



**REPUBLIC OF KENYA**

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

**HIGH COURT MISCELLANEOUS SUCCESSION CASE NO.27 OF 2016**

**IN THE MATTER OF THE ESTATE OF THE LATE NAHASON M'THIKA - DECEASED**

**AND**

**PRISCA KARIMI NAHASHON.....1<sup>ST</sup> PETITIONER**

**ALBERT NJOKA NAHASHON.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**LUCYLINE KAARI MICHENI.....1<sup>ST</sup> RESPONDENT**

**ALBERT NJOKA NAHASHON.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is a ruling on the application by the Petitioners represented by the firm of I.C Mugo Advocates dated 21<sup>st</sup> July, 2016 seeking various orders, to wit, the transfer of Chuka SPMC Succession Cause No. 65 of 2016 to this court for hearing and determination; substitution of Dennis Kinyua instead of Prisca Karimi Nahashon as 1<sup>st</sup> Petitioner and thirdly an injunction against Respondents restraining them from invading, cultivating fencing, trespassing or taking possession of LR Nos.Karingani/Gitarene/3717, 3718, 3719, 3720, 3721 and 3722 (hereinafter “the suit properties”) pending the determination of the main cause.
2. The grounds upon which the application was made were set out in the body of the summons as well as in the Supporting Affidavit of Mbuba Nahashon sworn on 14<sup>th</sup> July, 2016. Those grounds were that the estate of the deceased comprising of 39 acres is valued in excess of Kshs.58 million, thereby exceeding the lower court’s pecuniary jurisdiction, that Prisca Karimi (1<sup>st</sup> petitioner) passed away on 27<sup>th</sup> June, 2016 and that the suit properties belonged to the late 1<sup>st</sup> Petitioner and her sisters as had been distributed to them.
3. The Respondent opposed the application vide the Replying Affidavit of Lucyline Kaari Micheni sworn on 24<sup>th</sup> August, 2016. The Respondents contended that the estate was valued at Kshs.12 million which was within the jurisdiction of the Senior Principal Magistrate Court Chuka and that the forgery of her signature had led to the Petitioners encroaching on her 4 acres.
4. The application was argued by way of written submissions. Mr Mugo Learned Counsel for the Applicant submitted that since the Respondent had sold portions of the estate at over Kshs.1 million, obviously the estate was valued in excess of Kshs.20 million; that Rule 44 of the Probate and

Administration Rules directs that applications for revocation under Section 76 be heard by the High Court; that in the premises, the Chuka Senior Principal Magistrate's Court did not have jurisdiction to entertain the matter. Counsel further submitted that since the suit properties belonged to the late Prisca Karimi Nahason, the injunctive reliefs should be granted. On her part, Ms. Mutinda for the Respondent submitted that there was no documentary evidence to show that the value of the estate was as suggested by the Applicants and that the Applicants had not made a case for the grant of the orders of injunction. She cited the cases of **Momanyi Okero & Anor .v. Roselyn Banchiri Ouko & Anor [2016]eKLR** and **Jan Bolden Nielson .v. Herman Phillipussteya also known as Hermannusphillipus Steyn & 2 others [2012] eKLR** in support of her said submissions. She urged the court to dismiss the application.

5. I have carefully considered the Affidavits on record, the submissions of counsel and the authorities relied on. This is an application seeking three substantive orders, that is, for substitution of the 1<sup>st</sup> Petitioner which this court granted ex-parte having been satisfied of the demise of the original 1<sup>st</sup> Petitioner and her relationship with the proposed substitute; an order of transfer of the cause from the Senior Principal Magistrates Court to this Court and an injunctive order. Since the prayer for substitution is spent what remains are the prayers for transfer and injunction.

6. Section 48 of the Law of Succession Act Cap 160 Laws of Kenya, 2016 (hereinafter "the Act") provides:-

***"48. Jurisdiction of magistrates***

***(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate that gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates' Courts Act, 2015.....***

It would seem that this recent amendment to the Law extended the jurisdiction of the Magistrates Court to entertain any and all applications under the Act restricting that jurisdiction only to pecuniary limits set out in Section 7 of the Magistrates Act. The former caveat placed on the Magistrates Court on certain applications seems to have been done away with. In this regard, the Magistrate's Court now has jurisdiction to entertain all matters of Succession save as to geographical limitation under section 49 and pecuniary limits set out in section 7 of the Magistrates Act. Of course if jurisdiction is denied by the statute eg sealing of grants issued in foreign countries, the jurisdiction donated by Section 48 will not extend there.

7. In this regard the caveat previously placed on Magistrate's Courts on application under Section 76 of the Act on revocation was removed. In this regard the alleged Rule 44 of the Probate and Administration Rules relied on by Mr Mugo does not apply. A Subsidiary Legislation cannot purport to limit a provision enacted by parliament in the main statute. In this regard, parliament in its wisdom having removed section 76 from matters which the Magistrates Courts could not entertain as previously was the case, that restriction cannot be brought back by way of subsidiary legislation. Accordingly, the Magistrates Court is not precluded from determining an application for revocation.

8. The next issue is whether this matter should be transferred from the lower court on account of the value of the subject matter. The Applicant alleged that the estate is valued in excess of Kshs.58 million. I have thoroughly perused the entire record to discern the basis for that proposition but I have seen none. Under sections 107 and 108 of the Evidence Act Cap 80 Laws of Kenya, it is he who alleges that must prove. A value of a subject matter is an issue that requires scientific precision. The subject matter has to be valued and a value attached thereto by a professional valuer. Mere assertion in an affidavit or submission by counsel cannot do. In this case, the Applicant did not produce any valuation report to show that the estate is valued for anything more than Kshs.15 million. That being the case, the prayer for transfer on the basis of the value of the subject matter is hereby declined.

9. That being the case, what is left is the prayer for injunction. This court having declined to assume

jurisdiction, I think it will be wrong to express itself on that prayer. It is imperative that the court which is still clothed with jurisdiction, ie the Senior Principal Magistrate's Court, Chuka be the one to consider the matter and pronounce itself on the same before this court can interfere. In this regard, that prayer is hereby struck out. That means the Applicant is at liberty to file a fresh application before the trial court in future if he so desires.

10. Accordingly, the application is partially successful as follows:-

- a) Dennis Kinyua be and is hereby substituted for PRISCA KARIMI NAHASHON as the 1<sup>st</sup> Petitioner.
- b) The prayer for transfer is hereby declined.
- c) The prayer for injunction is hereby struck out with leave to file a proper application before the trial court, if need be.
- d) The original file of Chuka SPM Succession Cause No.65 of 2016 formerly Meru High Court Succession Cause No.616 of 2014 is hereby retransferred back to the Chuka Senior Principal Magistrate's Court for hearing and determination.
- e) This file H.C Misc. Cause No. 27 of 2016 be and is hereby closed.

It is so ordered.

Dated and Delivered at Chuka this 3<sup>rd</sup> day of **November, 2016**

**A.MABEYA,**

**JUDGE.**