



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

HIGH COURT SUCCESSION CAUSE NO. 77 OF 2012

**IN THE MATTER OF THE ESTATE OF KIMARUA NGAI alias JOHN KIMARUA NGAI
(DECEASED)**

RULING

The succession cause herein was initially instituted in the resident magistrates' court at Kangema as **Succession Cause No. 14 of 2009** in which **Naomi Nyanguru Kimarua** and **Patrick Njoroge Kimarua** petitioned for letters administration intestate for the estate of the late **John Kimarua Ngai** (herein "the deceased").

The original record from the magistrates' court shows that on 28th April, 2010, the court transferred the succession cause on its own motion to the high court in Nyeri for hearing and determination principally because the value of the estate was in excess of the monetary jurisdiction of the resident magistrate's court. The cause was entered in the register at the high court at Nyeri as **Succession Cause No. 413 of 2010**. When this court was established here at Murang'a in October, 2012 the cause was subsequently transferred to this court and registered as **Succession Cause No. 77 of 2012**.

The cause came up in court on 21st November, 2013, and on that date Mr Ndirangu for the applicant, informed the court that he was seeking directions on the summons for confirmation of grant dated 20th November, 2009 which had been filed in the magistrate's court on 23rd November, 2009. Mr Ndirangu was seeking directions apparently because one of the administrators of the estate, **Patrick Njoroge Kimarua**, had protested against the proposed distribution of the deceased's estate. Ms Mwangi for the protestor told the court that what was transferred from the magistrate's court to the High Court was a nullity and therefore the High Court could not proceed with the summons the way it was. As a preliminary point, the court directed the parties to address it on the issue and more particularly, whether, in the absence of jurisdiction of the subordinate court to entertain the petition, it could transfer the cause to the high court.

As directed by the court, parties submitted on the issue of jurisdiction on 21st March, 2014. On that day, the learned counsel for the applicant in the summons for confirmation of grant acknowledged that indeed the magistrates' court did not have jurisdiction, under section 48 of the Law of Succession Act, to deal with the petition. He, however, urged the court to consider whether the ceiling set on the monetary jurisdiction of the resident magistrates' court was a mere procedural issue or it was what the learned counsel referred to as a substantive issue. If the court found that it was a procedural issue, so the counsel argued, he urged the court to consider **Section 3A and 1B of the Civil Procedure Act, Chapter 21 Laws of Kenya**, as read with **article 159** of the constitution and proceed to deal with the summons and the protest from where the magistrates' court left.

Counsel for the protestor responded that the ceiling set by **section 48** of the **Law of Succession Act**, is a substantive issue that goes to the root of a petition filed under that Act. Counsel argued that **Sections 3A**

and **1B** of the **Civil Procedure Act** have no place in the Succession Act which is self-contained and reference to the Civil Procedure Act is only made in very limited circumstances which, in any event, are expressly provided for. **Section 3A** and **1B** of the **Civil Procedure Act**, so argued the counsel, are not among the provisions of the law that have been incorporated in or referred to by the Law of Succession Act. Counsel argued that even where a case has to be transferred from the magistrate's court to the high court, the magistrate's court does not have such a power to transfer suits; such power is vested in the high court only. Counsel argued that the petition was a nullity from the very beginning and therefore the court cannot be urged to hear a nullity.

Whenever the question of jurisdiction of the high court vis-à-vis that of the magistrates' court has arisen before this court, I have always taken the position that the jurisdiction of these courts in matters governed by the **Law of Succession Act, Chapter 160** Laws of Kenya is set out in **Sections 47 to 50** of that Act. **Section 48** thereof defines the extent of the magistrate's jurisdiction. That section provides as follows:

“48. Notwithstanding any other written law which limits jurisdiction, but subject to provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 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 the gross value of which does not exceed one hundred thousand shillings:

Provided that for the purpose of this section in any place where both the High Court and a resident magistrate's court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.”

The jurisdiction of the magistrate's court to entertain an application or determine any dispute or pronounce any decree or order is monetarily capped. How far the court may exercise its jurisdiction is determined by the value of the estate in respect of which the court may be called upon to determine a dispute, pronounce a decree or an order.

Under this provision, a magistrate's court may also make a grant of representation as long as the value of the estate in respect of which a representation is made does not exceed Kshs. 100,000.

The jurisdiction of the magistrate to entertain an application, pronounce a decree or an order or to make a grant of representation in respect of an estate governed by the Law of Succession Act, regardless of its value, is taken away and is exclusive to the High Court where both the High Court and the magistrate's court exist at the same station.

It must also be acknowledged that there is no provision either in the Law of Succession Act itself or the Rules made under Section 97 of the Act that provides for such powers or provides for a transfer of a petition or a succession cause from the magistrates' court to the High Court.

Turning back to the case before me the value of the estate which is the subject of the succession cause that was filed in the magistrate's court before it was transferred to the High Court was stated in form P & A 5 as Kshs. 400,000/= which, under section **48 of the Law of Succession Act**, was no doubt well beyond the jurisdiction of the magistrate's court.

To answer the applicant's question as to whether the monetary cap is a procedural issue or a substantive issue, there can be no doubt that a question of whether a court has jurisdiction or not is not a procedural issue. Neither is it a procedurally technicality which the courts have been prodded not to give undue regard to without sacrificing substantive justice. It goes to the root of the authority of the court to deal or not to deal with a particular issue. I cannot put it better what the learned judges of the court of appeal, Nyarangi, Masime and Kwach JJA (as they then were) said in their decision in the case of the **Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd (1989) KLR 1**. The learned judges said of jurisdiction at page 14 of their decision as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest

opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The court went further to cast any doubt as to what jurisdiction in this context means and quoted a passage from Words and Phrases Legally defined, Volume 3 at page 113 where it is stated:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented before it in a formal way for its decision. The limits of this authority are imposed by statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of particular facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

This passage largely answers the question whether a petition filed in a court without jurisdiction is a valid petition. The question that then follows is if the petition is invalid, whether that invalidity can be cured by the petition’s transfer to a court of competent jurisdiction. This is not a novel question; it has been asked elsewhere and the consistent answer appears to be that such suits are a nullity *ab initio* and a transfer to a court of competent jurisdiction cannot validate them.

In the **Nairobi High Court Miscellaneous Civil Application No. 7 of 2011, Edward Murangiri Mugambi versus Habib Bank Limited**, Njagi J while referring to the Kenyan case of **Omwoyo versus African Highlands & Produce Co. Ltd (2002) 1KLR 698** (the decision of Ringera J, as he then was) and the Ugandan case of **Kagenyi versus Misiramo & Another (1968) EA 48** the learned Judge had this to say on this issue;

“Where a matter is filed in a court which has no jurisdiction, then there is no suit, properly so called, which has been filed. Consequently, there is no suit, so to speak to be transferred in this instance”

By analogy a petition or a succession cause filed in a court without jurisdiction, is an incompetent petition or succession cause and thus non-existent and therefore there is nothing to transfer from one court to another. To the extent that the Succession Cause initially filed in the magistrates’ court as **Succession Cause No. 14 of 2009** was filed in breach of **Section 48** of the Law of Succession Act in a court without jurisdiction, that cause never existed and it is a nullity and being such a nullity there was nothing that was transferred to the High Court at Nyeri and subsequently to Murang’a. Consequently, **High Court Succession Cause No. 413 of 2010 (Nyeri)** and **High Court Succession Cause No.77 of 2012 (Murang’a)** are both nullities. For avoidance of doubt, the grant of letters of administration intestate made to Naomi Nyanguru Kimarua and Patrick Njoroge Kimarua on 20th May, 2009 by the magistrate’s court is hereby declared a nullity for want of jurisdiction.

Dated signed and delivered in open court this 12th day of March, 2014

Ngaah Jairus

JUDGE