



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MAKHANDIA & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 181 of 2018

BETWEEN

JOSPHAT MWANIA MUIA.....APPELLANT

AND

LOICE ATIENO ODUK.....RESPONDENT

(Being an appeal from the Ruling and orders of the High Court of Kenya

at Makueni (C. Kariuki, J.) dated 12th April, 2018

in

Makueni H.C. Misc. Appl. No 451 of 2017)

JUDGMENT OF THE COURT

1. This is an interlocutory appeal arising from the Ruling of the High Court Makueni, C. Kariuki, J. delivered on 12th April, 2018. By the said Ruling, the learned Judge ordered that the **High Court Succession Cause No. 451 of 2017** (In the matter of the Estate of **Asby Masila Muia** (deceased) be transferred from the High Court at Makueni to the High Court Kisumu for hearing and final determination. **Josphat Mwanua Muia** (the appellant) being aggrieved by the said order filed the instant appeal. There are a total of five (5) grounds of appeal which basically challenge the jurisdiction of the learned Judge in issuing the order of transfer.

2. The issue before us for determination therefore remains whether the learned Judge had jurisdiction to order transfer of the said Succession Cause from Makueni to Kisumu High Court. There are many contentious issues which do not concern us, but we think it is appropriate to give some brief background so as to contextualize this Judgement. The dispute herein is between, the appellant, who is a brother of the late **Asby Masila Muia** (deceased) who died in Nairobi on 20th February, 2016 at the age of 48 years and the respondent who claims to be the widow of the deceased. The real dispute which has apparently been eclipsed by the twists and turns the matter has taken, was whether the grant of probate over the deceased's estate was fraudulently or procedurally issued to the appellant.

3. It is not disputed that as at the time of his death, the deceased was an employee of Kenya Power & Lighting Co. (KPLC) based in Kisumu. On 6th June, 2016 the appellant applied at the Senior Resident Magistrates' Court at Makueni for the grant of probate of the written Will of the deceased which was dated 10th October, 2014. According to the affidavit in support of the said petition, the appellant stated that the deceased was at the date of his death domiciled in Kenya and his last place of residence was in Nairobi. An inventory of his assets were indicated as monies in bank accounts, but the actual amounts were not indicated save for the value of two parcels of land **Kisumu/Kanyawar/"A"/403** and **Kisumu/Korando/4933** and personal belongings all valued at Ksh. 2,720,000. It is also indicated that the deceased was survived by **Brian Muema Masila** a son. The grant seems to have been issued although we have not had sight of a copy thereof and most of the relevant documents that accompany such a petition.

4. Be that as it may, by a summons for annulment of the grant dated 10th July, 2017 the respondent applied for the revocation/annulment of the said grant issued to the appellant on the grounds that the deceased was survived by her being the widow. That it was her respondent who was entitled to administer the estate of the deceased; that the grant of probate was obtained without her consent; that the appellant failed to make full disclosure of the assets that belonged to the deceased and that the deceased did not leave any written will. Before that summons was heard, the respondent took out another notice of motion dated 25th August, 2017 seeking that the Succession Cause be transferred from

High Court Makueni to High Court Kisumu for hearing and determination.

5. This application was predicated on the grounds that the deceased lived in and worked for gain at KPLC in their Kisumu offices within the jurisdiction of the Kisumu High Court. That the appellant surreptitiously applied for the grant of probate over the deceased's estate before the Senior Resident Magistrate's Court at Makueni Succession Cause No 42 of 2016 without informing the respondent or first obtaining her consent and that the respondent had applied to annul the grant. The respondent contended that both she and the appellant and other beneficiaries of the deceased estate were within the jurisdiction of the High Court of Kisumu and it was prudent that the Succession cause be transferred to Kisumu; that the deceased owned two parcels of land in Kisumu which were jointly registered in the names of the respondent and the deceased and the vast interests of the deceased were in Kisumu where he was domiciled.

