



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CIVIL APPLICATION NUMBER 154 OF 2019

ANTHONY MUCHEMI JUMA.....1ST APPLICANT/PLAINTIFF

ANNE WANJIKU MUCHEMI.....2ND APPLICANT/PLAINTIFF

LUCY WANGOI JUMA.....3RD APPLICANT/PLAINTIFF

FRANCIS KARANJA MUCHEMI.....4TH APPLICANT/PLAINTIFF

MERCY WANGECHI MUCHEMI.....5TH APPLICANT/PLAINTIFF

VERSUS

MERCY WANJIKU.....1ST RESPONDENT/DEFENDANT

MARK WANGAI MUCHEMI.....2ND RESPONDENT/DEFENDANT

RULING

1. The notice of motion before court is dated 15/2/2019. The orders sought are;

1. Spent.

2. Spent.

3. THAT the Honourable court does call for the record of the above proceedings which are in the subordinate courts precisely the Chief Magistrate's Court at Nakuru and make an order as to its transfer to itself.

4. THAT the Honourable Court does exercise its supervisory role as enshrined in the Constitution and ensure that the above proceedings are heard without delay and that justice is dispensed to the parties herein.

5. THAT the costs of this application be in the cause.

2. In essence the application is one for a transfer of **Nakuru CMCC No. 3 of 2019** from the Chief Magistrate's Court to the High Court.

3. The application was prompted, as readily acknowledged by the applicants, by the discovery by counsel for the applicants during research that the Magistrate's Court has no jurisdiction to adjudicate upon customary burial. This is as per **Section 2** of the **Magistrate's Court Act**.

4. That proposition finds support in the legislation quoted **Section (2)** of the then **Magistrate's Court Act** and it has been retained in the **Magistrate's Court Act, No. 26 of 2015**, where it is found in **Section 7 (3) of the Act**.

5. I am also invited to exercise this court's supervisory role as enshrined in the constitution and ensure that the proceedings are heard without delay.

6. It is urged that the advocates on record for the applicants were served with;

(i) Application via chamber summons and supported by a supporting affidavit by Mary Wanjiku both dated 6th February 2019 and filed in court on 13th February, 2019.

(ii) Further affidavit sworn by Karanja George dated 6th February 2019 and filed in court on 13th February 2019.

(iii) Notice to cross examine addressed to F. A. Badia & Company Advocates from Mwaniki Gachoka & Company Advocates date 13th February 2019 and filed in court on 13th February 2019.

(iv) Notice of preliminary objection dated 13th February 2019 and filed in court on 13th February, 2019.

7. It is stated that the objectives of the respondents is;

(i) To prematurely terminate the Applicants/Plaintiffs suit against them.

(ii) To permanently bar the Applicants/Plaintiffs who are all biological children of the deceased James Juma Muchemi from finding out exactly what caused the death of the deceased on 8th December, 2018.

(iii) To permanently bar the Applicants/Plaintiffs who are the biological children of the deceased James Juma Muchemi from not only seeing their deceased father in death but also taking part in funeral preparations and actual burial of the deceased.

(iv) To permanently bar the Applicants/Plaintiffs the biological children of the deceased James Juma Muchemi, their biological mother and their extended relatives from visiting the grave site of the deceased; as the deceased has been buried at a site in the full and total control of the 1st and 2nd respondents/defendants and their nuclear family to the exclusion of all others.

8. There was no response to the application.

9. Of determination is whether the applicants have met the threshold for the transfer of Nakuru Chief Magistrate's Court Case Number 3 of 2019 to the High Court for hearing and disposal.

10. The grounds that I decipher from the maze that is the application and the grounds are that it has now come to counsels knowledge that the Chief Magistrate's Court has no jurisdiction to handle the matter and that the respondents are intent on prematurely terminating the plaintiff's suit, barring the applicants from finding out exactly what caused the death of the deceased barring the applicants from seeing their father in death and participating in the funeral preparations and actual burial of the deceased and prematurely barring the applicants from visiting their father's grave. It is also stated that it is in the broader interests of justice that the matter be transferred to the High Court, Family Division for its hearing and final determination on merit.

11. I have painstakingly considered the application, the supporting affidavit and grounds.

12. It is the plaintiffs who filed the suit at the Nakuru Chief Magistrate's Court. A belated realization that a party has filed a suit in a court without jurisdiction is not a ground to transfer a matter to another court, be it of concurrent jurisdiction or otherwise. In any event a suit filed without jurisdiction is not transferable as it is incompetent.

13. The respondents cannot be faulted for their response to the application through any means including affidavit(s), preliminary objection(s), counter applications, notice to cross-examine etc. The court seized of the matter has the necessary wherewithal to deal with all issues before it and resolve them.

14. The Plaintiff/Applicants cannot expect to run away from considering the issues raised by the respondents in their chamber summons application dated 6/2/2019, the supporting affidavit, the further affidavit, the medical report by Dr. Joseph Aluoch, the notice to cross examine and the notice of preliminary objection by seeking refuge in the High Court through a transfer of the matter, which transfer does not meet the parameters of the law.

15. My conclusion on a keen reading of the application before court is that the application is a product of a misapprehension of the law.

16. Not even the supervisory powers of this court over the subordinate court can be called to aid the applicant's cause. There is no demonstration that the subordinate court has so erred in law or misdirected itself or committed any breaches requiring the intervention by the High Court.

17. I find the application completely without merit and the same is dismissed with no orders as to costs.

Dated and Signed at **Nakuru** this **4th** day of **April, 2019**.

A. K. NDUNG'U

JUDGE