



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: Hon. D. K. Kemei - J

PROBATE & ADMINISTRATION

MISC. APPLICATION NO. E003 OF 2021

JOSEPH MUULU MBAI.....1ST APPLICANT

JOHN MUTHIANI MATINGO.....2ND APPLICANT

PETER MUMO MUTWIWA.....3RD APPLICANT

VERSUS

MUOKA MATHEKA.....1ST RESPONDENT

KIOKO MATHEKA.....2ND RESPONDENT

RULING

1. The Applicants herein filed an application dated 22/04/2021 pursuant to section 3A of the Civil Procedure Act seeking for an order that the **Machakos Chief Magistrate's Court Succession Cause No. 469 of 2016** be transferred to the High Court for hearing and determination.

2. The application is supported by the grounds set out on the face thereof as well as the affidavit of Peter Mumo Mutwiwa sworn on even date. The Applicants gravamen is that they are the petitioners in **Machakos Chief Magistrate's Court Succession Cause No. 469 of 2016** and that the said court does not have jurisdiction to hear and determine the said matter. It is further the Applicants case that the matter revolves around the first registration of **L.R. No. Mitaboni/Mitaboni/2555** which necessitates the reception of witnesses who witnessed the pre-land adjudication and demarcation period and who are of advanced ages and whose evidence should be taken as soon as possible. It was also the Applicants contention that the suit property is value well over Kshs.100 million and thus the lower court lacks jurisdiction to hear and determine the matter and hence the need to transfer it to this court.

3. The application is strenuously opposed by the Respondents. The 1st Respondent filed a replying affidavit sworn on 4/05/2021 wherein he deponed *inter alia*: that the Applicants are neither the dependants nor beneficiaries of the deceased within the meaning of section 29 of the Law of Succession Act; that the Applicants filed for letters of grant of administration and sought to have it confirmed but same did not take place as the Respondents filed a protest thereto leading to the Applicants withdrawing the suit as well as the entry of a consent revoking the grant of letters of administration and the matter being marked as closed; that the Applicants are no longer petitioners in the lower **Court Succession No. 469 of 2016** since the grant has already been revoked by consent and file closed; that there is no suit capable of being transferred to this court as the one in the lower court has been dealt with appropriately; that the application is an abuse of the court process and should be dismissed with costs.

4. I have considered the application as well as the rival affidavits. It is not in dispute that the Applicants had earlier cited the Respondents vide **Machakos High Court Citation No. 333 of 2015** in which the Applicants were granted leave to petition for grant of letters of administration. It is also not in dispute that the Applicants duly filed the petition vide **Machakos Chief Magistrate Succession Cause No. 469/2016** and secured the requisite grant of letters and went ahead to seek for confirmation of the same. It is also not in dispute that the trial court duly heard the summons for confirmation of grant as well as a protest lodged by the Respondents but however a determination thereon was not made since the parties entered into a consent dated 28/08/2019 to the effect that letters of grant earlier issued to the Applicants were revoked and that the matter was marked as closed. It is also not in dispute that on the 16/01/2020 the trial court directed the petitioners to file a fresh petition. That being the position, the singular issue for determination is whether the applicants have satisfied the court for grant of the order sought.

5. The power to transfer suits of a civil nature is donated to the High Court vide section 18 of the Civil Procedure Act that 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 proceedings 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 the proceedings pending in any court subordinate to it and thereafter-

(i) Try to 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) Transfer the same for trial or disposal to the court from which it was withdrawn.

(2) where any suit or proceedings has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special direction in the case of an order of transfer, either vary it or proceed from the point at which it was transferred or withdrawn”.

As the Applicants now want the court to transfer the suit from the Chief Magistrate’s Court Machakos to this court, they bear the burden of convincing this court that the transfer sought is merited. The Applicants focal point is that the lower court does not have the jurisdiction to try the matter in view of the fact that the value of the subject matter namely **L.R No. Mitamboni/Mitaboni/2555** is in excess of Kshs.100 million which is beyond the pecuniary jurisdiction of the magistrate’s court. Indeed, the issue of jurisdiction is a key consideration by any court before deciding on whether or not to try a matter placed before it. If the court lacks jurisdiction, then it must down its tools. That position was clearly established by Nyarangi JA in the case of the **Owners of Motor vessel “Lillians” –vs- Caltex Oil Kenya Limited [1989] KLR 1** where he held as follows:-

“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”.

There is thus need to find out whether the lower court had jurisdiction to try the matter now being sought to be transferred to this court. It is noted that the Applicants have not annexed a valuation report so as to establish if indeed the suit property is valued at over Kshs.100 million as contended by the Applicants. Be that as it may, if this court is going to accept the Applicants claim on the value of the suit property as the gospel truth, then it follows that the lower court did not have jurisdiction in the first place to entertain the suit since under the Magistrate’s Court Act the highest court presided over by a Chief Magistrate has pecuniary jurisdiction not exceeding Kshs. 20 million. It is trite that the power to transfer a case to the High Court for hearing may only be exercised if the court before which it is filed is a court vested with competent jurisdiction to try and dispose of the matter and that if the suit filed is incompetent, then the High Court lacks jurisdiction to effect a transfer. It is therefore quite clear that the suit namely **Machakos Chief Magistrate’s Court Succession Cause No. 469 of 2016** is not only an incompetent suit but also a nullity in law and hence there is nothing to transfer. The Applicants have admitted that the lower court has no jurisdiction to hear the matter and hence the suit before that court is incompetent and a nullity in law. There is therefore nothing to transfer. It is on that ground that the Applicants application must fail.

6. Before I pen off, I need to point out one more thing. The record of the lower court reveals that a consent was entered into on the 28/08/2018 whereby the letters of grant of administration issued on 21/02/2018 was revoked and that the suit was marked as closed. Again, on the 16/01/2020 the trial court directed that a fresh petition be filed by the petitioners who are the Applicants herein. If that is the true record of the lower court, then it means that there is nothing to be transferred to the High Court for determination since there is no suit in existence. Further, the revocation of the grant of letters of administration on the 28/08/2019 meant that the Applicants ceased to be petitioners in **Machakos Chief Magistrate’s Court Succession Cause No. 469 of 2016** and *ipso facto* lacked locus standi to institute proceedings on behalf of the estate of the deceased. It is instructive to note that the Applicants have not approached the lower court to seek to revive the suit by having the consent set aside so as to approach this court for the transfer of the suit. I must point out that at this juncture this court is not clothed with jurisdiction to transfer from a subordinate court to itself a matter that is already closed. It would appear to me that the Applicants are ingenuously trying to revive the closed case through the back door under the guise of the lower court’s lack of jurisdiction. If the lower court had directed that a fresh petition be filed then the Applicants or Respondents should do just that. No reasons have been given by the Applicants as to why they have not filed the fresh petition as ordered. I find the application is clearly an abuse of the court process.

7. In light of the foregoing observations, it is my finding that the Applicants application dated 22/04/2021 lacks merit. The same is ordered dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 14TH DAY OF JUNE, 2021.

D. K. KEMEI

JUDGE