



In re Estate Zakaria Karitu alias Karitu Kibui (Deceased) (Miscellaneous Case E092 of 2024) [2025] KEHC 2067 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CASE E092 OF 2024
RM MWONGO, J
FEBRUARY 6, 2025**

IN MATTER OF THE ESTATE OF ZAKARIA KARITU ALIAS KARITU KIBUI (DECEASED)

BETWEEN

JULIUS KIAMA KARITU 1ST APPLICANT

LILIAN WANJIKU WAWERU 2ND APPLICANT

AND

SOSPETER MURIMI KARITU 1ST RESPONDENT

JOHNSON KIBUI KARITU 2ND RESPONDENT

PETERSON MAINA KARITU 3RD RESPONDENT

RULING

1. The application herein is a summons dated 09th September 2024, seeking the transfer of file Kerugoya CM Succession Cause No. E088 of 2022 from Kerugoya law Courts to be incorporated with Baricho Succession Cause No. 229 of 2016 at Baricho Law Courts for hearing and determination. The application also seeks provision for costs.
2. In their affidavit the applicants state that the subject matter in Kerugoya CM Succession Cause No. E088 of 2022 and Baricho Succession Cause No. 229 of 2016 is the same. The court in Kerugoya CM Succession Cause No. E088 of 2022 directed the parties therein to move the matter to Baricho Magistrate's Court for final determination, hence the application herein.
3. The respondents deem the application as both bad in law and an abuse of the court process. They urge that Kerugoya CM Succession Cause No. E088 of 2022 should not be transferred to Baricho for the reasons that: it was filed in a court without territorial jurisdiction and therefore it cannot be transferred; it was filed as an intestate succession while the deceased died testate; and that Testate proceedings had



been filed in Kerugoya CM Succession Cause 229 of 2016 and the Applicants herein were participating in the said proceedings when they mischievously, fraudulently and secretly filed.

4. The 1st respondent deposed that he initiated testate succession proceedings through Embu HC Succession 615 of 2009 which were later transferred to Baricho Law Courts and renamed Baricho Succession Cause No. 229 of 2016. The applicants participated in the proceedings therein and their objection was dismissed. A grant was then issued that was erroneously initialled “intestate” instead of testate. The respondents deposed that since the applicants participated in the Baricho proceedings, it was irregular or them to file Kerugoya CM Succession Cause No. E088 of 2022 where a grant was also issued.
5. The respondents moved the court to have the said grant revoked in light of the Baricho proceedings. It was in the course of these revocation proceedings that the court advised the parties to move this court for transfer of the file to Baricho. The respondents stated that this direction by the court in Kerugoya CM Succession Cause No. E088 of 2022 was made in error and that the resultant application herein should not be allowed.
6. The applicants, in their submissions, state that the estate of the deceased had already been transferred to the beneficiaries. Relying on the case of Owners of the Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) they urge that this court has jurisdiction to grant the orders prayed. It was their submission that the estate of the deceased has been indicated as intestate in one case and testate in the other case, yet the beneficiaries are the same and they have already taken possession of their inheritance. That the contradiction can only be fully addressed once the matter is placed before one court through transfer and consolidation.
7. On their part, the respondents submit that Kerugoya CM Succession Cause No. E088 of 2022 was filed in a court lacking territorial jurisdiction to hear it thus it cannot be transferred to another court. They rely on *Okong’o v Loibex Builders Limited & 5 others* [2024] KEHC 4855 (KLR) where the court held that a suit filed in a court lacking jurisdiction is a nullity and cannot be transferred under section 18 of the *Civil Procedure Act*.
8. They point out that the suit in Kerugoya CM Succession Cause No. E088 of 2022 was commenced after the applicants’ objection had been dismissed in Baricho Succession Cause No. 229 of 2016. The applicants did not appeal against that decision by the court in Baricho. Instead, they mischievously filed another suit in Kerugoya CM Succession Cause No. E088 of 2022. Thus the applicants have not come to court with clean hands, and the application should be dismissed.
9. The issue for determination is whether Kerugoya CM Succession Cause No. E088 of 2022 should be transferred to Baricho Law Courts and consolidated with Baricho Succession Cause No. 229 of 2016.
10. There can be no doubt that the High Court has jurisdiction to transfer a suit from one court to another under the circumstances stated in Section 18 of the *Civil Procedure Act*, which provides:

“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.”

