



REPUBLIC OF KENYA



**In re Estate of Kipkurgat Kiptormos Kotut alias Chepkurgat Kiptormos (Deceased)
(Family Cause E012 of 2025) [2025] KEHC 10516 (KLR) (21 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
FAMILY CAUSE E012 OF 2025
RN NYAKUNDI, J
JULY 21, 2025**

BETWEEN

ANNAH KIMOI KIPTUM 1ST APPLICANT

DELLAH CHESANG KIPSEI 2ND APPLICANT

AND

PAULINE CHEPTARUS KURGAT 1ST RESPONDENT

ALFRED KOSKEY KURGAT 2ND RESPONDENT

RULING

1. What is pending before me for determination is a Notice of Motion Application dated 22nd April 2025 brought pursuant to Article 159, 165 (6 & 7) of *the Constitution*, Section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules where the Applicants are seeking the following orders:
 - a. That Eldoret CMCC P&A Cause No. 610 of 2018 at the Chief Magistrate’s Court Eldoret be transferred to Eldoret High Court for hearing and disposal.
 - b. That costs be in cause.
2. The Application is based on the following grounds among others: That the estate of the deceased is valued at Kshs. 50,000,000/= as per the Objector’s valuation report dated 6th March, 2025 and the High Court has jurisdiction to hear and determine this matter.
3. The Application is supported by the annexed affidavit dated 22nd April 2025 sworn by DELLAH CHESANG KIPSEII who avers as follows;
 - a. That I am the co-administrator of the estate of KIPKURGAT KIPTORMOS KOTUT alias CHEPKURGAT KIPTORMOS.



- b. That the objectors/respondents have filed application for annulment of grant vide summons dated 7th March, 2025.
 - c. That the value of the estate of the deceased is Kshs. 50,000,000/= as per the respondent's valuation report dated 6th March 2025.
 - d. That it is only fair and just that the CMC Cause No. 610 of 2018 be transferred from the Chief Magistrate's Court to Eldoret High Court for hearing and disposal.
4. The Application is opposed by the Respondents vide a Notice of Preliminary Objection dated 3rd June 2025 based on the following grounds;
- a. That the court lacks jurisdiction to transfer a suit and or proceedings instituted in a court with no jurisdiction.
 - b. That pursuant to doctrine of stare decisis and as held by the court of appeal in PHOENIX E.A. ASSURANCE CO. LTD VS S.M. THIGA T/A NEWSPAPER SERVICE (2019) eKLR the proceedings having been filed in a court without jurisdiction is incompetent a nullity ab initio and thus incapable of being transferred.
 - c. That no reason nor justification have been advanced why the proceedings was filed in a court without jurisdiction.
 - d. That costs be awarded to the respondents
5. The Application was canvassed by way of written submissions.

Respondents Written Submissions.

6. The Respondents filed their written submissions dated 12th June 2025 of the preliminary objection where the learned counsel Mr. Bundotich submitted that the case of Mukisa Biscuits Manufacturing Ltd —vs- West End Distributors (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection where their Lordships observed thus: “---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”. Counsel added that in the same case Sir Charles Newbold, P. stated: “a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.
7. The Learned counsel further submitted that that the court lacks jurisdiction to transfer a suit and or proceedings initiated in a court without jurisdiction and that it is thus the Respondents application that the application is incompetent and defective and thus the court cannot grant the orders sought. Reference was made in the case of Macfoy v United Africa Co LTD [1961] 3 All ER, 1169, comes into where it was held as follows: - “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”.



8. Counsel also submitted that in the celebrated case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989), it was held that “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 proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... 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 judgement is given.”
9. Counsel further made reference to the Court of appeal in Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR in the following words: - “In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, it is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same. ...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.”
10. It was also submitted by the Learned Counsel that decided cases on this issue are legion and made reference to the case of Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR which counsel stated that it is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. He added that the Court succinctly settled this point in the following words: - “When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court's pecuniary Jurisdiction. We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.
11. It was furthermore submitted by the learned counsel that in the case of Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] KECA 767 (KLR) court of appeal observed; It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void.

