



REPUBLIC OF KENYA



**In re Estate of Chepkurui Matwek (Probate & Administration  
Appeal 1 of 2024) [2024] KEHC 6014 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6014 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
PROBATE & ADMINISTRATION APPEAL 1 OF 2024**

**RN NYAKUNDI, J**

**MAY 28, 2024**

**IN THE MATTER OF THE ESTATE OF CHEPKURUI MATWEK**

**BETWEEN**

**SABUNA KURUI ..... 1<sup>ST</sup> APPELLANT**

**ALEXANDER NG'ETICH ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOSEPH KIPKOSGEI YATICH ..... 1<sup>ST</sup> RESPONDENT**

**WILLIAM CHEMWOLO ..... 2<sup>ND</sup> RESPONDENT**

**KENNETH KIPLIMO KIPCHUMBA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. At the heart of this appeal is the question of jurisdiction. Jurisdiction is everything and it is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. The appeal arises out of the ruling of Hon. C. Kutwa (SPM) delivered on 21<sup>st</sup> December, 2023 in Iten Succession Cause No. 43 of 2005. The appellant challenged the whole decision on the following grounds:
  - a. That the learned trial magistrate erred in both law and fact by vesting in himself pecuniary he knew or ought to have known he did not have hence acting *ultra vires*.
  - b. That the learned trial magistrate erred in both law and fact by failing to specifically indicate the assets being shared out in the estate and their respective shares as awarded to the beneficiaries.
  - c. That the learned trial Magistrate erred in both law and fact by purporting to distribute only 20 acres of an unidentified parcel of land out of the gross estate constituting over seventy acres. The rest of the estate remains undistributed by the impugned ruling.



- d. In all circumstances of the trial case, the findings of the trial court are not grounded on any existing law. The appellant proposed the following orders:
  - i. The appeal be allowed with costs to the Appellants.
  - ii. The ruling delivered on 21<sup>st</sup> December, 2022 be set aside for want of jurisdiction.
  - iii. Upon the grant of prayer (b) above, the court record for Iten Succession cause No. 343 of 2005 be transferred to this court for hearing and final disposal.
  - iv. The appellants be awarded the costs of this appeal and in the trial court.
2. In support of the appeal, the appellants did file submissions on 20<sup>th</sup> May, 2024 in which they argued that they have availed valuation reports for parcels namely:
  - a. L.R No. Irong/Iten/31 measuring approximately two (2) acres
  - b. L.R No. Irong/Iten/34 measuring approximately seventy-two decimal one five (72.15) acres and
  - c. L.R No. Irong/Iten/138 measuring approximately two decimal one seven (2.17) acres.
3. The appellants submitted that the valuation reports availed peg the value of the said assets at Kshs. 3,000,000/=, Kshs. 70,000,000/= and Kshs. 3,000,000/= respectively. The total value of the estate therefore is Kshs. 76,000,000/=. They maintained that from the foregoing and noting that there are no other valuation reports to controvert the findings of the reports on record, the Iten court lacked the requisite jurisdiction to deal with the estate. Every action undertaken by the said magistrate is thus null and void ab initio.
4. Learned counsel for the Appellants cited the decision in *Quick Enterprises Ltd versus Kenya Railways Corporation*, Kisumu High Court Civil Case No. 22 of 1999, where the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone.”
5. Finally, the appellants submitted that jurisdiction being a pure point of law, upshot of the above is that the Iten Court which is presided over by a senior principal magistrate indeed lacked the requisite pecuniary jurisdiction to entertain the estate forming the subject of this appeal.

