



In re Estate of Marnier Pierre Andre Rogers (Deceased) (Miscellaneous Application Probate & Administration 33 of 2022) [2023] KEHC 18184 (KLR) (19 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION PROBATE & ADMINISTRATION 33 OF 2022**

G MUTAI, J

MAY 19, 2023

IN THE MATTER OF THE ESTATE OF MARNIER PIERRE ANDRE ROGERS (DECEASED)

BETWEEN

MARION KAMENE KABUTHI 1ST OBJECTOR

PETER MUSAU KITUKU 2ND OBJECTOR

AND

FATUMA MOHAMED HAJI PETITIONER

RULING

Factual Background

1. The Summons before the Court is dated 15th September 2022. The same is expressed to be brought under section 2(1) of the Law of Succession Act (cap 160), section 5 of the Kadhi's Court Act, (cap 11) of the Laws of Kenya and Article 170 (5) of the Constitution of Kenya. Vide the said application the Objectors/Applicants seeks the following 4 orders: -
 1. This Honourable Court be pleased to withdraw Kadhi's Court Succession Cause No 284 of 2019 (involving the estate of Marnier Pierre Andre Rogers) from the Kadhi's court and transfer the same to itself for hearing and determination;
 2. This Honourable Court be pleased to revoke/annul aside and or vary the judgment/decree and or grant of letters of administration issued by the Kadhi's court on 25th January 2020;
 3. This honourable court do hear the succession cause and determine the interests of the Objectors/Applicants herein vis a vis those of Fatuma Mohamed Haji; and
 4. Costs be borne from the estate of the deceased.



2. The grounds upon which the application was based were stated in the body of the application. I will summarise them herein to be that: -
 1. The deceased person did not profess the Islamic faith;
 2. The deceased contracted a customary law marriage with the 1st Objector/Applicant. She does not profess Muslim faith although she has an interest in the estate. Her said marriage is alleged to have been celebrated before the one the deceased contracted with the Respondent;
 3. Although the Respondent is a Muslim the Objectors/Applicants aren't. The right court to handle the succession proceedings is therefore this court not the court below;
 4. The Respondent failed to disclose to the Kadhi Court that the deceased had another, non-Muslim wife, hence misleading the Kadhi into assuming a jurisdiction he does not have;
 5. There was a dispute between the 2nd Objector/Applicant and the deceased which may not be adjudicated upon by the Kadhi. The Petitioner/Respondent was aware of the matter but chose to hide the same from court;
 6. There is another case pending in court, to wit HCCC No 302 of 2008; Pierre Marnier Andrew Rodgers v Alex Muthami Ndungi which is still subsisting in which the interests of the Applicants have been prejudiced; and
 7. There are other suits pending in Kwale ELC Court to wit ELC 007 of 2022 and Kwale ELC E010 of 2021 in which the estate of the deceased is the subject matter.
3. The application is supported by the annexed affidavits of the Objectors/Applicants I need not rehash these affidavits as they raise the same grounds as those I have listed above. The Affidavit of the 2nd Objector/Applicant has some annexures to wit a title deed for Title No Kwale/Galu Kinondo/592, Memorandum of Intention of Sale and plaint filed in Mombasa HCC No 302 of 2008.
4. The Application is opposed. Vide a Replying Affidavit sworn on 14th October, 2022 and filed on 12th October, 2022 the Petitioner/Respondent averred as follows: -
 1. The summons before the court is incompetent, bad in law, a waste of judicial time and should be dismissed;
 2. Withdrawal of the suit before the Kadhi's Court would be self-defeating;
 3. The Kadhi Court issued a final judgment and decree in the matter before it on 23rd January, 2020. The application was filed after an undue delay;
 4. The case before the High Court was between a third party and the deceased. In any event the said suit had been dismissed as evidenced by a copy of the proceedings which was availed;
 5. She and the deceased were Muslims at the time they contracted the marriage and that is why the marriage was contracted before the Kadhi;
 6. There is no evidence of a marriage between the deceased and the 1st Objector/Applicant nor of any dealing between the 2nd Objector/Applicant and the deceased;
 7. It is clear from their conduct that the Objectors/Applicants didn't know the deceased and cannot, therefore, purport to speak authoritatively about his faith or property;
 8. No explanation was given for the lateness with which the Application that was filed;