Analysis and Determination

12. I have read and considered the Notice of Motion Application, the affidavit in support and the Notice of Preliminary Objection in opposition of the Application and the rival submissions. There are two issues of determination as follows:
 - a. Whether the Magistrate’s Court had jurisdiction to entertain the suit when it was filed.
 - b. Whether this court has the power to transfer the suit from the Magistrates Court to the High Court.

Whether the Magistrate’s Court had jurisdiction to entertain the suit when it was filed.



13. Regarding the transfer of suits, the law is quite explicit. It is impossible to order the transfer of a lawsuit from one court to another unless the lawsuit was initially filed in a court with the jurisdiction to hear it. If that suit was commenced in a court that had no jurisdiction to entertain the dispute, it would then mean that the said suit is a nullity in law and is incompetent. Consequently, the Court would not have jurisdiction to transfer the matter to any other court. It follows therefore, that the power to transfer a case from the subordinate courts to the High Court and courts of equal status for hearing may only be exercised if the court in which it was commenced is a court vested with competent jurisdiction over the dispute. It is for this reason that there is need to explore whether the Eldoret CMCC P&A Cause No. 610 of 2018 was filed in a court seized with jurisdiction to entertain the matter.

14. Jurisdiction is what gives the Court the power to hear a dispute and is given by law. The locus classicus case on jurisdiction is Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989), where it was held that;

“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 proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... 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 judgement is given.”

15. Moreover, the Supreme Court in Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 others (2012) eKLR while discussing the issue of jurisdiction rendered itself as follows:

“(68)A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.... Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

16. I take cognizant note that Article 169(2) of *the Constitution* of Kenya 2010 directed parliament to enact legislation conferring jurisdiction, functions and powers on Magistrate’s courts. Consequently, the Magistrates’ Court Act was enacted to define the jurisdiction of the various subordinate courts. Under Section 7(3) of the Magistrate’s Court Act, the Civil jurisdiction of Magistrates Courts is set out as follows: -

- (3) A magistrate's court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law-
 - a. land held under customary tenure;
 - b. marriage, divorce, maintenance or dowry;
 - c. seduction or pregnancy of an unmarried woman or girl;



- d. enticement of, or adultery with a married person;
- e. matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy;
- f. intestate succession and administration of intestate estates, so far as they are not governed by any written law.

17. The application at hand is with regard to the pecuniary jurisdiction of the Magistrates Courts. From the Affidavit evidence, I take note that the value of the estate of the deceased is Kshs. 50,000,000/= as per the respondent's valuation report dated 6th March 2025. With this, I would like to put reference in section 7 of the Magistrate's Act which sets out the pecuniary jurisdiction of the Magistrate Court as follows: -

“7.

- (1) A Magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed-
 - a. Twenty million shillings, where the Court is presided over by a chief magistrate;
 - b. Fifteen million shillings, where the Court is presided over by a senior principal magistrate;
 - c. Ten million shillings, where the Court is presided over by a principal magistrate;
 - d. Seven million shillings, where the Court is presided over by a senior resident magistrate; or
 - e. Five million shillings, where the Court is presided over by a Resident Magistrate.

18. The Court of Appeal in *Equity Bank Limited vs Bruce Mutie Mutuku T/A Diani Tour & Travel* (2016) eKLR observed as follows:

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.”



19. It has previously been held that jurisdiction cannot be inferred, nor can it be granted to a court by judicial skill or compassion. Additionally, the applicants attempted to invoke the *Civil Procedure Act's* Sections 1A, 1B, and 3A. It goes without saying, though, that lack of jurisdiction cannot be regarded as a procedural technicality that can be resolved by applying the overriding objectives. In *Macharia & Another vs Kenya Commercial Bank Limited & 2 others (Supra)*, the Supreme Court was clear that: -

“We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

20. The ultimate result from the discussed legal principles above is that the Chief Magistrates' court at Eldoret where Eldoret CMCC P&A Cause No. 610 of 2018 was filed had no jurisdiction to entertain that suit at the time it was commenced as I have discussed elsewhere above.

