



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Dominic Omach Ogola (Deceased) (Miscellaneous Cause E042 of 2024) [2025] KEHC 2110 (KLR) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2110 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CAUSE E042 OF 2024**

**G MUTAI, J**

**FEBRUARY 5, 2025**

**RULING**

1. Before the court is a Notice of Motion dated 4<sup>th</sup> November 2024 vide which the applicant, Sharon Athiambo Oloo, prays for the following orders: -
  - a. That this honourable court be pleased to transfer Mombasa Succession Cause No MCC 151 of 2019 from the Chief Magistrate's Court at Mombasa to the Chief Magistrate's Court at Ngong for hearing and final determination;
  - b. That the honourable court be at liberty to make such further and other orders to meet the ends of justice; and
  - c. That the costs of this application be provided.
2. The grounds upon which the application is based are that the beneficiaries and the surviving administrator reside at Ongata Rongai in Kajiado County. The applicant, who is the putative administrator, and one Margaret Julia Auma Mbalo filed a petition for letters of administration intestate at Ngong Law Courts being Succession Cause No CMCC No. 109 of 2021. The said petition was, however, withdrawn once a compromise was reached with the brother of the deceased regarding a succession cause he and one other person had filed, to wit the Mombasa Succession Cause No CMCC No. 151 of 2019.
3. The consent reached was that if the results of the DNA test conducted on the children of the applicant showed that they were biological issues of the deceased then she would be made an administrator so that she could represent them.
4. The applicant now desires to have the Mombasa succession cause transferred to Ngong Chief Magistrate's Court for hearing and determination on the ground that all the dependants and beneficiaries of the deceased's estate reside within the jurisdiction of the said court and not in Mombasa. It is also urged that the deceased's last place of residence was Ongata Rongai, which is close to Ngong town. The applicant stated that there would not be prejudice to any beneficiary if the matter was transferred as proposed.



5. In support of the application, the applicant deposed to an affidavit sworn on 4<sup>th</sup> November 2024. The applicant averred that what was remaining in the cause before the lower court was the confirmation of the grant. As it would be necessary for the beneficiaries to be present in court, it was urged that the applicant, whose employment was described as modest, would not be able to attend the court or travel to Mombasa unless the matter was transferred.
6. Although the hearing notice was served on the counsel for the respondent on 6<sup>th</sup> November 2024, as indicated by the affidavit of service, through WhatsApp, neither the respondent nor his counsel entered an appearance or filed a response to the application. Pursuant to the court's directions, service was further effected on 28<sup>th</sup> November on Mr Edward Gichana through his known telephone number. Despite being served for the second time no response was filed.
7. I heard the application on 22<sup>nd</sup> January 2025. In his oral submission, counsel relied on the court's decision in *Hangzhou Agrochemical Industries Ltd v Panda Flowers Limited* [2012] KEHC 1937 (KLR) to support his contention that the orders sought herein should be issued.
8. The respondent's counsel, who turned up in court upon being requested to do so, on the other hand, contended that he was not served. He submitted that his clients' input was necessary regarding costs and expenses. He urged that the confirmation of the grant could be done virtually and that, therefore, the question of expenses was moot.
9. I have considered the Notice of Motion filed herein, the supporting affidavit, the annexures, and the parties' oral submissions. The sole issue before me is whether the matter before the court below ought to be transferred to Ngong Law Courts for determination.
10. I must point out that the respondent did not file any affidavit in opposition to the application. That being so, the allegations made by the applicant in her affidavit have not been controverted.
11. Section 18 of the *Civil Procedure Act* gives this court the power to transfer suits pending before the subordinate courts. It provides as follows: -
  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.”



12. As a case for transfer been made? The applicable test was stated by Okello, J in the case of David Kabungu vs Zikarenga & 4 others Kampala HCCS No 36 of 1995 being as follows:-

“Section 18(1)(b) 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 a 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 purpose of working injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction...It is 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 expense, interest of justice and possibilities of 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 would be refused...Since the expense which the plaintiff/applicant in this case is likely to incur in transporting and maintaining the numerous various senior public officers from Kampala to Kabale to attend and give evidence in court in this case is bound to be so prohibitive as to deny the applicants justice and the plaintiff/applicant has the right to choose his court, he should not be denied justice by forcing him to have his case heard in a court to which he would not by reason of expense produce his witnesses to prove his case”.

13. The applicant and her children reside in Ongata Rongai, where the deceased lived and died. In my view, transferring the matter to Ongata Rongai for its hearing and conclusion would achieve the expenditure disposal of this matter.
14. In the circumstance I allow the application dated 4<sup>th</sup> November 2024. Each party will however bear own costs.
15. Orders accordingly

**DATED AND SIGNED IN MOMBASA THIS 5TH DAY OF FEBRUARY 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

No appearance for the Applicant;

No appearance for the Respondent; and

Arthur - Court Assistant.