9. The Objectors/Applicants have no lawful interest in the estate and the application should therefore be dismissed; and
 10. Since the dispute appears, to be one of joint tenancy this court shouldn't interfere but leave the Kwale ELC Court to hear and make a determination on the disputed facts.
5. In support of her case the Petitioner/Respondent annexed a decree from the Kadhi Court given on 23rd January, 2020 vide which she was, inter alia, declared to be the sole beneficiary of the estate of the late Marnier Pierre Andre Roger. Her share was given as 100% and the properties forming part of the estate were stated to be Title Nos. Kwale/Galu Kinondo/591 and Kwale/Galu Kinondo/592, order vide which Case No 302 of 2008 was dismissed on 8th July, 2015 under Order 17 Rule 2 of the [Civil Procedure Rules, 2010](#) and a certificate of Marriage issued in Mombasa on 7th July, 2011, celebrated between Marnier Pierre Andre Roger and the Petitioner/Respondent.
 6. The 1st Objector/Applicant filed a supplementary Affidavit on 16th November, 2022. In her set affidavit she deposed that the Kadhi Court set aside its judgment on 18th August, 2022. No evidence of such setting aside was however provided. She denied that this court lacks jurisdiction to transfer the case and asserted that to the contrary it has sufficient powers to do what has been asked of it. She alleged that the proceedings before the Kadhi had been conducted in secret hence her lack of knowledge of the proceedings in good time.
 7. The 1st Objector/Applicant categorically denied that the deceased was a Muslim. She deposed that no certificate of conversion had been produced to prove that that was the case. She insisted that she was married under customary law and that her marriage was no less valid because she did not have a certificate. She averred that she would call witnesses who would testify in support of her contention if the case of the Court below was transferred to this court. Regarding the cases before the Kwale ELC Court, she stated that it was necessary to stay any illegal act that the Petitioner/Respondent had done pursuant to the grant she had obtained.

Proceedings Before this Court

8. When this matter came before me on 14th February, 2023 I directed the parties to file and exchange Written Submissions and fixed the same for mention to confirm compliance on 20th March 2023. On the said date I stood over the mention to 24th April 2023. On the said date both parties were compliant. I therefore fixed the matter for ruling on 19th May 2023.

Submissions of the Parties

9. The Objectors/Applicants filed Submissions on 16th March, 2023. They gave a summary of the case before the court. I have already referred to the facts, as seen by them. I do not have to repeat the same here. They submit that the constitutional provision that is applicable herein is Article 170 of the [Constitution](#) of Kenya, 2010 which establishes the Kadhi's Court. They urge that not only must all the parties before the Kadhi be Muslims they also need to submit to its authority for without submission the said court has no jurisdiction. The Objectors/Applicants rely on the case or [CKC & CC \(Minors suing through mother and next friend JWN\) v ANC](#) Civil Appeal No 121 of 2018 which sets out the jurisdiction of the Kadhi's Courts. The Objectors/Applicants deny that the deceased was a Muslim. They affirm that they, for their part, aren't Muslims and have not, at any point submitted to the Kadhi's court. For that reason, they deny its jurisdiction and insist that only this court has jurisdiction. Even where the Kadhi Court has jurisdiction, the Objectors/Applicants submit, the High Court has unlimited jurisdiction to try matters which come before it.



10. The court was also referred to section 2(3) of the [Law Succession Act](#) for the proposition that the latter Act still applies to the administration of the estates of Muslims unless the provisions of the Act are inconsistent with the Muslim Law. It was reiterated that the Objectors/Applicants aren't Muslims and shouldn't be forced to be heard by the Kadhi Court. The Objector/Applicants insisted that the decedent was a French National and a Christian. I was asked not to make final determination on issues that call for a hearing.
11. The Petitioner/Respondent submitted that the instant application was filed after an inordinate delay by which time the Petitioner/Respondent had dealt with the estate of the decedent on the basis of the grant she had obtained. As the grant had been issued the Kadhi Court that Court became functus officio. There is therefore no suit before the court below, capable of being transferred, as the administration of the subject estate had been completed.
12. I was referred to the Uganda case of *David Kabungu v Zikarenga & 4 others*; Kampala HCCS No 36 of 1995 for principles I should have in mind when transferring a case. I was also referred to the following cases; Marsabit HC Misc Succession Cause No E002 of 2021; [Denge Wario Guraacha v Habiba Wario Guraacha & 2 others](#) and Machakos HC Misc No 308 of 2048 [Rose Mbithe Ndambuki v Peter Kimatu Wambua & 2 others](#). The court was thus asked to dismiss the Summons for Revocation of Grant.

The Applicable Law

13. I will set out briefly the applicable constitutional and legal provisions which will undergird my decision. I shall begin with the [Constitution](#) of Kenya, 2010 which provides thus in Article 170(5):-

“The jurisdiction of a Kadhis’ court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s courts.”
14. Section 18 of the [Civil Procedure Act](#) gives this Court the power to transfer cases 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.”

(emphasis added).

Issues for Determination

15. I understand the following as the issues I must determine in this matter:-

1. Whether there is a matter pending determination before the lower court that is capable of being transferred;
2. Whether the decedent was a Muslim;
3. Whether a case has been made for the revocation of the grant issued to the Petitioner/ Respondent.

I shall look at each of these in turns.

Is there a subsisting succession Cause before the Kadhi's Court?

16. I consider the holding in the Ugandan case of *David Kabungu v Zikarenga & 4 others*; Kampala HCCS No 36 of 1995 authoritative when a court is considering transfer of a matter before a subordinate court either to itself or to another court. In the said case Okello J stated as follows: -

“Section 18(1) 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 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 purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction It is a 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 expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication 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 could be refused...”