6. The motion was supported by the respondent's affidavit where she stated that she married the deceased on 15th May, 2014 after they had been cohabiting as husband and wife from 2008 until they formalized their union. That the deceased also paid dowry to the respondent's family according to the Luo customary laws in the year 2011 after which they solemnized the marriage. Prior thereto, the respondent stated that she had one child from a previous union JOM, a minor who was born on 1st March, 1989 whom the deceased accepted as his own, and they were later blessed with another child born on 14th January, 2016. Before the deceased married the respondent he was a widower having lost his wife, the late **Ester Mwende Masila** who died on 14th November, 2003 leaving one son BMM a minor who was born in the year 2000. The respondent claimed that as at the time the deceased died, they used to cohabit at their matrimonial home that she and the deceased had established at Kisumu/Kanyakwar "A" /403. The respondent claimed that the deceased started ailing in July 2014 when he was diagnosed with meningitis, a condition that damaged his brain and affected his memory.

7. That sometimes in mid-2015, the appellant together with his brother **Shadrack Muteti** took away the deceased on the pretext of seeking further medical assistance in Nairobi. That at the time, the appellant was incapacitated as she was expecting a child. That the appellant did not inform her when the deceased's condition deteriorated, or that they had taken him to Aga Khan Hospital where he died after ailing for some time while staying at his sister's house in Nairobi. The respondent accused the appellant and his family members of hurriedly burying the deceased at his parents' home in Makueni without informing the respondent and thereafter proceeding to obtain a grant of probate fraudulently by false misrepresentation and concealment of material facts that the deceased was survived by a widow who was the rightful person to petition for letters of administration.

8. Both applications were opposed by the appellant, as regards the summons for annulment, he contended that the respondent was not married to the deceased but to one **Zablon Opondo Otieno** and the said marriage had never been dissolved and dismissed a copy of a marriage certificate as a forgery; that the deceased did not pay any dowry for the respondent or conducted any Luo customary rites as the deceased was a Kamba and not a Luo. The appellant also denied the deceased had a matrimonial home in Kisumu stating that the properties situated in Kisumu were of commercial and for rental purposes and that the deceased was survived by his only son and prior to his death he had executed a Power of Attorney in favor of the appellant, and had also left a Will. That it was the appellant who personally took care of the deceased until his demise and he paid the deceased's medical bills amounting to over Ksh. Two million shillings. The appellant denied the allegations made by the respondent which he termed spurious and reiterated that the grant was procedurally issued and he had no obligation to inform the respondent or anybody else as the deceased was not married and was survived by his son **Brian** who was named as the beneficiary of the deceased estate.

9. As regards the notice of motion to transfer the Succession Cause from Makueni High Court to Kisumu, it was equally opposed by the appellant who took a two-pronged approach. First, he contended that the deceased had constructed a bungalow at his home in Makueni where he was buried next to his late wife and that it is the Resident Magistrates' Court at Makueni that had jurisdiction to hear the matter. Secondly, that the High Court had no jurisdiction to hear the matter of transfer as there was no matter before the High Court. The appellant contended that the Law of Succession Act which is a complete code with its own rules and regulations did not give any power to the High Court to transfer a matter to another High Court.

10. Upon considering the rival submissions the learned Judge made the following conclusions: -

"It is not disputed that the applicant is wife of the deceased who lived with her in Kisumu vide a certificate for marriage annexed. He has property in Kisumu and resided and worked therein.

There is no explanation as to why the respondent brother of deceased sought to lodge succession cause in Makueni and failed to disclose same to the objector.

It is not denied that the greater part of the deceased estate is in Kisumu

By dint of the provisions of S. 49 of the Succession Act Cap (sic) 40, the succession cause ought to have been filed in Kisumu.

The provisions of S 49 Cap 160 L.O.K empowers court to transfer the matter herein as prayed to Kisumu in view of the circumstances of the matter and the parties.

