



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.316 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE BISHAR BIN SALEH (DECEASED)

MOHAMED AHMED BISHAR APPLICANT

VERSUS

JAMILA BISHAR

MIRIAM BISHAR

FAISAL BISHAR ADMINISTRATORS

RULING

The application before court is one dated 6th October, 2015 brought under *section 47* of the Law of Succession Act (cap 160) Laws of Kenya and *rules 49 and 73* of the Law of Succession Rules. The application seeks to have this cause transferred to the High Court at Eldoret for hearing and determination together with Eldoret High Court Civil Appeal No.84 of 2014.

The application is supported by an affidavit of the applicant, Mohamed Ahmed Bisher, sworn on 6th October, 2015. The applicant has deponed that he is a grandson to the deceased (Bisher Bin Saleh) and the administrators are his relative and (sisters and brother to his father who is also deceased). According to the applicant, after his grandfather died in 1980, the administrators petitioned for a grant of letters of administration of the estate of the deceased which was granted on 1st November, 2013. The deceased left behind certain properties namely *Grant No. IR No.10745 in Uashin Gishu, Kakamega/Town Block 1/78, Kakamega Town Block 1/80 and Kakamega Town Blck111/115*. The applicant says that on or about 13/4/2011 a beneficiary of the estate of the deceased *Abdul Malik Ahmed Bisher* filed Petition No.13 of 2011 against the applicant herein and his brother seeking to be appointed administrators of the estate but he opposed that petition which was heard before the Kadhi in Eldoret and a judgment was delivered on 29th June, 2011 in favour of that petitioner, prompting the applicant to lodge an appeal in Eldoret High Court being case No.131 of 2011. That appeal was withdrawn and a fresh one was late filed being appeal 84 of 2014. The applicant says that he feels it is better this cause be heard together with the Civil Appeal pending in the high Court at Eldoret to avoid parallel decisions.

The respondents filed a replying affidavit through Jamila Bisher Bin Saleh sworn on 12th October, 2015 and filed in court on 13th October, 2015. They have opposed this application saying that the applicant is a grandson to the deceased and therefore not first in priority to the estate of the deceased. They have also stated that majority of the deceased's properties are in Kakamega within the jurisdiction of this court. They have further objected to this cause being consolidated with the Civil Appeal in Eldoret saying there is no justification to do so.

The application came under urgency and upon being certified urgent it was fixed for hearing on 19th October, 2015. On that day, Mr Manyoni, learned counsel for the applicant, appeared for the applicant while Mr Osango was for the respondent. Mr Manyoni moved the application and asked the court to order the cause transferred to the High Court at Eldoret to be heard together with the appeal. This he said, was because the property in question, namely Land Reference No.8545, was within that court's jurisdiction and comprised a major portion of the estate of the deceased (about 76.7 acres). He also argued that the land had been distributed by the Kadhi, prompting an appeal to the High Court. He therefore thought it would make sense to transfer this cause to Eldoret.

Mr Osango, learned counsel for the respondents, on the other hand opposed the application and submitted that whereas the administrators are children of the deceased, the applicant was a grandson who did not have the first priority to apply for a grant of letters of administration of the deceased's estate. He further submitted that the applicant's interests can be taken care of by his mother who is a named beneficiary in this cause. Counsel went on to submit that the deceased died in Kakamega and most of the properties comprising his estate all in Kakamega, the beneficiaries are residents of Kakamega and that the land in Eldoret is included as one of the properties in this cause. He argued that a succession cause cannot be heard alongside a civil appeal. He therefore asked that the application be dismissed with costs.

I have considered the application, affidavits in support and opposition to the application and submissions by counsel for the parties herein. The applicant who is a grandson to the deceased herein has sought have this cause transferred to Eldoret High Court in order to have the same disposed of together with a civil appeal pending before that court. However this is a succession cause under a different legal regime which cannot be consolidated with a civil appeal for purposes of hearing and determination. This cause is about administration and distribution of the estate of a deceased person while the civil appeal is about whether or not a decision made by a lower court was right or wrong. Those are two different legal issues that cannot be heard together.

Secondly, the present succession cause is about the estate of the late *Bisher Bin Saleh* (the deceased) who died on 16th April 1980, while the civil appeal (No.84/2014) and the proceedings before the Kadhi (Petition No. 13 of 2011) relate to the estate of the late *Ahmed Bisher*, who according to the petition, passed away on 1st March, 2011. Clearly the proceedings before the kadhi and the subsequent appeal, are not the same as the proceedings herein. The two relate to two different estates and on that ground, they cannot be consolidated and heard together.

Thirdly, the applicant herein is a grandson of the deceased in this cause. He does not rank in priority above the petitioners who are children of the deceased and who in law, rank higher in priority than the applicant. I do not think the applicant gave a deep thought over this matter before moving the court to have this cause transferred to Eldoret. His action was simply aimed at stalling these proceedings rather than propelling them forward towards a conclusion.

The applicant has also argued that the proceedings before the kadhi's court and the High Court (on appeal) relate to some parcel of land known as Land Reference No.8545 (I.R.10745). I note from the record herein, that Land known as IR 10745, which I am told is the same as Land Reference N.8545 is mentioned as part of the late *Bisher Bin Ali's* estate. As I have said above, the matter before the kadhi was on the estate of the late *Ahmed Bisher*, a son of the deceased herein. As to whether Land Reference No. 8545 formed part of the estate of the late *Ahmed Bisher* father to the applicant herein, is a matter that is not before this court at the moment but I doubt whether that is possible that one parcel of land could belong to two different estates of deceased persons unless it was a joint ownership.

Forthly, *Bisher Bin Ali*, the deceased in this cause, died at Kakamega which can clearly be seen from the certificate of death issued on 4th August 1980. The properties of the deceased except Land Reference No.8545 (IR 10745), are at Kakamega, placing the matter within the jurisdiction of this court. I have also noted that the petition herein includes among the beneficiaries of the estate of the late *Bisher Bin Ali*, one *Mohammed Ahmed Bisher* – grandson, a name similar to that of the applicant herein. If it be true that the applicant is a beneficiary in this cause, I do not see what purpose to transfer this cause to Eldoret will serve, if not waste time and resources since the beneficiaries and administrators reside within

the jurisdiction of this court.

I do find as a matter of law, that the applicant has not laid a basis for making the orders sought. For the court to order a cause to be transferred from one court to another, there must be good grounds but not for convenience of the applicant. This court is the proper court to hear and determine this cause on the basis of the reasons given herein above. I am not therefore satisfied that the application before me is merited. Consequently the application dated 6th October 2015 is declined and is hereby dismissed. Each party will bear their own costs.

Dated and delivered at Kakamega this 4th December, 2015.

E.C. MWITA

JUDGE