



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

SUCCESSION CAUSE NO. 152 OF 2012

IN THE MATTER OF THE ESTATE OF NJEGA NGUBIA (DECEASED

SALOME WAMUTIRA & 7 OTHERS.....APPLICANTS

VERSUS

KARANI JAMES KIBICHO & 9 OTHERS.....RESPONDENTS

AND

RHODA WAMUTIRA & 5 OTHERS.....INTERESTED PARTIES

JUDGMENT

1. This matter relates to the estate of Njega Ngubia, deceased who died in testate on 10-4-1992. A grant of letters of administration was issued to David Kabugua Njega and confirmed on 3rd February, 1995. The estate of the deceased comprised in Land Parcel No. **Mwea/ Tebere/ B/ 20** was distributed as follows:

- i. Karani James Kibicho - 8 acres
- ii. David Kabugua Njega - 8 acres
- iii. Cyrus Muthike Njega - 8 acres
- iv. Patrick Muriuki Njega - 6 acres
- v. James Njega Kabugua - 6 acres

2. What is now pending before this court is an application filed by Salome Wamutira, Lucy Waruguru, Rosemary Wanjiru, Florence Muthoni and Poline Wambui seeking orders that the grant be revoked and or annulled. The application is brought under Section 76 of The Law of Succession Act Cap 160 Laws of Kenya (be referred to as the Act) and rule 44 (1) of the Probate and Administration rules. It is based on the grounds that,

- The proceedings to confirm the grant were defective in substance.
- That the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case.
- That the grant was obtained by means of untrue allegations of facts essential in point of law to justify the grant not withstanding that the allegations was made in ignorance or inadvertently.

3. It is alleged that the Petitioner failed to disclose that the applicants are his sisters and daughters of the deceased who were entitled to a share of his estate. That the petitioner under valued the estate Land Parcel No. Mwea/ Tebere/ B/ 20 measuring 35 acres to be Kshs; 100,000/=. That the Lower Court did not have jurisdiction to adjudicate the Succession cause. The applicants never filed consent forms to allow the petitioner to get the letters of administration.

That the deceased had 4 wives and several children as hereunder;

(a) Grace Wamuyu

- David Kabugua
- Naftaly Kibicho (deceased)
- Jekelia Kanoti
- Cecelia Njega
- Juliana Njoki

(b) Jane Wanjiru

- Wakagio Kithumbi
- Wakuthi Njega
- Wanjiru Njega

(c) Margaret Wangechi - No children

(d) Damaris Njoki

- Cyrus Muthike
- Lucy Waruguru
- Rosemary Wanjiru
- Patrick Muriuki
- Florence Muthoni
- Samole Wamutira
- Josphat Muriithi
- Poline Wambui

ii. 1st, 2nd, 5th - 11th Respondents' case.

In their response dated 10/12/2012, they stated that the application as filed is belated. That the estate has been fully distributed and the application has been overtaken by events. That the applicants have not disclosed that they are married and seek to benefit twice, from their father's estate and from where they are married. That the deceased made an oral will on how he wished his estate to be distributed, that his land would be shared among the four wives but the share of each wife to be registered in the name of the son(s). That a wife who had no son or children was to elect which son in the other house would take her house's share. The estate was therefore shared out as hereunder;

1. Grace Wamuyu

David Kabugua

2. Jane Wanjiru - no sons

Naftaly Kibicho (deceased)

3. Margaret Wangechi - no children

James Njega Kabugua (grandson of deceased)

4. Damaris Njoki

Cyrus Muthike

To hold in trust for Josphat Muriithi

That the dependents have bequeathed to their sons some of whom have disposed of the land to third parties. That the applicants are driven by recent judicial activism which requires all children of the deceased to be noted in the list of beneficiaries. That such recent decisions were not applicable at the time the petition was filed. That when conducting succession proceedings, all family members including the mother of the applicants were fully involved and the mode of distribution was by consent.

iii. 3rd and 4th respondents' case:

In their response dated 08/10/2012, they acknowledge that the deceased estate was confirmed as stated and state that the petition had been advertised vide Kenya Gazette. That after the confirmation, the estate was sub-divided into new *Titles Mwea/ Tebere/ 1264 -1268* on or about 15/08/2003 and all the beneficiaries got their share 19 years ago. That there was another letter by the chief issued to the petitioner to enable filing of letters of administration intestate. That 'equity aids the vigilant and not the indolent' and even if the grant was obtained as demonstrated which fact they dispute, reasonable time has lapsed and the application is an abuse of the court process. She filed a notice dated 25-5-2017 to withdraw the application for revocation of grant.

Margaret Wangechi's case

She filed a replying affidavit dated 10/12/2002 and claimed to be the only surviving widow of the deceased. She stated that the deceased had convened a family meeting and invited some clan elders whereby he gave his oral will as to how he wanted his land distributed. That the succession proceedings were openly filed and everybody related was informed. That during the Land Control Board, the mother of the applicants attended and consented to it.

(iv) 2nd applicant's case

She filed a response dated 10/12/2012 stating that her sister included her name without consulting her first. That in seeking to revoke a grant which is more than 18 years old and had been agreed by all family members will cause more harm than good and she does not wish to be a party. She associated herself with the replying affidavit of Margaret Wangechi and the 2nd respondent. She filed a notice dated 25-5-2017 to withdraw the application for revocation of grant.

The interested parties filed their response dated 21/06/2016 stating that, that in the application for revocation, the 1st -5th applicants are only targeting *Mwea/ Tebere/ B1266 and 1267* that was given to their alleged brothers the 3rd and 4th respondents while the 6th and 8th applicants are targeting *Mwea/ Tebere/ B1265* given to the Petitioner. That they are only seeking interests of their houses through the 4th wife of the deceased Damaris Njoki and the 1st wife of the deceased Grace Wamuyu respectively. That though there is no time limit within which application for revocation may be brought, the probate court is a court of equity and has wide discretion to aid interest of justice.

4. Two of the applicants withdrew from the application. These are Mary Wanjiru Kibicho who swore affidavit stating that she is opposed to the application and Lucy Waruguru also who swore affidavit stating that she does not wish to be a party and was not consulted.

5. The applicants adduced evidence in support of the application. The respondents and the interested parties also **adduced evidence.**

- The 1st applicant Salome Wamutira (PW1) testified that she is the daughter of the deceased. She testified that the wives of the deceased were Grace Wamuyu, Jane Wanjiku, Margaret Wangechi, and Damaris Njoki.
- She further testified that before the deceased died he owned *Mwea/ Tebere/ B/ 20* measuring **36 acres**. That according to the Grant of administration herself and other applicants did not get anything and that she did not know when the consent was filed and they were not informed of the cause. James Kabugua Njega was the administrator. She testified that the land was sub-divided and new title deeds were issued. She testified that upon the confirmation of grant the land was sub-divided into various portions and some have been sold.
- She testified that the deceased did not leave a will she prays that the court assist them to get their father's inheritance.
- In cross-examination she stated that the land was sub-divided in 1995 that she is married to one James Nyamu and has land there measuring 5 acres.
- That she got married in 1992 and that at the time of sub-division she was not there she is from the house of Damaris Njoki and that herself and her sisters who are daughters of Damaris want to get a share of their father's land.
- She conceded that the land was divided in accordance with what was agreed after her father died and that her house was left out.
- For the Respondents (DW1) John Karimi Kibicho testified that the deceased is his grandfather and that he had four wives. He testified that he is from the 1st house of Grace Wamuyu and his father is Naftaly Kibicho Njega. His father had three wives.
- He further testified that the certificate of confirmation of grant show that five persons inherited the land and from their house Karani James Kibicho was included and his interest is in the share of Karani James Kibicho who is from the house of Leah Wanjira Kibicho who is from the 2nd house. That no wife or son of his father was included in the certificate of confirmation of grant. He testified that his father had a parcel of land **INOI/KIAGA/42** measuring 6 acres the land belongs to Naftaly Kibicho. He testified that all the children of Naftaly Kibicho reside on that land. That the land was sub-divided into three portions and each wife getting 2 acres and he did not agree with the mode of distribution of his grandfather's

