



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

PROBATE AND ADMINISTRATION CAUSE NO. 200 OF 2015

IN THE MATTER OF THE ESTATE OF SALIM JUMA HAKEEM KITENDO (Deceased)

ROSE FAITH MWAWASI

JUDITH MALALE MWAWASIPETITIONERS

VERSUS

FATUMA ATHMAN ABUD FARAJ OBJECTOR

RULING

1. Before this Court is an application dated 26.8.15 seeking the following orders:

- a. That Mombasa Kadhi's Court Succession Case No. 92 of 2015 (Estate of the late Salim Juma Hakeem Mwakitendo) be withdrawn from the said Court and be transferred to this Court;
- b. That the aforesaid succession case be consolidated with Mombasa High Court Succession No. 200 of 2015 (Estate of the late Salim Juma Hakeem Kitendo) and the two causes be determined together;
- c. That costs be provided for.

The Petitioners' Case

2. The Application is supported by the grounds on the face of it as well as the Supporting Affidavit of Rose Faith Mwavasi, one of the Petitioners sworn on 26.8.15. She deposed that after she filed the cause herein, she discovered that another cause No. 92 of 2015 had been filed in the Kadhi's Court. That both causes relate to the estate of the deceased herein; that she has filed a response to the said cause wherein she exercised her right under Article 170 of the Constitution indicating that she did not wish to submit to the jurisdiction of the Kadhi's Court; that it is just and expedient that the two causes be heard by this Court. In their submissions filed in this Court on 19.10.15, the Petitioners reiterated the grounds set out in their application and the supporting affidavit and further stated that the proceedings before the Kadhi's Court should not be left pending indeterminately. They relied on the case of *Onward Cargo System Company v. Eveready East Africa Limited [2015] eKLR* to buttress their position challenging the Objector's opposition to their application.

The Objector's Case

3. In response to the Application, the Objector filed Grounds of Opposition dated 12.10.15 arguing that the Kadhi's Court was automatically devoid of jurisdiction, the Petitioners having opted not to submit thereto for purposes of trying or disposing it; that by virtue of Section 18 (i) (b) (i) of the Civil Procedure Act, the High Court cannot withdraw a suit pending before a subordinate Court that lacks jurisdiction to hear it, to itself. To support her argument, the Objector filed a number of authorities including ***Onward Cargo System Company v. Eveready East Africa Limited [2015] eKLR*** together with her grounds of opposition.

Determination

4. I have considered the Application and the Supporting Affidavit Grounds of Opposition as well as the written submissions filed by the Petitioners.

5. **The issue for determination before me is whether or not this Court can withdraw and transfer to itself Kadhi Court Succession Case No. 92 of 2015. The Objector argues that upon the Petitioners opting not to submit to the jurisdiction of the Kadhi's Court in exercise of their right under Article 170 (5) of the Constitution, the Kadhi's Court automatically was devoid of jurisdiction. The High Court cannot therefore transfer to itself a suit that is pending before a Court that lacks jurisdiction. The Objector also cited Section 18 of the Civil Procedure Act which makes for provision for the power of the High Court to withdraw and transfer of suits in subordinate Courts.**

6. This very question was before Lesiit J in Misc. Application No. 434 of 2008 when she held that

“Section 18 of the Civil Procedure Rules (sic) should be interpreted having regard to the power of the court to try the matter at the time of the institution of the suit. The provisions of this section should not be applied to the defence or other pleadings filed subsequent to the pleading that instituted the suit in the first instance. That should be the correct way of interpreting the section”.

In upholding and affirming the Ruling by Lesiit, J. the Court of Appeal in *Onward Cargo System Company v. Eveready East Africa Limited [2015] eKLR* held:

In our view, the suit was in the first instance, brought before a Court of competent jurisdiction. It is the counterclaim that exceeded the pecuniary jurisdiction of the magistrate's court... Once the counterclaim was filed, the magistrate's court ceased to have jurisdiction over the suit, and therefore, there was no error in the learned judge ordering the said transfer as that was the only logical step”

7. In the case herein, even the Objector in her grounds of opposition concedes that the Kadhi's Court had jurisdiction in the first instance. She states in ground 1 thus:

“The Petitioner having invoked the provision of Article 170 (5) of the Constitution of Kenya 2010 in her reply to the petition (emphasis mine) before the Kadhi's Court, the said Kadhi automatically was devoid of jurisdiction to entertain the petition before it”.

8. In my view when the Petition was filed in Kadhi's Court by the Objector herein who was the Petitioner therein, the Kadhi's Court had jurisdiction to hear the Petition. When the Petitioner herein filed her Replying Affidavit in the Petition before the Kadhi, she stated that she did not submit to the jurisdiction of the Kadhi's Court. It was at that point that the Kadhi's Court ceased to have jurisdiction over the matter. I agree with Lesiit J. in the case above that the provisions of Section 18 of the Civil Procedure Act should not be applied to the said Replying Affidavit filed subsequent to the Petition that instituted the suit in the Kadhi's Court in the first instance.

9. **On the issue of consolidation, I have perused the record herein. The subject matter in Mombasa Kadhi's Court Succession Case No. 92 of 2015 and the subject matter herein is the estate of the deceased Salim Juma Hakeem Kitendo who is also referred to as Salim Juma Hakeem Kitendo in the Kadhi Court**

case.

10. The broad principle of consolidation of suits was re-stated in the case of Stumberg and another vs. Potgieter (1970) EA 323 in the following terms:

“Where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”

The Court went ahead to state:

“The principle is that consolidation of suits will be ordered where common questions of law or fact arise of such importance as to make it desirable that the whole of the matter be disposed of at the same time. This would mean that the suits are brought together with a view to disposing of them simultaneously, if the questions of law or fact to be answered in each of them are one or common, and they can conveniently be disposed of simultaneously”.

In R M G v N G Interested Party S P Limited & M D Limited [2013] eKLR, on the principle of consolidation of suits, Musyoka J pronounced himself thus:

“The principle is that consolidation of suits will be ordered where common questions of law or fact arise of such importance as to make it desirable that the whole of the matters be disposed of at the same time. This would mean that the suits are brought together with a view to disposing of them simultaneously, if the questions of law or fact to be answered in each of them are one or common, and they can conveniently be so disposed of simultaneously”.

11. It is clear from the record that the issues of law and fact for determination in the two suits filed in this Court and in the Kadhi’s Court are similar. The questions of law or fact to be answered in each of them are one or common, and they can conveniently be disposed of simultaneously. It is desirable that the questions of law and fact in both suits be disposed of at the same time. Consolidation of both suits will also ensure that there is no conflicting judicial decision relating to the matters in the two suits resulting to absurdity of court decisions

12. In the result, I find that the Application herein has merit and I hereby order that:

- a. Mombasa Kadhi’s Court Succession Case No. 92 of 2015 (Estate of the late Salim Juma Hakeem Mwakitendo) be and is hereby withdrawn from the said Court and is hereby transferred to this Court;
- b. Mombasa Kadhi’s Court Succession Case No. 92 of 2015 (Estate of the late Salim Juma Hakeem Mwakitendo) be and is hereby consolidated with Mombasa High Court Succession No. 200 of 2015 (Estate of the late Salim Juma Hakeem Kitendo) and the two causes be determined together;
- c. Costs shall be in the cause.

DATED, SIGNED and DELIVERED in MOMBASA THIS 1ST DAY OF DECEMBER, 2015.

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioners**

..... **for the Objector**

..... **Court Assistant**