This court makes the following order;

1. Application is allowed as prayed

2. Costs in the main cause."

11. During the hearing of this appeal, **Mr. Gichaba** appeared for the appellant. He relied on his written submissions and made some oral highlights. Counsel emphasized that under the provisions of **Section 49** of the **Law of Succession Act** ('the Act') it is the resident magistrate

in whose area the deceased person had his last known place of residence who is supposed to deal with the matter if he has the pecuniary jurisdiction according to the gross value of the estate of the deceased. In this case counsel argued that the learned Judge had no jurisdiction to transfer the matter more so, by invoking the provisions of the **Civil Procedure Rules** (CPR) which are not applicable under the Law of Succession Act which is a complete Code with its own rules of procedure. In as much as the motion was brought under the provisions of **Section 3, 3 A, 15 (a), (b) and 18** of the Civil Procedure Rules counsel submitted that it was a non-starter and the learned Judge ought to have struck it out.

12. In further arguments counsel for the appellant cited the cases of **Josiah M. Mutero vs. Faith M. Njagi & Others [2016] eKLR** and **Francis Kamau Mbugua & Another vs. James Kinyanjui Mbugua** and a host of other decisions where the courts have emphasized that the provisions of the Civil Procedure Rules are not applicable to the Law of Succession except as provided for in the Probate and Administrative Rules. Counsel also made reference to a recent decision by **Ongundi, J.** in the same matter, where the learned Judge was dealing with an application by an interested party that was seeking leave to be enjoined in the succession cause, and the Judge found that there was no matter before her as the Magistrate's court had jurisdiction to entertain any application and to determine any dispute under the Law of Succession Act so long as she/he had the pecuniary jurisdiction which the Judge found was 20 million and the estate of the deceased was indicated as Ksh. 2,720,000.

Counsel urged us to allow the appeal by setting aside the order appealed against and substituting it with an order dismissing the application dated 25th August, 2017 with costs.

13. The respondent was represented by **Mr. Kori Kent**, who also relied on written submissions and made some brief oral highlights. Counsel submitted that the respondent being the widow of the deceased had priority to apply for letters of administration. However, the appellant secretly applied for the grant of probate in Makueni without informing the respondent or seeking her consent. The respondent used to live with the deceased in Kisumu where he was an employee of KPLC and incidentally even the appellant lived in Kisumu. The respondent applied for the annulment of the grant pursuant to the provisions of **Rule 44** of the **Probate and Administration Rules "P & A Rules"** which provides that an application for revocation or annulment should be made before the High Court. According to counsel, the order of transfer made by the Judge, did not cause the appellant any prejudice.

14. Counsel for the respondent further submitted that although the provisions of the CPR were cited, the appellant and his counsel understood that the application was seeking an order of transfer of proceedings. As such as even though the provisions of **Section 49** of the Act were not cited, all parties were able to decipher that from the prayers. On the submission that an order of transfer could only be made by a magistrate with the consent of the Judge as provided under **Section 49 (1)** of the Act, counsel cited the provisions of **Article 165 (1) (a)** of the Constitution which provides that the High Court has unlimited original jurisdiction in criminal and civil matters, while **Article 165 (6)** gives it supervisory jurisdiction over the subordinate courts and may call for the records of any proceedings before the subordinate court and may make any order or give any direction it considers appropriate to ensure fair administration of justice. Counsel supported the impugned ruling especially the holding that a petition in respect of the estate of the deceased person must be filed at his last known place of residence. Counsel therefore urged us to dismiss the appeal with costs.

15. We have considered the record of appeal as captured in the above summary of what transpired before the High Court as required under the provisions of **Rule 29 (1) (a)** of the Court of Appeal Rules. We have also deliberated on the submissions. As stated in the opening paragraphs of this judgement, the issue raised in this appeal is whether the learned Judge had jurisdiction to transfer the succession matter from the High court at Makueni to Kisumu High Court. In the same vein, before the hearing of the appeal, counsel for the appellant was asked whether he had sought and obtained leave to file this appeal before the High Court. This is because under the provisions of **Section 50** of the Act, the decision of the High Court is final in respect of any decision made by a magistrate over an estate of the deceased person. We have nonetheless taken a broader view of this matter, and also considering that the decision that is being appealed against is not one that emanated from the magistrate's court but an application that was made before the High Court, we will overlook that issue and dwell on the substantive issue before us which is whether the learned Judge had jurisdiction.

