



In re Estate of Wanjira Theuri alias Wanjiru Theuri (Deceased) (Miscellaneous Civil Application 16 of 2019) [2024] KEHC 4585 (KLR) (16 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4585 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
MISCELLANEOUS CIVIL APPLICATION 16 OF 2019
AK NDUNG’U, J
APRIL 16, 2024
IN THE MATTER OF THE ESTATE OF WANJIRA
THEURI ALIAS WANJIRU THEURI (DECEASED)**

BETWEEN

JOYCE NYAMBURA NGETHE APPLICANT

AND

JAMES KIHU KAIRA 1ST RESPONDENT

SIMON NGETHE GICHIMU 2ND RESPONDENT

SAMUEL WAGURA KAIRA 3RD RESPONDENT

RULING

1. This ruling resolves the application by Notice of motion dated 12/09/2019 filed by the Applicant herein which seeks the main order that–

“ this court be pleased to transfer to itself for hearing and determination of Nanyuki CM Succession Cause No. 80 of 2016 in the matter of Estate of Wanjira Theuri alias Wanjiru Theuri (deceased).”
2. The application is brought under section 18(1)(b) of the *Civil Procedure Act* and section 47 of the *Law of Succession Act* and is based on the grounds on the face thereof and supported by an affidavit sworn by the Applicant. In her supporting affidavit, she deponed that she petitioned for grant of letters of administration and on 29/12/2016, she was issued with a grant of letters of administration intestate. She later applied for confirmation of grant but the Respondents raised a preliminary objection challenging the territorial and pecuniary jurisdiction of the court and on 02/09/2019, the learned magistrate ruled that she had no jurisdiction in the matter due to the pecuniary restraint of her court.



3. It is urged that this matter should be brought to this court for further hearing and determination of the summons for confirmation. That this court has powers under section 47 of the Law of Succession Act to call for and transfer to itself any matter pending before the subordinate court. That it will be in the interest of all parties if the matter is transferred instead of filing fresh petition.
3. In response, the Respondents filed a preliminary objection dated 11/10/2019 raising two grounds that; the application is incompetent and a non-starter as the same seeks to transfer proceedings which are void ab initio and the same should be struck out with costs and that the court has no power to transfer to itself proceedings which are invalid and of no legal consequence as transferring the same would perpetuate an illegality.
4. Parties canvassed the application by way of written submissions. The Applicant's counsel submitted that this court has power under Section 18 of the Civil Procedure Act to transfer matters from subordinate court to itself for hearing and disposal if the said matters fall outside the pecuniary jurisdiction provided for in Section 48 of the Law of Succession Act. Reliance was placed on the case of Muchiri & 4 others v Muchiri (miscellaneous application E013 of 2021) (2022) KEHC 10481 (KLR) whereby the court allowed the transfer of the matter.
5. It was submitted that in the instant case, the government valuer on 20/03/2017 valued the deceased's estate at Kshs.19,750,000/-. The Respondents filed a valuation report from a private valuer which valued the deceased's estate at Kshs. 27,000,000/- as at 05/08/2019 and based on this, the learned magistrate ruled that she had no more jurisdiction on the matter due to pecuniary restraint. Notably, the learned magistrate did not nullify or revoke the grant issued to the Applicant.
6. In rejoinder, the Respondents' counsel submitted that the Law of Succession Act makes provision for transfer of the matters from the lower court to the high court and therefore, the Applicant's notice of motion is incompetent as the same is brought under the Civil Procedure Act which is not applicable to succession matters. That the learned magistrate having found that she lacked the requisite pecuniary jurisdiction, the proceedings in the lower court became of no legal consequence. Therefore, the succession cause became null and void and incapable of being transferred to this court and calling this court to entertain such an incompetent cause would amount to further perpetuating an illegality.
7. Reliance was placed on the case of Phoenix of E.A Assurance Company Limited v S.M Thiga t/a Newspaper Service (2019)eKLR where it was stated that a suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Further reliance was placed on the case of Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel (2016) eKLR. Further, the transfer of the matter would amount to sanctifying an incompetent matter.
8. I have considered the rival arguments by the parties. The application is stated to be brought under section 18 Civil Procedure Act and section 47 Law of Succession Act to support her claim. The said section 18 states that;
 - “(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.”

9. The Respondents’ counsel argued that Section 18 of the Civil Procedure Act is not applicable to succession matters. Rule 63 of the Probate and Administration Rules provides as follows;

“(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

10. In John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another [2016] eKLR the court stated as follows:

“As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time...”

11. I note that the instant application is also anchored on Section 47 of the Law of Succession Act. Under Section 47 of the Act, this court has jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient. Further, pursuant to Rule 49 of the Probate and Administration Rules, a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in the Rules ought to file a summons supported if necessary by affidavit. Rule 73 on the other hand preserves the inherent jurisdiction of this court while dealing with matters succession. The wording of that Rule is pari materia with Section 3A of the Civil Procedure Act on inherent powers of this court.

12. I have considered the application, the supporting affidavit and response filed. I have had due regard to the applicable law and case law cited. It is not disputed that the trial court made a finding that it had no pecuniary jurisdiction to handle this Cause. The Magistrate inexplicably made no orders as to what



was to become of the Succession Cause. This was not only a clear dereliction of duty but a miscarriage of justice to the parties before court. This lapse is one amenable for correction under the supervisory jurisdiction of this court over subordinate courts.