- estate and his prayer is that the distribution be repeated.
- He further stated that they had filed a case at the Tribunal but they lost.
 - He further stated that he only heard that the grandfather had followed traditions in distributing the land.
 - He stated that if the law was followed there is no point of revoking the grant.
 - The witness did not seem to know much of what transpired because his answer to most of the questions were that he was not aware. When confronted with the question whether he would be ready to refund the purchase price and the money used for sub-division to the interested parties who have bought the land after the grant was confirmed his response was that he was not ready to refund.
 - The witness further stated that his interest is in Mwea / Tebere /B/ 1265 which went to Karani James Kibicho and his father is buried on the land and that this is the portion that was meant for his father. He has cautioned the land.
 - Defence witness 2 David Kabagua testified that he did not include his sisters in the Succession because the deceased who is his father had said how his land would be distributed. He had indicated that when he called his sons and the clan elders. He did not call any of his wives or his daughters. The deceased told his sons and the clan members how he wished his land to be distributed. He testified that there was only one daughter who was not married. Salome Wamutira was one of the daughters and her husband is Nyamu Karani and she has land where she is married. The deceased called the sons' and clan elders for a meeting in 1992. That after his death they called meetings' in 1993. At the time the deceased called the meeting the Kikuyu culture was followed on the distributioin of land. The daughters were aware that land was being distributed. Salome Wamutira is from the house of Damaris Njoki. The house of Damaris Njoki and in the grant they are represented by Titus Muthike and Patrick Muriuki that this house had Salome Wamutira, Lucy Waruguru, Rosemary Wanjiku, Florence Muthoni and Poline Wambui. One of the daughters Lucy Waruguru has withdrawn from the case and has said that the land to remain the way it is. She is the eldest daughter in that house.
 - The daughters' of the deceased did not join the case including his sisters as they knew the wishes of the deceased. It is his evidence that the succession followed the right procedure. There is a Kenya Gazette notice he did not conceal anything he did everything openly.
 - That he has annexed a Chief's letter which he testifies that it is misleading and gives an example that it has mentioned two grandchildren of the deceased that is Wakuthii Njega and Wanjiru Njega whereas there mother was Wagithii Njega who was married to Titus Chumbiritu who is still alive, if anything they should claim from their father not to mention that they are married.
 - He further testified that the estate of the late Njega Ngubia was fully distributed and there is no such estate as of today and the application is overtaken by events.
 - He further testified that the estate was distributed pursuant to an agreement among all the family members including the applicants and they are enstopped from raising the issues they are now raising.
 - He further testified that the applicants are all married.
 - According to him the deceased had four (4) wives Grace Wamyu, Jane Wanjiku, Margaret Wangechi and Damaris Njoki and prior to his death the deceased in front of all his family members and clan elders made a will on how he wished his estate (land) would be distributed.
 - He testified that the wish of the deceased was that land be shared along the four houses of the four wives but the share of each wife was to be registered in the names of her sons.
 - He further testified that according to the wishes of the deceased a wife who had no son or no children was to elect which son in the houses of their wives would take the share of her house. Jane Wanjiku the 2nd wife had no son and her share was given to Naftaly Kibicho who in turn bequeathed it to his son James Karani Kibicho.
 - He further testified that the share of Margaret Wangechi who had no children was given to James Njega Kabugua (a grandson to the deceased). James Njega was a son of Faith Wamalwa who was married to a son of the deceased but they separated. The share of the house of Damaris Njoki the 4th wife was given to her two sons Cyrus Muthike and Patrick Muriuki who were to hold in trust of any other children in their mother's house and particularly one mine Josephat Mureithi.
 - He testified that all the five applicants are all from the house of Damaris Njoki. That there are other daughters of the deceased that have not come to court and this is because they are aware that the distribution of land was by consent of all the family members and as the wishes of the deceased. That the sons in other houses have also bequeathed to their sons who have also disposed of land to third parties.
 - He further testified that Succession proceedings, or when the Succession proceedings were conducted all family members including the mother of the applicants were fully involved and the distribution was by consent.
 - He has also relied on meetings held on 22nd July, 1993 and 3rd October, 1993 to show how the distribution of the estate of the deceased was agreed on.
 - He testified that the mode of distribution was in line with Section 33 of the Act.
 - He relied on his affidavit sworn on 10th of December, 2012
 - **Dw3** Nelson Nicodemus Gituma Kabangi whose evidence was that the deceased in this case is his brother(cousin), he testified that the deceased when he was sickly called his family and clan members and told them how he would like his land distributed.
 - That he was present when the deceased distributed his estate to his sons from his four wives.
 - He further testified that the mode of distribution was in line with the culture in 1992.
 - Defence witness (Dw4) four was Karani James Kibicho his evidence was in line with what was stated by Dw2 and Dw3 I need not repeat it.
 - Defence witness five (Dw5) Cyrus Muthike Njega he is the son of the deceased and his mother was Damaris Njoki. He testified that he had one brother Patrick Muriuki Njega.