Whether this court has the power to transfer the suit from the Magistrates Court to the High Court.

21. Having discussed on the jurisdiction of the Magistrates Court, I wish to delve on the issue of whether this court should allow the transfer of suit to this Honourable Court for hearing and determination. Transfer of suits is governed by Section 18(1) of the *Civil Procedure Act* which provides that:

18. Power of High Court to withdraw and transfer case instituted in subordinate court

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.

22. Under Section 18(1) of the *Civil Procedure Act*, this Court may exercise its supervisory jurisdiction, to withdraw or transfer suits for trial and final disposal by itself or other courts subordinate to it. This law also gives the court the general power to transfer suits, which power may be exercised at any stage of the proceedings. A court may do so either on application by a party or suo moto. It is a well-established principle of law that, when the transfer is at the instance of a party then the burden lies on the applicant



to make out a strong case for the transfer. In *Equity Bank Limited vs Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR, the Court of Appeal held as follows:

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent Court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where the Court lacks jurisdiction parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the same...”

23. The balance of convenience, cost considerations, the interest of justice, and the potential for undue hardship are a few of the factors that must be taken into account if the court is uncertain whether it is appropriate to order a transfer in all the circumstances, the application must be denied. Additionally, the power under Section 18 of the *Civil Procedure Act* refers to competent suits filed in courts seized with the requisite jurisdiction to entertain them. The general power of the court to transfer suits under section 18 of the *Civil Procedure Act* cannot therefore be exercised in a matter where the suit was filed in a court without jurisdiction. The Supreme Court case of *Albert Chaurembo Mumba and 7 Others vs Maurice Munyao & 148 Others* (2019) eKLR held that: -

“However, as it was well elucidated in the case of *Kagenyi vs Musiramo & Another* (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It’s therefore irrelevant as parties cannot consent to confer jurisdiction to a Court or tribunal where it is not provided by law.”

24. The Chief Magistrates Court lacked jurisdiction to entertain the suit that was brought before it, as this court has already determined. That conclusion is based on a superior court’s interpretation of preexisting statutes rather than a recently passed law. Because of this, the only reasonable conclusion that can be drawn is that the current application does not satisfy the requirements for an order transferring the case from the subordinate court to the High Court for hearing and determination.

25. The court’s duty does not extend to upholding an illegality by legitimizing an incompetent suit. Lord Denning in the case of *Macfoy vs United Africa Co Ltd* (1961)3 All ER, 1169 stated that: -

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”

26. In any event, the matter has not been heard and determined, thus the only action the Magistrate’s Court can do is strike it out, leaving the Applicants with the option to file it afresh in the appropriate court for hearing and determination without triggering the doctrine of *res judicata*. In the same breadth, the Applicants are also at liberty to withdraw the suit and file it afresh in this court. The Court of Appeal



in the case of Phoenix of E.A. Assurance Company Limited vs S. M. Thiga t/a Newspaper Service [2019] eKLR stated that;

“We are not persuaded that that proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer Jurisdiction to itself...it is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was nullity ab initio and was not transferable to another court...”

27. Considering that the Applicants seek to transfer the suit on the basis of lack of jurisdiction by the Magistrate Court, I hereby find that the Application is not merited. The suit before the Chief Magistrate’s Court it is not only an incompetent suit, but also a nullity in law. As a result, there is nothing to transfer. This Court has not been convinced by the applicants that they are entitled to the orders sought.

28. In view of the above, the following orders shall abide: -

- a. The Application dated 22nd April 2025 is devoid of merit and the same is dismissed with the costs to the Respondents.
- b. A petition to be filed afresh in the appropriate forum.
- c. The costs shall abide the outcome of the Succession Cause

29. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT ELDORET THIS 21ST DAY OF JULY 2025

.....

R. NYAKUNDI

JUDGE