## Decision

6. As I commence, I am reminded of the learned editor of Mulla on the *Code of Civil Procedure* (Act v of 1908), 13th Edition, where it is stated that;
  - “4. Jurisdiction. An order for the transfer of a suit from one court to another cannot be made under this section unless the suit has been in the first instance brought in a court that has jurisdiction to try it. But, if after the transfer is made, the parties without objection join issue and go to trial upon the merits, the order of transfer cannot subsequently be impeached.”
7. The aforementioned position was adopted by the Court in *Nyadundo Primary School & Another v. Stephen Waweru* CA No. 179 of 1999 (unreported) where the Court held that even where the suit was



instituted in a court without jurisdiction, the High Court could transfer it to itself if the parties consent or where the competence of the suit is not questioned. Kwach, JA expressed himself as follows: -

“The order of transfer was apparently made by consent, but had the application by the Plaintiff been contested the learned Judge would have had to decide whether the suit ought to be transferred was incompetent or not for lack of jurisdiction. If the competency of the suit had been questioned, it would have become obvious to the learned Judge that the suit before the Resident Magistrate’s Court was incompetent and he would most probably have declined to make the order for transfer but since the order was made by consent and without the benefit of argument, I am satisfied that the Judge had power to transfer the suit to the High Court this latent defect notwithstanding.”

The Court of Appeal in the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR spoke in the following terms: -

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.”

8. The locus classicus on the subject of jurisdiction is the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989): where the court pronounced itself as follows:

“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 proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... 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 judgement is given.”

9. Essentially, the appellant raises the question of pecuniary jurisdiction. That is the only issue I am called to determine. Whether the Succession Cause No. 43 of 2005 should be heard by this court or the Magistrates court. The appellants have argued in the positive and they wish that the suit may be transferred to this court.
10. The law on transfer of cases is captured under Section 18 of the *Civil Procedure Act*. The provision empowers the High Court to withdraw and transfer cases instituted in the subordinate court. The court may be moved by either party or the court may do it on its own motion. Any suit pending before the Magistrates’ Court may be transferred for various reasons even if the court in question is competent to determine it.
11. In the instant case, the appellants have taken issue with the pecuniary of the Magistrate court to hear and determine the cause Section 48 of the *Law of Succession Act* was amended to give Magistrates powers to hear and determine succession causes. Section 48(1) provides: -

“Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application 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 the pecuniary limit prescribed under section 7(1) of the Magistrates' Courts Act.”

12. It is evident from the said provision that the jurisdiction of magistrates is attached to their pecuniary jurisdiction as stipulated in Section 10 of the Magistrates Court Act where the highest is that of the Chief Magistrate which has been capped at Kshs. 20,000,000/=. The valuation reports filed by the appellants cumulatively indicate the value of the state to be Kshs. 76,000,000/=. The valuation reports have not been challenged so far because on record I don't see any report to the contrary from a professional valuer. Jurisdiction can only be granted by the law and without jurisdiction, the outcome of this cause may be open to challenge in a court of law.
13. I have taken into consideration the valuation reports filed by the appellants and I am persuaded that the Senior Principal Magistrate in Iten lacks the jurisdiction to entertain the said cause. I wish to assert that it cannot be seriously disputed that the scope of this Succession Cause in terms of pecuniary jurisdiction is not a matter to adjudicated by the Magistrate's Court. There is no controversy on personam and jurisdiction in rem. It follows therefore, that in this case the petition was filed in the wrong forum. The impugned jurisdiction to be exercised by courts either in Succession, Criminal, or Civil matters is not boundless in scope. It is circumscribed in extent of personal and subject matter jurisdiction, in that it relates to an inquiry into the legal and evidentiary questions relevant to the determination of the free property of the deceased, its value, and legitimate heirs to that estate.
14. I would therefore allow the application by the Applicant to have this succession cause pursuant to Section 18 of the Civil Procedure Act as read with Rule 73(1) of the Probate and Administration Rules to have it removed from the case docket at the magistrate's court and be transferred to the High Court for hearing and determination on the merits. I can only answer one pertinent question that jurisdiction is never cured by Section 1(a) 1(b) and 3(a) of the Civil Procedure Act or Article 159 2(d) of the Constitution. The legion of issues which may have been canvassed before the Lower Court are voidable for want of jurisdiction. For if an act is void then it's in law a nullity. I find that the appeal is merited and the way forward is that Iten Succession Cause No. 43 of 2005 be transferred to this court for hearing and determination. Each party shall meet their own costs.
15. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET ON THIS 28<sup>TH</sup> DAY OF MAY 2024**

.....

**R. NYAKUNDI**  
**JUDGE**