- That he further stated that the deceased gave them land. Their parcel of land was 8 acres. He testified that the land was lawfully distributed he was given land and he is not ready to part with it.
- Benson Muchiri Miano (DW6) testified on behalf of all the Interested parties, he stated that they are buyers of various portions. He testified that the Succession was done lawfully it was gazetted vide the attached gazette notice and he testified that he conducted a search before they bought the land and there were no objections or inhibitions on the title deeds. He testified that he did not know about the applicants' and there was no way he could have known they wanted to get portions of the land. He testified that they are peace loving, and if the applicants want the land they can refund the purchase price them. He further stated that he bought Parcel number 3371 for Ksh: 280,000/=, he bought the land seven (7) years ago and at present the value is Kshs; 750,000/=. He testified that Rhoda Wamutira bought land and paid Kshs; 380,000/= that all the other interested parties paid for their parcels and have been issued with title deeds.
- He further testified that the grant was confirmed 23 years back on 3rd February, 1995 the land has passed from their father and from their brothers. It is not just for them for the applicants to get land.

This is brief analysis of the evidence tendered.

The parties filed submissions.

6. For the applicant submissions were filed by Wangechi Munene & Company Advocates. It is submitted that the grant was obtained fraudulently by making of a false statement or concealment from Court of something material to the case. The applicants who were daughters of deceased were not named as dependents apart from the 1st applicant on Form P & A 5. They did not sign a consent to allow the administrator file the cause. They submit that the deceased did not leave an oral will. She relies on

Section 40 of the Act on the mode of distribution.

7. The Applicant relies on the case of **Mary Rose -versus - Jane Rono & Another Eldoret Court of Appeal No. 66 of 2002 C.A** where the Court of Appeal held that the Customary law did not apply.

They also rely on the Estate of **Mwangi Gitune (deceased) HCSC No. 1033 of 1996** where there was a dispute on distribution of the estate involving two houses. The court applied **Section 40 of the Act** and stated it had no discretion.

8. For the 3rd and 4th respondents and 1st to 6th Interested parties submissions were filed by Wambugu Kariuki Advocates. It is submitted that the applicants are blood sisters and are only interested in Land Parcel No. **Mwea/ Tebere B/1266** and **Mwea/ Tebere/ B/1267**. That 6th and 7th applicant are interested in Parcel Number Mwea/ Tebere/ B/ 1265. That the grant cannot be revoked simply because the applicants have developed interests in some portions.

