



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

MISC. APPLICATION NO.E001 OF 2021

ALICE SIAGANI DIPONDO.....APPLICANT

VERSUS

ANDREW DARKEY DIPONDO.....RESPONDENT

R U L I N G

[1] The application dated 5th January 2021 is essentially for transfer of Busia CM Succession Cause No.313 of 2019, to this court for hearing and final determination.

The supporting grounds are set out in the notice of motion and are followed by the applicant's averments and annexures contained in her supporting affidavit deponed on 6th January 2021. The respondent opposes the application on the basis of the grounds of opposition dated 5th February 2021. Hearing of the application proceeded by way of written submissions which were filed by both parties through **Gabriel Fwaya & Co. Advocate** and **Abok Odhiambo & Co. Advocates**, respectively.

[2] Having considered the application on the basis of the supporting grounds and the rival submissions, it became apparent to this court that the application turns on the pecuniary jurisdiction of the Magistrate's Court in hearing and determining the matter.

It is thus contended by the applicant that the estate subject of the suit is valued at more than ksh.20 million thereby divesting the Magistrate's court of the jurisdiction to deal with the matter. The applicant therefore prays for a transfer of the matter to this court.

[3] On his part, the respondent contends that the application is an abuse of the court process in as much as it seeks to transfer a suit which is incompetent and fatally defective.

The respondent therefore asked this court to dismiss the application with costs.

The question is whether the applicant is entitled to the order sought on the basis of pecuniary jurisdiction of a Magistrate court. Undoubtedly, **s.18** of the **Civil Procedure Act** empowers the High Court to transfer a suit instituted in a subordinate court. However, there must be satisfactory and proven grounds for such action to be put into effect.

[4] Herein there was no attempt whatsoever by the applicant to establish that the value of the subject estate exceeds, a sum of kshs.20 million. As a matter of fact, the applicant is unable to determine the actual value of the estate and has largely relied on the allegations made elsewhere by the respondent that the estate is valued at more than ksh.20 million. She implied in paragraph 14 of her supporting affidavit that apart from what the respondent alleged, she has no evidence as to the monetary value of the estate.

In the circumstances, this application is unwarranted and even if the value of the estate exceeds, the sum of ksh.20 million the proper thing for the applicant to do is to beseech the trial court to exercise its inherent powers under **Rule 73** of the **Probate & Administration Rules** and re-locate the suit to a court with necessary pecuniary jurisdiction for hearing and disposal.

[5] The respondent submitted that the present application by the applicant is an attempt to "sanitize" a matter which is already defective, incompetent and nullity for want of necessary pecuniary jurisdiction. Such argument cannot hold sway as it is possible that at the time the suit was filed the subject estate was valued at less than ksh.20 million and as years passed by the value increased to over ksh.20 million. It would be unjust for a litigant to be driven off the jurisdiction of a court simply because the value of the suit property subsequently increased and over shot the pecuniary jurisdiction of the court. The suit would not be rendered defective and incompetent because of the increased new value of the suit property. In the circumstance, it would be prudent for a court to consider and rely on the value of the property given at the time the suit was filed to determine whether or not it has the pecuniary jurisdiction to deal with it. If this were not to be the case then every succession cause instituted in the subordinate court would eventually be rendered defective and incompetent for want of pecuniary

jurisdiction on account of recent value and/or re-value of the property. It would not matter that the suit has been pending in court for more than ten (10) years or even twenty (20) years.

[6] If the respondent had not raised a preliminary objection to the filing of/or hearing of the suit on account of the pecuniary jurisdiction of the court, doing so after the hearing or part hearing of the matter was not only an afterthought but also an abuse of the court process with a view to delaying the expeditious disposal of the case and to continue enjoying the proceeds of the estate at the expense of other beneficiaries.

An order from this court to have the case transferred from the subordinate court to this court would be tantamount to providing the respondent with additional ammunition to continue carrying out his undeserved mission. Otherwise, this present application is lacking in merit and is hereby dismissed with each party bearing his/her own costs.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[Read and signed this 17TH day of JUNE 2021]