11. A perusal of the pleadings and the submissions shows that the respondents petitioned for a grant of probate through Baricho Succession Cause No. 229 of 2016. Grant was issued but wrongly titled “intestate”. They argue that such is an error since they were pursuing testate succession. Through the same proceedings, the applicants objected to issuance of the grant but the objection was dismissed and the grant issued.
12. The applicants then proceeded to file Kerugoya CM Succession Cause No. E088 of 2022 through which they pursued intestate succession over the same estate of the deceased. The respondents have termed this move as an abuse of the court process and should have instead appealed against the decision of the court in Baricho Succession Cause No. 229 of 2016 dismissing the objection. The trial court in Kerugoya CM Succession Cause No. E088 of 2022 urged the parties to seek transfer of the suit to Baricho Law Courts since there were already proceedings in the same estate.
13. The respondents have urged that the suit in Kerugoya CM Succession Cause No. E088 of 2022 was filed in a court lacking territorial jurisdiction, therefore this court cannot transfer the suit which is a nullity in the first place.
14. While it is true that the Kerugoya succession was in a wrong court, the issue of whether or not a court has jurisdiction is determined by the court itself. That is to say, the court in Kerugoya CM Succession Cause No. E088 of 2022 is itself tasked with determining whether or not it is clothed with the jurisdiction to hear and determine the case. That court, as a subordinate court, could hear the matter in terms of pecuniary jurisdiction. It was merely filed in the wrong location.
15. Under section 7 of the Magistrate’s Courts Act, civil jurisdiction is determined in terms of pecuniary limits. It has not been argued by the respondents that the court has no pecuniary jurisdiction. Thus, this matter is purely an issue of transfer of suit, which the High Court is competent to do under Section 18 CPA.
16. The respondents have not moved the court in Kerugoya CM Succession Cause No. E088 of 2022 to determine whether it has jurisdiction before the matter is brought before the High Court. Through its ruling, delivered on 18th August 2023, the learned Magistrate correctly found it un-procedural and irregular to have 2 parallel suits running in 2 different courts of concurrent jurisdiction over the same estate of the deceased. The trial court did not address the issue of jurisdiction. Instead it urged the parties to move the High Court for transfer of the suit before that court.
17. The main contention here is that there are testate and intestate succession proceedings in the estate of the deceased herein. That position cannot be allowed to stand or persist. The parties are similar and the deceased is the same. It is not contended that the deceased had a will for only some assets.



Conclusion and Disposition

18. As such, I am of the view this is a clear case for transfer since the contentious issues can be wholly adjudicated before one court. In *Julius Lekuruito & Another vs Nottingham Mwangi & Another* (2018) eKLR, the court held:

“Under Section 17 and 18 of the Act, upon an application by a party, or on its own motion, the High Court may transfer the suit to another subordinate court with territorial jurisdiction, when justice of the case demands such action.” (See also the case of *Waweru v. Prime Auto Solution Limited* (2024) eKLR)

19. In the spirit of the overriding objective and Article 159(2)(d) of *the Constitution* and given the circumstances of this case, the prudent thing is to transfer the suit in Kerugoya CM Succession Cause No. E088 of 2022 to Baricho Law Courts, and that it be consolidated with Baricho Succession Cause No. 229 of 2016 for holistic determination.

20. The parties herein can ventilate all their issues before that court since the issues arise from the same estate of the deceased herein.

21. The application is therefore allowed, and each party shall bear its own costs.

22. Orders accordingly.

DELIVERED VIRTUALLY AT KERUGOYA HIGH COURT THIS 6TH DAY OF FEBRUARY, 2025

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Natocho holding brief for Magee for Respondents
2. No representation – Respondents in person
3. Francis Munyao - Court Assistant

