



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Wangigi Kamiti (Deceased) (Succession Cause  
E001 of 2020) [2022] KEHC 3078 (KLR) (27 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3078 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
SUCCESSION CAUSE E001 OF 2020  
RM MWONGO, J  
JUNE 27, 2022**

**BETWEEN**

**GRACE KARIUKO GACHIBI ..... APPLICANT**

**AND**

**SAMSON GACHOKI KAMITI ..... RESPONDENT**

**RULING**

1. This Ruling concerns a Preliminary Objection by the Respondent to the Applicant's summons for revocation of grant dated 16<sup>th</sup> Sept 2020. The Preliminary Objection dated 7<sup>th</sup> Nov 2020 and Supplemental Preliminary Objection dated 7<sup>th</sup> Dec 2020 oppose the revocation summons on the following grounds:
  - a) That the summons for revocation is res judicata having been previously determined by the High Court in Nyeri Misc Succ Case No. 251 of 2002; and
  - b) That the summons for revocation is true barred.
2. In the summons, the applicant asserts that the grant was obtained by fraudulent non-disclosure as the following other children of the deceased:
  - a) Margaret Wanjiru Kamiti – Daughter
  - b) Faith Wanjiku Kamiti – Daughter
  - c) Grace Kariuko Gachibi – Daughter
  - d) Charity Muthoni Munene – Daughter

As a result of this alleged concealment, the beneficiaries were prejudiced and disentitled to any share in the deceased's estate.



3. In support of the application, the applicant, Grace Gachibi, has annexed to her supporting affidavit a letter from the Chief ref ADM/KL/VOL 18/467 (Annex GKG 2), indicating that the children of the deceased included the sons indicated in the confirmed grant, and also the daughters, namely, Margaret Wanjiru Kamiti, Faith Wanjiku Kamiti, Grace Kariuko Gachibi and Charity Muthoni Munene.
4. A brief background is necessary here. The deceased died on 23<sup>rd</sup> July 1998. The respondent filed a petition in SRM Succession Case No. 4 of 1999. He was issued a grant of representation to the deceased's estate on 18<sup>th</sup> May 1999. The grant was confirmed and a certificate thereof issued on 3<sup>rd</sup> Dec 1999.
5. The record and documents in File No. Succ 4/1999 shows that the respondent indicated the deceased matriarch's sons as survivors as follows:
  - a) Samson Gachoka Kariuki – son
  - b) Joseph Gati Nyamu - son
  - c) Peter Muchira Kamiti - son
  - d) David Njagi Kamiti - son
  - e) James Kabira Kamiti - son
6. Distribution of the deceased's estate was to be effected in terms of the certificate of confirmation, and the last proceeding in that file is dated 30/5/2000, namely, a rectification of the grant.
7. A Miscellaneous Civil Application No. 251/2002 was then filed in High Court in Nyeri against the Respondent by Margaret Wanjiru Kamiti and two of her sisters. Accordingly, the lower court file was forwarded to Nyeri High Court.
8. The parties in HC Misc Civil Application No 251/2002 Nyeri are indicated in the documentation provided as Margaret Wanjiru Kamiti, Charity Muthoni and Faith Wanjiku Kamiti. In other words, of the four sisters who are the deceased's daughters, only the present applicant Grace Kariuko Gachubi was not indicated as a party to that miscellaneous application.
9. According to the annexures in the Replying Affidavit of Samson Gachoka, the orders sought by the applicants in Misc Application 251/2002 included:
  - a) Orders for revocation of the grant to Samson Gachoki
  - b) Orders stopping dispossession of the applicant's key by the respondents
  - c) Orders against parcel numbers
  - d) A declaration that the applicants were the rightful beneficiaries of the deceased's estate.
10. However, the Judge in High Court in Misc Succ Case 251/2002 gave the following orders:

“ That the application dated 26<sup>th</sup> Sept 2002 is dismissed with costs to the Respondents.”
11. This court has seen the file for HC Misc No. 251/2002 and the orders made in that suit. The file does not appear to be complete. However, what is clear from documents attached by the parties, however, is that the suit by the present applicant's three sisters was dismissed and no documents indicating an appeal have been filed in this court.



12. It is against this background that the application for revocation was made, and the Preliminary Objections thereto filed.

