was at this stage that the applicant applied for its transfer to the High Court.

The jurisdiction of the High Court and the magistrate's courts in matters governed by the **Law of Succession Act, Chapter 160** Laws of Kenya is set out in **Sections 47 to 50** of that Act. **Section 48** thereof defines the extent of the magistrate's jurisdiction. That section provides as follows:

***“48. Notwithstanding any other written law which limits jurisdiction, but subject to 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.”***

It is apparent from this provision that the jurisdiction of the magistrate's court to entertain an application or determine any dispute or pronounce any decree or order is monetarily capped. How far the court may exercise its jurisdiction is determined by the value of the estate in respect of which the court may be called upon to determine a dispute, pronounce a decree or an order.

Under the same provision, a magistrate's court may also make a grant of representation as long as the value of the estate in respect of which a representation is made does not exceed Kshs. 100,000.

It must also be acknowledged that there is no provision either in the **Law of Succession Act** itself or the in the rules made under **Section 97** of the Act that provides for a transfer of a petition or a succession cause from the magistrates' court to the High Court because of the former's want of jurisdiction. In my humble view, this omission must be deliberate particularly because the jurisdictional boundaries between the two respective courts have been distinctly set; once the value of the estate is clearly established, there should be no doubt to any petitioner as to which court he should lodge his petition for letters of administration and hence the question of transfer of a petition from one court to another because the court in which it was initially filed lacks jurisdiction need not arise. It is upon this understanding that I would hesitate to invoke the provisions of the Civil Procedure Act and transfer a succession cause from a magistrate's court to the High Court when it is clear from the Law of Succession Act itself that there is no such an intention.

It is not in dispute that in the cause that was filed in the magistrate's court, the value of the estate of the deceased was indicated as Kshs. 300,000/=; indeed it is on this basis that the applicant seeks to have his cause transferred from the subordinate court to the High Court. It is apparent that the extent of the estate was well beyond the jurisdiction of the magistrate's court in which it was lodged whose limit, as noted, is set out in **section 48 of the Law of Succession Act**.

As always a question of jurisdiction is not a procedural issue that a court can perfunctorily dispense with as such and direct its focus on what one may deem as more substantive issues. Jurisdiction goes to the root of the authority of the court to determine or not to determine a particular issue. Its gravity in decision making was put more appropriately by the learned judges of the court of appeal, Nyarangi, Masime and Kwach JJA (as they then were) the **Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd (1989) KLR 1**. The learned judges said of jurisdiction at page 14 of their decision as follows:

*"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

The court went further to cast any doubt as to what amounts to jurisdiction and quoted a passage from **Words and Phrases Legally Defined, Volume 3** at page 113 where it is stated:

*"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented before it in a formal way for its decision. The limits of this authority are imposed by statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of particular facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."*

Looking at the applicant's cause filed in the magistrate's court from the foregoing perspective, it is easy to see why a petition filed in a court without jurisdiction, as the applicant's was, cannot be a valid petition. The question that would then follow is, if a petition is invalid, can that invalidity be cured by its transfer to a court of competent jurisdiction? This question has been raised before in other cases and the consistent answer has always been that such suits are a nullity *ab initio* and a purported transfer to a court of competent jurisdiction is inconsequential.

In the **Nairobi High Court Miscellaneous Civil Application No. 7 of 2011, Edward Murangiri Mugambi versus Habib Bank Limited**, Njagi J while referring to the Kenyan case of **Omwoyo versus African Highlands & Produce Co. Ltd (2002) 1KLR 698** (the decision of Ringera J, as he then was) and the Ugandan case of **Kagenyi versus Misiramo & Another (1968) EA 48** the learned Judge had this to say on this issue;

***“Where a matter is filed in a court which has no jurisdiction, then there is no suit, properly so called, which has been filed. Consequently, there is no suit, so to speak to be transferred in this instance”***

By analogy a petition or a succession cause filed in a court without jurisdiction, is an incompetent petition or succession cause and thus non-existent and therefore there is nothing to transfer from one court to another. The inevitable conclusion that one can make out of the applicant's application is that the proceedings in the **Thika Chief Magistrates Court Succession Cause No. 588 of 2006** were a nullity from the beginning solely for want of jurisdiction of the magistrate's court in which they were filed. The purported grant of letters of administration made by that court was in equal measure a nullity and the application for confirmation of the grant which the applicant now seeks to transfer to this court is baseless. For these reasons I reject the applicant's motion dated 12<sup>th</sup> June, 2012.

**Dated signed and delivered in open court this 16<sup>th</sup> day of May, 2014.**

Ngaah Jairus

**JUDGE**