



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU**

**Miscellaneous Civil Application 87 of 2010**

**ABDULLAHI DABASO WABERA ..... APPLICANT**

**VERSUS**

**SAID DABSO WABERA ..... 1<sup>ST</sup> RESPONDENT  
MOHAMED DABSO WABERA ..... 2<sup>ND</sup> RESPONDENT  
HASSAN DABSO WABERA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

The Notice of Motion dated 21<sup>st</sup> June 2010 seeks the transfer of Succession Cause No. 3 of 2008 pending before the Kadhi Court at Isiolo to the Kadhi Court at Nyeri. The application is brought under Section 18 (1) (b) of the Civil Procedure Act. The applicant though served on the respondents they did not attend court for the hearing. It is rather unfortunate that the respondents ignored the application because, in my view, there was need for the court to hear their side on this issue. The applicant has made the present application on the basis that he is apprehensive that justice will not be done before the Kadhi sitting at Isiolo. He deponed in his affidavit in support of the application as follows:-

2. *That the respondents are my step brothers.*
3. *That in the year 2008, I filed Succession Cause No. 3 of 2008 at the Kadhi's Court at Isiolo which case is over the distribution of the immovable property of the late Daudi Dabaso Wabera, who died on 28<sup>th</sup> June 1963.*
4. *That the respondents have consistently failed to attend court for the hearing of this case hence frustrating the hearing and determination of the case.*
5. *That the presiding Kadhi is biased and does not record all the proceedings and actually acts as the advocate for the respondents who communicate and even adjourns the case through the Kadhi.*
6. *That on 11<sup>th</sup> February, 2010, I gave my evidence after the presiding Kadhi was satisfied that*

*service was proper and adjourned the matter to the 16<sup>th</sup> March 2010 where the presiding Kadhi held brief after getting instructions from the 1<sup>st</sup> respondent through a phone call in the presence of my advocate and myself and put the matter for hearing at 2pm.*

7. *That at 2.00pm only the 1<sup>st</sup> respondent turned up for hearing when I was directed by the presiding Kadhi to give my evidence afresh.*
8. *That after giving evidence the Kadhi adjourned the matter to the 20<sup>th</sup> April 2010 which date 1<sup>st</sup> respondent again called the presiding Kadhi in open court and informed him that he will not be attending court and the presiding Kadhi conveyed the message to me and my advocate and directed us to take another date.*
9. *That on 29<sup>th</sup> April 2010 the presiding Kadhi refused to hear the case because the respondents were absent although served and again directed me to provide a valuation report of all the immovable property of the estate despite the fact that a party (sic) had requested for the same and no dispute exists over the existence of the properties of the estate and the said valuation is absolutely unnecessary.*
10. *That on the same day the residing Kadhi told my advocate that I should not expect a judgment unless the valuation report is filed.*
11. *That I am unable to single handedly carry out the valuation of all the properties of the estate as the same will be costly and prejudicial to my case because the Kadhi is acting at the behest of one advocate who has filed Misc. Application No. 10 of 2010 at the High Court Meru against me and has quoted the value of the estate has over Kshs. 10 million.*
12. *That I verily believe that the presiding Kadhi's conduct in this matter is unlawful and prejudicial to my case.*
13. *That on 20<sup>th</sup> May 2010 when this matter was fixed for judgment the presiding Kadhi was absent but directed the clerks at the registry to give us a hearing date because the 1<sup>st</sup> respondent was now in court and was ready to give his evidence.*
14. *That I found this to be unprocedural because we had closed our case and what was pending was a judgment which the presiding Kadhi was not ready to deliver.*
15. *That from the conduct of the presiding Kadhi, the court clerk, one Miriam and the respondents, I am not likely to get justice if the matter proceeds at the Kadhi's court at Isiolo because the clerks always inform the first respondent what always transpires in their absence.*
16. *That I might not be able to complete giving my evidence owing to my ill health which has also affected my eye sight and am partially paralyzed and if this case is not concluded in time I am unlikely to give my evidence.*

It is obvious that the applicant has lost confidence in the court of the Kadhi in Isiolo. That apprehension is clear in those paragraphs. On that basis, the applicant's application passes the test applicable in an application for transfer of a suit. That test was set out in the case Republic Vs. Hashimu [1968] EA 656 where the Court had this to say:-

*“Before a transfer of any trial is granted on the application of an accused person, a clear case must be made out that the accused person has a reasonable apprehension in his mind that he*

**will not have a fair and impartial trial before the magistrate from whom he wants the trial transferred.”**

Perception is important when it comes to judicial proceedings. If a party does not perceive that justice will be done, it ought to cause a court to sit up and consider how justice can be seen to be done. The principle that justice must be seen to be done was considered by the Court of Appeal in the case **Jasbir Singh Rai & Others Vs. Tarlochan Singh Rai & Others** Civil Application Nai. No. 307 of 2003

[154/2003 UR] where the court stated:-

*“I now turn to the second principle in contention, namely that justice must be done and be seen to have been done in each and every litigation that comes before the courts. That principle, once again, is based on public policy – that the public must have confidence in the courts and their decisions, i.e. the public must have confidence in the judicial system itself and if issues such as bias on the part of a judicial officer is not dealt with and corrected, the public will lose confidence in the judicial system. Mr. Justice Gaudron of the Australian High Court remarks thus:-*

***“Impartiality and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system.....”***

***See Clenae Pty Ltd & Others Vs. Australia and New Zealand Banking Group Limited.”***

Bearing in mind what the applicant deponed in his affidavit, which depositions were uncontroverted, the orders which are sought are in my view are merited. I therefore grant the following orders:-

- 1. An order is hereby issued ordering the withdrawal of Succession Cause No. 3 of 2008 pending before Kadhi’s Court Isiolo and an order is made for the same to be transferred to the Kadhi Court at Nyeri for hearing and final disposal.***
- 2. There shall be no orders as to costs in respect of the Notice of Motion dated 21<sup>st</sup> June 2010.***

Dated and delivered at Meru this 26<sup>th</sup> day of July 2010.

**MARY KASANGO**  
**JUDGE**