### Submissions of Parties

13. The applicant's submissions to the Preliminary Objections restate part of the history of the succession case. The applicant asserts that: she was not a party to the aforementioned suit and was unaware of it; the respondent did not deny concealing material facts and that the grant was obtained fraudulently; and that res judicata does not apply in this case.
14. Further in light of Sec 7 *CPA* there are several elements that must be established for res judicata to apply, namely:
- a) That the suit or issue was directly and subsequently in issue in the former suit;
  - b) That the former suit was between the same parties or parties under whom any of the claim;
  - c) That the issue was finally determined in the former suit.
15. The applicants assert that none of the above conditions apply in the present case. That:  
The respondent's submissions on the issue of res judicata is essentially that the applicant had previously had a bite of the cherry and is not entitled to bit it again through the present litigation.
16. On the issue of the application being time barred, the same was submitted upon from the point of view of delay in seeking revocation, and from the point of view as to whether Sec 76 *LSA* creates a timeframe for filing applications. The parties' respective arguments are as follows.
17. On the question of inordinate delay in seeking revocation of grant the following authorities were cited by the respondents:
- i. *Ndungu v. Gitau* [2005] eKLR: where a 7 years' delay in applying for revocation was deemed inordinate;
  - ii. *Ali Owa Ali Abdurahman v. Mohamed Ali Abdurahman* [2020] eKLR : where the court held that the issue of the rejudice to be occasioned to a party too great to allow the application for revocation.
  - iii. *Tabitha Wanjiru v. Jotham Kihiko Hika & 2 Ors* [2017] eKLR: where the court found that there was unreasonable delay in seeking revocation
  - iv. *In the matter of the estate of Stanley Kimani Karanja (Deceased)* [2015] eKLR : where the court held that the applicant had been indolent in seeking revocation, and that equity aids the vigilant not the indolent.
  - v. *Joseph Mukono Kunguru v. James Kabeere Kunguru and Pauline Chelangat Rono v. Johana Kipkosgei Simotwo & 2 Ors* [2014] eKLR  
whether the court found that there was nothing left to administer.
18. On their part, the applicants provided authorities that veered towards the proposition to the effect that Sec 76 *LSA* entitles a party to seek revocation at any time as it creates no timeframe for revocation or annulment of grant. The authorities were as follows:
- a) *Ansazi Gambo Yinga & Another v Nicholas Patrice Taburebe* [2019] eKLR –where it was found that the action seeking revocation is not time bound.



- b) *Re estate of Charles Ngotho Gachunga (Deceased)* [2015] eKLR – where the court held that the office of administrator is an office for life and Sec 76 LSA imposes no time limitations for the administrator to be required to account.

### Determination

19. The first stop in this application is to consider the meaning of a preliminary objection. It should be in the form of a demurrer which should settle all issues leaving nothing else for determination. The definition of a preliminary objection was well set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696.

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

This was well set out the judgment of Sir Charles Newbold in the same case as follows:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

20. This court must now consider whether the issues raised in the respondents’ Preliminary Objection are matters of fact or law. I have carefully perused the objections filed in this case.
21. Starting with the supplementary preliminary objection, I note that there are two schools of thought on the issue as to whether the court can disallow revocation due to the length of time it took to bring the application to court, notwithstanding the provisions of Sec 76 LSA. For both, there were valid arguments.
22. I also find that the question of inordinate delay is not a proper question from the preliminary objection as it would have to depend on a consideration of the facts of this case. That question of inordinate delay can only be answered by looking at the facts, and in this application, they are disputed.
23. The dispute in the facts is this: that whilst the applicant states that Misc Succ Case No. 251 of 2002 was instituted by the applicant’s sisters “on behalf of themselves and of the applicant herein”, the applicant herself says she was never a party to the suit.
24. Further, it is not clear whether or not the estate of the deceased has been fully administered. It is true that in the replying affidavit of Samson Gachoki, the respondent/administrator, he states that the estate of the deceased was duly distributed and the beneficiaries have developed the same, as the application is being filed some 20 years after the grant was issued and distribution concluded. However, the respondents did not annex any evidence to show that the distribution had been completed, which would have led to different considerations.
25. It is also evident to me that the facts are definitely in dispute as regards whether or not the applicant was involved in the previous suit. It is clear to me from the documents availed on Misc Case No 251 of 2002 that the applicant herself was not a party to that former suit. The parties that are clearly recorded



to have been in the former suit were her sisters, namely Margaret Wanjiru Kamiti, Charity Muthoni and Faith Wanjiku Kamiti. There is nothing I have seen that indicates that those parties were acting on behalf of or for the applicant.

26. Accordingly, the Preliminary Objection on *res judicata* cannot hold and is hereby dismissed. The applicant will be permitted to pursue her application on her own behalf only.
27. As for the issue of whether or not the application is time barred, that is a question of fact for determination on the merits of the suit herein.
28. Directions on the progress of this suit are therefore issued as follows:
  - a) Parties are at liberty to file and serve further documents and witness statements in furtherance of their respective cases within thirty (30) days of the date hereof;
  - b) The hearing of the revocation application shall be by *viva voce* evidence;
  - c) The hearing shall be expedited;
  - d) A date shall be fixed for further directions and the hearing at the time of delivery of this ruling.
29. Orders Accordingly.

**DATED AT KERUGOYA THIS 27<sup>TH</sup> DAY OF JUNE 2022.**

**RICHARD MWONGO**

**JUDGE**

**Delivered in the presence of:**

Mwangi for the applicant

Muturi holding brief for Magee for the respondent

Murage Court Assistant