9. It is submitted that the mother of the applicants, Damaris Njoki who died in 2007 had no problem with the distribution and the mother of 6th and 7th applicants Grace Wamuyu who died during the pendency of this case had no objection with the distribution.

10. It is submitted that the process of obtaining the grant cannot be faulted because it was published in the Kenya Gazette No. **671 of 11-2-1992**. That the application for revocation of grant was filed seventeen (17) years after the grant was confirmed. New title deeds have been issued and there are interested parties who are purchasers for value. It is submitted that it is too late in the day to apply for revocation of grant. He relies on **Succession Cause No. 92 of 1993 Estate of Kamau Thuku Justice Rawal (as she then was)** where it was stated that where the grant was confirmed long time ago it would be unfair to upset it. **Succession Cause No. 1475 of 2014 Estate of Stanley Kimani Karanja, Justice Achode** where it was stated that the interest of the applicant has been extinguished by fluxion of time since the suit property has already been transferred to innocent third parties.

11. For the 1st, 2nd and 5th - 11th respondents it is submitted that the estate was distributed and title deeds issued and some changed hands to innocent purchasers. It is submitted that at the time of distribution the daughters were all married apart from one Wambui Mwai who is not seeking to have the grant revoked. It is further submitted that the delay has not been explained. It is also submitted that there is an award in respect of Mwea/ Tebere/1265 and a decision of this court may be in conflict with that award. It is submitted that there was nothing submitted to prove the value of the land. It was not proved that the transfers to 3rd parties were done during the pendency of this application for revocation of grant. They were made long before this application was filed.

12. I have considered the application. The issued for determination is revocation of grant. Whether the Law of Succession Act was applicable and whether the deceased had made his wishes as to how his estate was to be distributed.

The issue of the deceased dependents is not in dispute and the fact that the applicants being daughters of the deceased were not provided for in the confirmed grant. The issue arising is the time within which the applicants filed the application for revocation of grant. The grant was confirmed in 1995 and the application was filed in 2012 which is about 17 years

13. On the issue of the applicable law, the deceased died on 10-4-1992. This was after the commencement of the Law of Succession on 1-7-1981. The Act applies to estates of deceased persons dying after the Act came into force. Section 2 (1) of the Law of Succession Act Provides;

“(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons”

The deceased having died after the commencement of the Act, the law applicable in the administration of his estate is the Law of Succession Act (Cap 160 Law of Kenya) and not Customary Law. The deceased was survived by his wives and children. **Section 40** of the Act provides:

“ (i) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(ii) the distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in section 35 to 38.”

14. On the issue of revocation of grant, the law on the subject is **Section 76** of the Act. It provides;

“ A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the Court decides, either on application by any interested party or of its own motion -

a. that the proceedings to obtain the grant were defective in substance.

b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.

c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently”

A party wishing to have the grant revoked must prove that the proceedings to obtain the grant were defective. The onus is on the party to provide evidence to prove that the proceedings were defective. The party must also prove that the grant was obtained fraudulently by making false statement or concealing from Court something material to the case or by making of untrue allegations.

16. The applicant submits that proceedings were defective in substance, grant was obtained fraudulently and grant was obtained by means of untrue allegations.

16. The applicants are stating that they were not informed and their names were not included as beneficiaries.

DW2 - David Kabugua testified that he did not include his sisters as the deceased had said how he wanted land to be distributed.

17. The deceased was polygamous and the estate was distributed pursuant to an agreement by all family members including the applicants. David Kabugua Njenga in his affidavit sworn on 10-12-2012 annexed minutes of meeting held on 27/7/1993, 3/10/1993 and 5/11/1994. DK 1 -6. The documents show that deceased had stated that his land should not be registered in the names of wives but the house of each wife was allocated some land in the name of the sons. The estate was distributed to each of the houses represented by a son. The grant confirmed was in accordance with the wishes of the deceased contained in these documents. The applicants had been married.

18. The applicants had the burden to prove that the grant was obtained fraudulently. Section 76 of the Act deals with revocation of grant. The party must prove that

1. The proceedings are defective in substance

2. That the grant was obtained fraudulently by

i. Making a false statement

ii. Concealment from court of something material to the case

iii. The grant was obtained by means of untrue allegation of fact essential in points of law to justify the grant.

This form the grounds upon which the court will order the grant be revoked. The party need only prove any one of the grounds or a combination of all the grounds.

19. The applicants did not tender any evidence to prove that the proceedings were defective. He who alleges must prove. **Section 107 of the Evidence Act provides that -**

“ (I) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

In her testimony the applicant Salome Wamutira (PW1) testified that the applicants did not get anything. We did not know when the consent was filed and we were not informed of the cause.

20. The applicant did not produce the consent form which she says she did not sign. The Chiefs letter which the applicant produced as exhibit. 10 is not the letter which was used to file the Succession as it is dated 12/7/2012. She has not discharged the burden to prove that her names and those of the applicants were not included.

21. The applicant was not candid and could not have been truthful. This in view of the fact that there were some applicants who pulled out. One of them is Mary Wanjiru Kibicho ID No. 101064615 who swore a replying affidavit on 17/8/2017 and stated that she did not want to be part of those seeking to revoke the grant that was **properly granted** emphasis mine. She has clearly disputed the contention by the applicant that there was any irregularity in the manner the grant was issued.

22. The other applicant who pulled out of the case Lucy Waruguru swore a verifying affidavit sworn on 10-12-2012 at paragraph 2 of the affidavit she states;

“That this sudden twist by my sisters (the other applicants) seeking to revoke a grant which is more than, eighteen (18) years old, had been agreed by all family members which if effected will cause more harm than solution takes me by surprise and I do not wish to be party to such attempts.”

At paragraph 4 states:

That the replying affidavit by David Kabugua Njega and the one of my Step mother Margaret Wangechi have been read and explained to me and I wish to state that those two affidavits reflect a true and fair position of the deceased estate and his wishes before he died. I would therefore like to associate with those two deponents.

Paragraph 5

“That I find it very unreasonable for my sisters who are married just like me to seek to go back to my biological father’s house and cause havoc therein when they are well catered for where they currently live.”

23. Though listed as an applicant with the above averments she urged the court to dismiss the application for revocation of grant.

24. David Kabugua Njega who has sworn an affidavit on 10/12/2012 depones that the estate was distributed pursuant to an agreement among all the family members.

He depones that there were family meetings where all the family members were involved. Margaret Wangechi Njega swore an affidavit sworn on 10/12/2012 and depones that she was present when the deceased convened a family meeting and invited some clan elders to give his oral will on how he wished his land to be distributed. That all family members were informed even those who did not attend.

She further depones that the applicants mother was informed and she attended the Land Board and consented.

25. From the above analysis the distribution of the estate was done above board. What was agreed by the family members is what was agreed in Court and the grant was confirmed.

26. There are other daughters of the deceased who swore an affidavit on 10/12/2012

27. There are three daughters of the deceased who have sworn affidavit sworn on 10/12/2012. These are, Jackline Mabuti Mbogo, Cecilia Wangechi Mararo, Julian Njoki Benard and Wakagio Githumbi was are daughters of the deceased. They aver that before the deceased died, he convened a family meeting whereby he distributed his estate along the line of his four wives and made it clear that any piece of land could only be registered in the name of a son in a particular house. That they are surprised by the claim by the applicants that they were kept in the dark. That every member of the family of deceased was aware of the Succession proceedings. They depone that what the applicant is doing was not right.

28. There is every indication that the deceased had expressed his wish on how his estate would be distributed. The family members were aware and the grant was in line with the wishes of the deceased.

29. The applicants who are seeking revocation of grant has the burden to prove that;

- i. The proceedings were defective in Substance.
- ii. Fraud by making a false statement or concealing from court something material to the case.
- iii. Grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant.

