



**In re Estate of Salim Ali Buya (Deceased) (Miscellaneous Application
E029 of 2023) [2023] KEHC 22564 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E029 OF 2023**

G MUTAI, J

SEPTEMBER 22, 2023

**IN THE MATTER OF TRANSFER OF THE SUCCESSION CAUSE NO. 95 OF 2019
FROM THE KADHI'S COURTS TO THE MAGISTRATE'S COURT IN MOMBASA
AND IN THE MATTER OF THE ESTATE OF SALIM ALI BUYA (DECEASED)**

BETWEEN

SHAKILA SWALEH APPLICANT

AND

MBARAK ALI BUYA RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 14th July 2023. The same is brought under section 3A, 17 and 18 of the [Civil Procedure Act](#). The motion seeks the following orders:-
 - a) Spent;
 - b) That this honourable court be pleased to transfer Succession Case No. E95 of 2019 to the Magistrates Court, Mombasa which is pending before the Kadhi's Court at Mombasa; and
 - c) That the costs of this application be in the cause.
2. The application is premised on the grounds stated therein as well as on the Supporting Affidavit of the Applicant sworn on 14th July 2023.
3. The Applicant stated that she filed Succession Cause No.95 of 2019 at the Kadhi's Court Mombasa seeking the determination of the heirs of the deceased, and their respective shares, in accordance to the Islamic Sharia law as well as the distribution of the estate. On the 22nd day of June 2021 the Principal Kadhi issued orders that the valuation of the suit property be conducted by government valuer to determine its monetary value. The same was done. Subsequently valuation report dated 11th August



- 2021 was presented to the court. In the said report the value of the property was given as being Kes.2,000,000/-.
4. Being dissatisfied with the said valuation report she sought the services of a private valuer who valued the property at Kes.4,500,000/-. The valuation report was admitted by the Kadhi's Court on 30th August 2021. The court directed that the suit property be sold. The Applicant was ordered to look for a buyer. Unfortunately she was unable to find one. The Respondent is desirous of buying the suit property at Kes.2,000,000/-. She is apprehensive that the Kadhi might permit the Respondent to buy the property at the said price.
 5. The Applicant stated that she no longer has confidence in the Kadhi's Court neither does she want to be subjected to the Kadhi's Court anymore and urged the court to transfer the matter to Mombasa Magistrate's Court for hearing and determination. She submitted that the transfer will facilitate just, expeditious, proportionate, and affordable resolution of the dispute between the parties herein and that it would be in the interest of justice that the matter be transferred to the magistrate court for hearing. She urged that the Respondent will suffer no prejudice if the same is allowed.
 6. The Applicant filed a Supplementary Affidavit sworn on 21st August 2023 vide which she stated that the Magistrate's Court has the requisite jurisdiction to hear and determine succession matters governed by Muslim Sharia law.
 7. The Applicant further stated that the matter before the Kadhi's Court is yet to be determined. She submitted that although she had earlier subjected herself to the jurisdiction of the Kadhi's Court but she no longer has confidence in it. In her view she has tendered sufficient grounds for the orders sought to be granted. She urged the court to allow the application.
 8. The Respondent opposed the application. The Respondent filed a Replying Affidavit sworn on 27th July 2023 vide which he stated that the application lacks merit, is frivolous, vexatious and an abuse of the court process. He urged that the application is misleading and fails ab initio for the reasons that the Magistrate's Court lack jurisdiction to deal with Muslim succession matters.
 9. He further stated that the matter is a very old matter, which was, at the time the application was filed, in the distribution stage. That being so the application was a delaying tactic. The Respondent stated that he had indulged the Applicant since 2021 to no avail. He averred that in the circumstances, going by the Kadhi's orders of 22nd June 2021, he was at liberty to buy the suit property at the price indicated in the government valuer's report.
 10. He stated that this honourable court lacks jurisdiction to transfer a matter that had been determined. He argued that the Kadhi's Court jurisdiction is not concurrent with that of the Chief Magistrate's Court. He urged that transfer of suits could only be done between courts of concurrent jurisdiction. The Respondent argued that the Applicant had not produced any sufficient reason(s) to persuade this honourable court to exercise its discretion in her favour. He therefore urged the court to dismiss the application with costs.
 11. On the 27th July 2023 I directed that the matter be canvassed by way of written submissions. Subsequently the Applicant through her advocates Lawrence Obonyo Legal Advocates filed her submissions dated 21st August 2023. Counsel Submitted that Section 18 of the *Civil Procedure Act* empowers the High Court to transfer suits from one subordinate court to another. He urged that this court is vested with discretion to either grant or decline transfer of a suit from one subordinate court to another.