16. It is commonly accepted as a rule that jurisdiction is everything and counsel for the appellant reiterated that in his submissions and cited the *locus classicus* decision of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR1** where it was held that:-

"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 continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

17. We entirely agree with that position of the law but we however find the matter that was before the Judge does not fall into a no-go zone where the learned Judge had no jurisdiction. It fell into some grey areas and here are the reasons. First of all the High Court has supervisory jurisdiction over the magistrate's court not only generally under the Constitution but even specifically under the **Law of Succession Act, Section 49** of the Act, provides that magistrates within whose area, a deceased person had his last known place of residence shall, if the gross value of the estate of the deceased does not exceed pecuniary jurisdiction of the magistrate, may with the consent or by the direction of the High Court, transfer the administration of an estate to any other resident magistrate where it appears that the greater part of the estate is situated. It is because of this provision that counsel for the appellant argued that the High Court lacked jurisdiction.

18. We have however looked into this matter more broadly as it is clear from the Act whichever way one looks at it, the magistrate could not have ordered a transfer without the consent and or direction of the learned Judge. It is for this reason that we find that the learned Judge cannot be said to have acted without jurisdiction. On whether the matter fell within the jurisdiction of the High Court or the magistrate's court we find that this was also a grey area. This is for the simple reason that there are many issues that are contested including the gross value of the estate. It is to be recalled that the respondent claimed that the appellant left out some assets which she contended belonged to the deceased and more importantly, in the schedule of assets, that the appellant provided, lacks critical information such as the value of many of the assets. For instance, there are so many items indicated such as bank accounts, shares and pension whose value is not indicated. Those are contested matters which can only be determined after the hearing of the summons for the annulment of the grant. Once the gross value of the

estate is determined, whether it is the learned Judge or magistrate to deal will be determined.

19. The other issue is whether the deceased was domiciled in Kisumu or Makueni. It is clear to us and not disputed that prior to his death he was working in Kisumu with the KPLC and was moved to Nairobi by the appellant when he was critically ill. Also, that a substantial portion of the deceased estate indeed what is given as the gross value of the estate are properties situated in Kisumu. Incidentally even the appellant is a resident of Kisumu going by his address as per his sworn depositions.

20. There was also a second angle to this, that the respondent had invoked the Civil Procedure Rules to move the court while citing provisions that are not the ones provided under **Rule 63 of the P & R Rules**. This is also a correct position of the Law, that the Law of succession is a complete code with its own rules and regulations. The respondent thus should have moved the court or the court should have moved *suo moto* under the provisions of **Section 49** of the Act. However, we do not think that the failure to invoke that provision in itself went to the root of the matter as the appellant did not suffer any prejudice. He clearly knew what he was facing. We also wish to state that under **Section 47** of the Act -

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient;

Provided that the High Court may for the purpose of this section be represented the resident magistrates appointed by the Chief Justice”

What the above provision portends is that everything done by the magistrate under the law of succession is closely supervised by the High Court. Further, we also wish to mention that under Rule 73 of the same P & A Rules, the learned Judge has unfettered discretion to make such orders as may be necessary for the ends of justice or to prevent abuse of the court. To us the order to transfer a succession cause to the High Court Kisumu where the deceased lived, worked and owned a majority of assets does appear to us reasonable in the circumstances.

21. In conclusion, we think we have said enough to demonstrate that this appeal is devoid of merit and we accordingly order it dismissed with costs to the respondent.

Dated and delivered at Nairobi this 22nd day of May, 2020.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR