



**KTL.NO.671/2019**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL MISC. APPLICATION NO. 91 OF 2019**

**LUCIA NDOTU MUTUNGA.....APPLICANT**

**VERSUS**

**MAGDALINE MUTANU MUTUNGA.....1<sup>ST</sup> RESPONDENT**

**FAITH KAINGI MUTUNGA.....2<sup>ND</sup> RESPONDENT**

**MAURICE CHARLES NZUVA MUTUNGA.....3<sup>RD</sup> RESPONDENT**

**THE PRINCIPAL MAGISTRATE, MWINGI.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicant approached this Court by way of Notice of Motion seeking stay of execution of the directions/orders made by the **Principal Magistrate's Court, Mwingi** on the **19<sup>th</sup> September, 2019** in **Succession Cause Number 43 of 2019**. She also asked the Court to invoke supervisory jurisdiction over the Subordinate Court by transferring the matter to Kitui Chief Magistrate's Court for hearing, disposal and distribution of the Estate of the Deceased, **John Mutunga Nzuva**.
2. The application is premised on grounds that following a Petition presented by the Applicant, a widow of the Deceased, for grant of Letters of Administration ad litem, she was granted the same that enabled her to collect **Kshs. 606,070.80/=** from **Wakulima Sacco Society** that she was to spend on payment of school fees for minors.
3. Subsequently, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, daughters and son of the Deceased filed an application requiring her to render a full account of how the money collected had been spent. She complied but the Principal Magistrate directed her to deposit the total sum in Court until beneficiaries of the Deceased would be ascertained. Eventually, an order of her arrest was made.
4. She faults the conduct of the Court for colluding with individuals who have been harassing her following the death of her husband.
5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition urging that the application is incompetent and fatally defective as the subject orders sought to be stayed had not been disclosed by the Applicant and that she concealed material facts leading to the Court's intervention.
6. Also filed is an affidavit deposed by the 1<sup>st</sup> Respondent on her own behalf and that of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, where she states that the Deceased was married to the Applicant, a second wife and their mother, the 1<sup>st</sup> wife who was deceased.
7. That on **31<sup>st</sup> May, 2018**, by consent, parties agreed to have joint letters of administration issued and the sum collected to assist them. The process was initiated but the Applicant declined to participate further and while awaiting the process to proceed they learnt that the Applicant had withdrawn **Kshs. 970,000/=** from NHIF on **21<sup>st</sup> December, 2017** and she was in the process of accessing dues at **BIMA** and **Ukulima Sacco Nairobi** without the consent of beneficiaries of the Estate of the deceased. That they visited **NSSF** and found a sum of **Kshs. 1.8 Million** was about to be released to the Applicant and they were compelled to apply for injunction orders in that regard.
8. That the limited grant ad litem was filed without their consent and after they applied for revocation, the Court ordered the funds to be deposited in Court to await distribution of the Estate.
9. That one of their brothers was in college but the Applicant did not assist him with the sum collected.

10. The application was canvassed by way of oral submissions.

11. **Mr. Kaingu**, learned Counsel for the Applicant urged that the case be transferred to **Kitui** for hearing and disposal. He relied on the case of **Barnaba Kipsonkok Tenai vs. Republic (2014) eKLR** where it was stated that the test of transfer of the matter is a question of fair trial being achieved. That it is based on reasonableness of the Complaint but not if the Magistrate is experienced.

12. **Mr. Langat** for the Respondent opposed the application. He argued that the application was lacking merit and had to be dismissed.

13. I have duly considered rival submissions by both Counsels for the Applicant and 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent.

14. I have been called upon to invoke supervisory powers bestowed upon me by the law. **Article 165(6)(7)** of the **Constitution** provides thus:

*“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

*(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”*

15. Circumstances that would move a Court to grant orders sought were considered in the case of **David Kabungu vs. Zikarenga & 4 Others, Kampala HCC.S No. 36 of 1995** where **Okello, J** stated that:

*“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 ...”*

16. In the case of **Hangzhou Agrochemicals Industries LTD vs. Panda Flowers LTD (2012) eKLR** the Court addressed conditions to be considered in determining whether or not to grant an order transferring a suit, as follows:

*“The Court’s power to transfer proceedings from one Court to another is a useful corrective to ensure that proceedings wherever began or whatever forum the Plaintiff has initially chosen should be dealt with or heard or determined by the Court most appropriate or suitable for those proceedings. When making or refusing an order for transfer the Court will have regard to the nature and character of the proceedings the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power of the Court under Sections 3A of the Civil Procedure Act .... Although there is only one High Court in Kenya which sits in different areas as directed by the Chief Justice (as opposed to Subordinate Courts established under various laws) it is not forbidden for a Kenyan High Court sitting in one location to order a transmission or allocation of a case file before him to another Judge sitting in another location. It must be a matter of discretion for the Judge and it must be for compelling reasons which would be for the purposes of ensuring justice and this is all within the inherent power of the Court under Section 3A of the Civil Procedure Act ...”*

17. The Applicant in making the application did not point out which particular Judicial Officer was seized of the matter. She generally alluded to an order made by the Principal Magistrate. Her gravamen is in respect of a sum of money she collected forming part of the Estate of the Deceased that she was ordered to deposit in Court to await distribution of the Estate of the Deceased.

18. She has described the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as survivors of the Estate of the Deceased hence being entitled to part of the money. Serious allegations have been raised and not disputed in the Replying Affidavit. This would call for succession issues being addressed prior to the distribution of the Estate. In the premises no strong case has been put up that necessitate transfer of the case.

19. I must also point out that there are two (2) Judicial Officers at **Mwingi Law Courts**. Therefore, there is nothing to suggest that both Judicial Officers may be biased as suggested by the Applicant.

20. In the premises I find the application lacking merit. In the result, it is dismissed with costs to the Respondents.

21. It is so ordered.

**Dated, Signed and Delivered at Kitui this 9<sup>th</sup> day of January, 2020.**

**L. N. MUTENDE**

**JUDGE**