



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CIVIL APPLICATION NO. 18 OF 1998

HIRBAYE NANE SHEGE1ST APPLICANT

MOHAMED NANE SHEGE 2ND APPLICANT

SHEGE OSMAN NANE 3RD APPLICANT

- V E R S U S -

MAKO SHEIKH YASSIN RESPONDENT

RULING

1. The applicants through an application dated 8th April 2015 brought pursuant to Section 1A,1B, and 18 (1) (A) and (c) of the Civil Procedure Act and Order 51 Rule 10 and 15 of the Civil Procedure Rules seeks orders for consolidation of Kadhi's court Moyale civil case no. 16 of 2014 and Kadhi's court Moyale civil no. 33 of 2014 on the ground that the parties involved in both cases are all the same and the subject matter relates to a share of inheritance from the deceased, Osman Nane Shege left by his late father Nane Shege on plot nos 332 and 333 located at Manyatta location together with a shamba in Mansile and Gubalticha in Moyale, that the Kadhi's Court Moyale civil case no. 16 of 2014 and Kadhi's court Moyale Civil case no. 33 of 2014 be transferred to the Honourable Kadhi's court in Meru and costs be provided for.
2. The application is premised on the ground on the face of the application and supporting affidavit sworn by Mohamed Nane Shege on his behalf and that of his co-applicants.
3. The respondent is opposed to the application and has filed a replying affidavit dated 8th May 2015.
4. I have carefully considered the pleadings and annexures thereto and the parties opposing positions as well as their oral submissions. The issue for consideration is whether the civil case no. 16 of 2014 and no. 33 of 2014 arise over the same issue or are the same and whether the subject matter relates to a share of inheritance of the late Osman Nane Shege and whether the suits can be consolidated. The second issue is whether the suits can be transferred and if so to which Kadhi court?
5. The respondent in her replying affidavit concedes that the parties involved in both civil cases no. 16 of 2014 and 33 of 2014 filed in the Kadhi's court Moyale are the same but the prayers sought thereunder are totally different as in civil case no. 16 of 2014 seeks custody, care and management of the respondent's children. While civil no. 33 of 214 relates to the distribution of the estate of

the respondent's husband's estate. The respondent for various reasons objects to the consolidation of the two matters. The applicants did not elaborate on the nature of the claim in the two suits. The applicants did not attach copies of the complaints for perusal by the court nor did they produce any evidence that the parties are the same. The cause of action was not disclosed by way of pleadings. The respondent in her unchallenged affidavit has demonstrated that the parties are the same but the claims are totally different. The applicant in my view has failed to demonstrate that the two suits relate to the same cause of action; and that the prayers are the same. It is for this reasons that I decline to have the two suits consolidated, however, this order is not a bar for similar applications to be canvassed before the trial court in a later date.

6. The applicants further seek transfer of the two suits on the grounds; that Moyale Kadhi has shown open bias by chasing the applicants from the court and accusing them of being selfish individuals with intentions to grab the deceased property. The 2nd applicant contends that the Kadhi denied him an opportunity to complete his cross-examination during the hearing of an application filed under certificate of urgency and he denied him an opportunity to take notes when he was delivering the ruling. That on 12th September 2014, the applicant filed an application for court to disqualify itself to which court gave directions on 28th October 2014 for the applicant to file an application for that purpose at the High Court.
7. The Respondent on her part deponed that the deceased was domiciled in Moyale and all properties are in Moyale and as such it is only fair the Kadhi court at Moyale handles the matter that relates to the distribution of the estate of one Osman Nane Shege. The respondent deponed that the application for transfer of the suits is actuated by malice and greedy and with intention to punish her.
8. I have considered the parties affidavits in light of the proceedings before the trial Kadhi's court. The attached court proceedings show that the applicants/plaintiffs gave detailed evidence when cross-examined. That the respondent/defendant upon giving evidence was also cross-examined by the plaintiffs but It does not show which of the plaintiff cross-examined the defendant. The Kadhi court should have indicated in the respective cross-examinations which of the plaintiffs/applicants cross-examined the defendants. The record does not show that the applicants were chased out of the court nor is the accusation of them being greedy individuals nor is there evidence of denial of cross-examination on the part of the applicants among other accusations against the Kadhi. There is however an application for the Kadhi's court to disqualify itself and refer the matter to another Kadhi's court.
9. The parties in any court have a constitutional right to have a fair judicial process. A party who expresses fears or apprehension that there may be no fair trial before a particular court whether that is misapprehension is justified or not I believe in the interest of justice and fair trial such issue should be considered. It is my view that fair trial is the foundation of our justice system and should be embraced by all courts.
10. **Article 50 (1) of the Constitution of Kenya 2010** emphasis on fair hearing in all matters. It provides as follows:-

“50. (1). Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

11. In view of the above and having said so much, it is my view that in the interest of justice the suits pending before Moyale Kadhi's court should be transferred to another Kadhi court. The applicants have prayed for the suits to be transferred to Kadhi court at Meru. I have to point out that there is no Kadhi court at Meru. The respondent has insisted that the suit should be heard by a Kadhi court at Moyale and should the court be inclined to transfer the cases they should be transferred to Kadhi court at Marsabit because of the expenses on transport. I have considered the parties submissions and I am mindful of the fact that the overriding objective in litigation isto facilitate, just,expeditious,proportionate and affordable

resolution of a civil dispute. In considering the above I am of the view that the present two cases ought to be transferred for hearing and determination by Kadhi court at Marsabit.

12. The upshot of the matter is that the applicants' application is partially allowed in the following terms;

(a) The application for consolidation of Kadhi's court Moyale Civil case no. 16 of 2014 and Kadhi's Court's Moyale 33 of 2014 is refused.

(b) The Kadhi's court Moyale Civil case no. 16 of 2014 and Kadhi's court Moyale no. 33 of 2014 are withdrawn from the Kadhi's Court Moyale and transferred to Kadhi's court at Marsabit for trial and determination.

(c) Costs to the Respondent of Kshs. 15000/- to be paid by the applicants.

DATED AND SIGNED at Meru this 11th day of June 2015.

J.A MAKAU

JUDGE

11.6.2015

DELIVERED in open Court in the presence of:

Mr. Abdul Kadhir for applicant- absent

Respondent - in person - present

Court clerks – Penina/Mwenda/Omar

J.A. MAKAU

JUDGE

11.6.2015