17. As I understand section 18 of the [Civil Procedure Act](#) this Court may only transfer those matters that are “pending”. A pending matter is one in which the Court hasn't made final, determinative findings on the rights of the parties before it. It therefore follows that where there is no pending case this Court won't act in futility. A case that isn't pending is dead. Transferring a dead case is an exercise in futility. It is a trite observation that courts don't act in vain.



18. It has been argued that the Court below set aside its decree. I am afraid that no evidence of that was placed before me of a decree/order of the Kadhi vide which that was done. In the absence of an order of the Kadhi setting aside his judgment and decree the only conclusion I can draw is that there no such order.

Was the decedent a Muslim? What personal law applied to him?

19. Although the decedent has a French/European name the only document available for my perusal that would indicate his faith was a marriage certificate evidencing the union he celebrated with the Petitioner/Respondent before a Kadhi. Section 48 of the *Marriage Act* (on the application of Islamic law) provides that “this part shall only apply to persons who profess Islamic faith.” I understand this legal provision to mean that a valid Islamic marriage can only be contracted by a couple that both profess Islam. Thus, where a Muslim bride or groom desires to have a religious wedding with a non-Muslim, he/she must procure the conversion of his/her non-Muslim prospective spouse. In the event that the prospective spouse isn’t willing there is always the option of contracting a civil marriage.
20. I am further convinced that the decedent was a Muslim by the fact that he was able to marry the Petitioner/Respondent in an Islamic wedding. The Holy Quran is clear that Muslim women are not allowed to marry non-Muslims (including Christians and Jews). Had Marnier Pierre Andre Roger not been a Muslim he wouldn’t have been allowed to marry the Petitioner/Respondent before the Kadhi in view of what the Holy Quran provides in Surat al-Baqarah 2:221 as follows: -

“Do not marry polytheistic women until they believe; for a believing slave-woman is better than a free polytheist, even though she may look pleasant to you. And do not marry your women to polytheistic men until they believe, for a believing slave-man is better than a free polytheist, even though he may look pleasant to you. They invite #you# to the Fire while Allah invites #you# to Paradise and forgiveness by His grace.1 He makes His revelations clear to the people so perhaps they will be mindful.”

21. I do not have a reason to believe that the Kadhi who celebrated the marriage engaged in fraud by officiating a marriage that was contrary to the *Marriage Act*, 2014. The only conclusion I can draw from the circumstances of this case is that the decedent was a Muslim. In my opinion the fact that he was a Caucasian French man with European sounding names is irrelevant.
22. Being a Muslim his estate would be governed by section 2(3) of the *Law of Succession Act*. The said section provides that the devolution of an estate of a deceased Muslim is governed by the applicable Islamic law. His estate would therefore devolve under Islamic law to his lawful heirs.

Was the 1st Objector/Applicant the wife of the deceased?

23. I am afraid that I have not seen any evidence that would support the assertion of the 1st Objector/Applicant that she was the spouse of the deceased. Her affidavit didn’t state how exactly they got married, where they lived, if they had children and what role she played in his interment. Her narration had several yawning gaps that begged to be filled. If for example the decedent was her spouse why did it take her long to file the objection? Although she variously pleads ignorance it does appear to me that there are 2 pending cases before the Kwale ELC court between the parties herein.
24. From the way the objection proceedings herein have been framed it therefore becomes clear that what is before the court is actually a land case and the tussle before this court is an attempt by one faction to steal a march from another. I say this as I am cognizant of the impact my ruling in favour of the Objectors/Applicants in the prosecution of the case before the Kwale ELC. If the grant is revoked there



will be no one to defend the interest of the estate of the deceased in the said matters as the Respondent gained an interest in the properties in dispute following her appointment as the personal representative of the estate of the decedent and the consequent transfers of titles to her.

Has a case been made for revocation of grant?

25. Section 76 of the *Law of Succession Act* provides that:-

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.

26. I have already found that the 1st Objector/Applicant wasn't a spouse of the decedent, at least going by the evidence before the Court. I have found no evidence of concealment or the withholding of information. To my mind the proceedings before the Kadhi Court were lawful, fair and procedural. I am unable to see any procedural defect. From what I can discern the Respondent acted with due diligence in administering the estate. In any case the grant hasn't become useless and inoperative.

27. The claim made by the 2nd Objector/Applicant on the other hand would be best handled by the Kwale Environment and Land Court as it is in regard to the use, occupation and title to the two pieces of land in issue.

28. Having found that there is no case capable of transfer inevitably no grant capable of revocation exists before me.

Disposition

29. From the foregoing it is clear that this is a case that calls for dismissal of the application. The application has no merit and is dismissed.



30. Costs aren't usually granted in family matters. I see no reason why I should depart from that convention in this case. I wont therefore make an order as to costs.

Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS 19TH DAY OF MAY 2023 AT MOMBASA VIA MICROSOFT TEAMS

.....

GREGORY MUTAI

JUDGE

In the presence of:-

Ms. Mutheke for the Objectors/Applicants

Ms. Nyariki for the Petitioner/Respondent

Winnie Migot – Court Assistant