13. The parties now find themselves with the absurd situation of a pending cause that has no directions on the next course of action. The Applicant has moved this court to transfer the cause to this court. That application is vehemently opposed on the basis that the proceedings before the trial court were void ab initio having been filed in a court without jurisdiction.
14. Notably, the Succession Cause in the lower court was filed on 2nd September 2016. 8 years down the line the parties herein have been in the corridors of justice without a resolution in sight. The Application before court sits between this sad scenario and the hope for resolution of the dispute.
15. I have anxiously considered the matter at hand given the unsavoury history and the attendant delay that would be visited on the parties if this application was to fail. I am fully aware of the centrality of jurisdiction in any matter before a court. The question whether this court can transfer a case filed without jurisdiction to another court (including to itself) has been settled through several determinations. In *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR the Court of Appeal stated:

“Decided cases on this issue are legion and we cannot cite all of them. The case of *Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another* (2013) eKLR 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. 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.”

“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. Civil Appeal No. 6 OF 2018 *Phoenix East Africa Assurance Co.ltdv. S.M. Thiga t/a Newspaper Services* therefore a nullity as it was based on a nullity. We have said enough to demonstrate that this appeal has merit. We allow it with costs to the appellant.”

16. In *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR the court stated;

“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.”

17. This position is emphasized in *Andrew Mambo Muthee v Raphael Ngugi Mambo & another* [2014] eKLR where the Judge while rejecting a similar application stated that;

“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. 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.”

18. From the above decisions, it follows that where a suit is instituted before a court having no jurisdiction, such a suit cannot be transferred to a court where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing. In other words, courts can only transfer a cause whose existence is recognised by law.
19. In our instant suit, the Petitioner filed the succession cause in a court without pecuniary jurisdiction. That court has since made a finding that it has no jurisdiction in the matter. In view of the extrapolation of the law above, the court lacks the power to transfer the matter to this court. The application thus fails.
20. I cannot close my eyes to the predicament that the parties in this cause find themselves following the failure of this application. As noted earlier, 8 years down the line after the filing of the petition for letters of administration, the estate remains un administered. This court must rise to its higher calling to do justice and ensure the protection of the estate and the interests of the beneficiaries. Ideally, there are no protagonists in a succession cause. A succession cause aims at establishing the free property of a deceased, the rightful beneficiaries and the mode of distribution of the estate.
21. I have noted from the lower court record that during the long pendency of the succession cause, there have been serious allegations of wanton intermeddling with the estate to the prejudice of the estate and the rightful beneficiaries. It is in the interests of the estate and all parties, the Respondents included, to have the estate preserved. The matter calls for the invocation of the inherent powers of the court to do justice to the parties.
22. The extent of inherent powers of the court was eloquently explained by the authors of the *Halsbury’s Laws of England*, 4th Edn. Vol. 37 Para. 14 as follows;

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without



plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

Musinga JA, in *Equity Bank v West Link MBO Limited* (Civil application No.78 of 2011) in addressing the question of the inherent powers of the court stated;

“Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from the constitution or statute.”

23. The learned judge proceeded to quote Jerold Taitz in *“The Inherent Jurisdiction of the Supreme Court* (Cape Town South Africa, Juta Publishers, 1985) who stated as follows:-

“The inherent jurisdiction of the Supreme Court may be described as the unwritten power without which the court is unable to function with justice and good reason.”
24. Before this court is a Petitioner who approached the court in a quest to administer the Estate of Wanjira Theuri alias Wanjiru Theuri. All the procedural formalities were met including the necessary publication of Gazette Notice No. 4749 dated 29th November 2016. That succession course has been thrown into the limbo by the finding by the court seized of the matter that it has no jurisdiction to adjudicate the cause. By that finding, the grant became null and void since the court having not been seized with the requisite jurisdiction could not issue a valid grant. In its ruling on jurisdiction, the court ought to have revoked the grant. This is a lapse that this court exercising its supervisory jurisdiction is empowered to correct. Having called for the relevant file, I make an order revoking the grant.
25. This in effect leaves the estate exposed and vulnerable to malfeasance. As intimated above, through applications before the lower court, there has been allegation of intermeddling with the estate of the deceased. Noting that this cause has been jolted into a reverse gear whereby the Petition for letters of administration have to be applied for afresh, this court must rise to its higher calling to do justice to the parties by invoking its inherent powers to make orders of preservation of the estate pending the filing of the petition.
26. The cumulative result of the above is that the application dated 12th September 2019 fails and I make the following orders;
 - a. The Application dated 12th September 2019 is dismissed.
 - b. The Petitioner/Applicant be at liberty to file a fresh Succession Cause before the High Court within 3 months hereof.



- c. The Respondents shall be at liberty to file any objections as per law permissible upon the filing of the petition.
- d. The Grant of Letters of administration issued on 29th December 2016 is hereby revoked.
- e. Pending the filing of the petition, an inhibition be registered against Title No. Laikipia/Olarabel/92.
- f. This matter be mentioned in 6 months to monitor progress.
- g. Each party to bear its own costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF APRIL 2024.

A.K. NDUNG’U

JUDGE