12. Counsel relied on Article 170 (5) of the *Constitution* of Kenya, 2010 and Section 5 of the *Kadhi's Court Act* and submitted that the jurisdiction of the Kadhi's Court is determined by three factors namely, the subject matter of the claim, the parties professing the Muslim faith and the submission by the parties to the jurisdiction of the Kadhi's Court. Counsel submitted that the Applicant is the widow of the deceased while the Respondent is a brother to the deceased. That both parties profess the Muslim faith and dispute is one of inheritance. Further for a matter to be heard in the Kadhi's Court, there must be consensus between the parties and in this case the Applicant no longer wishes to submit to the Kadhi's Court jurisdiction.
13. In conclusion counsel urged the court to allow the application.
14. The respondent on the other hand through his advocates A.O. Hamza & company Advocates filed written submissions dated 30th August 2023. Counsel submitted on four issues which he argued ought to be determined by this Court namely; whether the Supplementary Affidavit and the Applicant's submissions are properly on record, whether the Kadhi's Court and the Chief Magistrate's Courts are courts of concurrent jurisdiction, whether the said application is properly before this honourable court and whether orders as to costs should issue.
15. On the first issue counsel submitted that the submissions together with the Supplementary Affidavit should be expunged from the record as they were filed out of time, without the leave of the court and that they raised new matters, respectively.
16. On the second issue counsel submitted that the Kadhi's Court jurisdiction is not concurrent with the other subordinate courts more so Magistrate's Court.
17. On the third issue counsel submitted that the application lacks merit, it is frivolous, vexatious and an abuse of court process only brought to delay justice. That who comes to equity must come with clean hands and that litigation must come to an end and urged the court to dismiss the application.
18. On the fourth issue counsel submitted that costs follow events and are in the discretion of the court and urged the court to award costs to the Respondent.
19. I have considered the application, the responses therein and the rival submissions by both counsels. I must now determine the following matters; whether this honourable court has jurisdiction to transfer Succession Case No. E95 of 2019 from the Kadhi's Court and whether the same should be transferred to Magistrate's Court Mombasa.
20. On matters jurisdiction the Supreme Court in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR stated as follows:-

“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. 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.”
21. Section 18 of the *Civil Procedure Act* Cap 21 Laws of Kenya gives this court power to transfer suit instituted in the subordinate court. It provides: -



- a. 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.
 - b. 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.
22. The court in the case of *Guyo Jarso Daleno v Jamila Mohamed Maalim* [2020] eKLR in dealing with transfer of suit cited the case of *David Kabungu v Zikarenga & 4 others* Kampala HCCS No. 36 of 1995 and stated:-

“The Court exercising discretion on a request for transfer of suit in circumstances similar to our *Civil Procedure Act* had this to say:-

“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 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. What the Court has to consider is whether, the applicant has made 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 principle matters to be taken into consideration are: balance of countenance, 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.”

23. In this case the applicant has argued that she no longer has confidence in the Kadhi’s Court and would not wish to be subjected to the Kadhi’s Court any longer and urged this honourable court to transfer



the suit to Mombasa Magistrate's Court for hearing and determination. Further the transfer of the suit would facilitate just and expeditious determination of the matter.

24. In my opinion the jurisdiction of the High Court under section 18 of the *Civil Procedure Act* may only be exercised in respect of cases that are still pending determination. The matter before the Kadhi's Court would appear to me have been concluded as the trial Kadhi delivered his judgment. The only thing that is pending is distribution/execution of that judgment. In the circumstances I do not think that this Court has jurisdiction to issue the orders that have been sought. I must down my tools.
25. The foregoing notwithstanding the Applicant herein submitted to the Kadhi's Court jurisdiction willingly for almost five years and cannot have second thoughts on the same when the matter is at the last stage. Equity, as is oft said aids the vigilant and not the indolent or put differently delay defeats equity.
26. The application dated 14th July 2023 has no merit and is dismissed. Given the nature of the matter each party shall bear own costs.
27. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023 VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr. Obonyo for the Applicant;

Ms. Hamid for the Respondent;