30. The contention by the applicant is that the applicants as daughters of the deceased were not mentioned in the list of the survivors. They did not sign the consent to allow the administrators to petition for letters of administration yet they rank in equal priority with them.

31. The applicants have not disclosed that they had been married at the time the cause was filed. The record shows that the Petitioners obtained a Chief's letter before filing the Succession. The names of the applicants appear on the letter. The cause was gazette vide gazette notice number; 671 of 11-2-1994.

The purpose of the Gazette Notice is to inform all interested parties that a Succession cause has been filed so that they can file objections or join in the cause to pursue their interests. Where the cause has been gazetted, I would not hold that the cause was filed secretly. It is the applicants who slept on their rights for too long. It has been proved that the estate was distributed and the beneficiaries took their respective positions. The applicants are said to have visited the estate and were aware of the distribution. They never raised objection when the wives of the deceased were alive. The application is an afterthought. There must be a limit on the time which a party will seek to revoke the grant, depending on the circumstances of the case like this one which applicants were aware of the distribution.

The application must be filed within a reasonable time. A period of seventeen (17) years which the applicant took when they were fully aware that there was a Succession cause is no doubt inordinate. There is a limitation to the filing of an application for provision for dependents under **Section 30** of the Act. The Section provides:

“No application under this part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by Section 71”

It is clear that what the applicants are seeking is order to make provision for them but are hiding in an application for revocation of grant which has no limitation on the time that it has to be brought. Section 76 of the Act does not impose time limitation for filing an application for revocation of grant.

The applicants herein have not informed court or given a reason as to why they did not file the application for revocation within a reasonable time. The deceased passed away 17 years ago and after confirmation of grant, the estate was duly sub-divided and respective dependents took possession of their portion. These are members of the same family and it is strange that they did not become aware once the dependants took possession of their father's estate.

32. I must agree with the 3rd and 4th respondent the application is a back door attempt to revoke or annul the grant which was properly issued, and confirmed nineteen years ago. That the estate of the deceased is no longer in existence and there is nothing capable of being re-distributed. The revocation of grant will affect 3rd parties who have brought land from the beneficiaries and are not parties to the suit. The interest of such parties is protected under the Act.

Section 93 (1) of the Act provides;

1. A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

The Provision is Mandatory

The High Court has held in various persuasive decisions that the interests of a purchaser for value without notice of the dispute cannot be defeated by way of revocation of grant. In **Stephen Mwangi -versus- Joyce Wanjiru Wathua Misc. Application No. 26/ 1999 Justice Makhandia (as he then was)**. Held

“I must however emphasize that the gist of Section 93 of the Law of Succession Act is to protect purchasers for value of the properties arising out of Succession proceedings. The second respondent was one such person. His fear that he may lose the property in the event that the application for revocation of the grant is allowed is clearly unfounded. He can count on the protection enshrined in and afforded to him by Section 93 (1) of the Law of Succession Act in case of such eventuality.

..... whatever the outcome, his purchase and title to the suit premises will not be impugned or disturbed at all.”

This same view was held by Justice Ongundi in the case of; **Godfrey Mbuba Kirai -versus- Luchesta Mbingu & 6 Others H.C. Embu Succession Cause No. 160 of 2011** where she stated.

All these new owners have been joined as parties to this suit as interested parties. Though I do not find this matter to be res judicata, I do find that the respondent/ applicant slept for too long in his right. A number of persons are occupying the land legally by virtue of Section 93 of the Law of Succession Act.... even if the grant is revoked it would not serve any purpose as the title has changed hands to too many persons many of who bought the land legally.”

Further in the matter of Estate of **Miriam Gathoni Mwathi Nairoi H.C. Succession Cause No. 387 of 2010. Justice Lenaola** (as he then) was stated that the plain reading of Section 93 aforesaid, even if the grant were to be revoked, the transfer to the applicant who was a purchaser would remain valid.

I have not seen a different view. Section 93 of the Law of Succession Act is couched in mandatory terms and even if the grant would be revoked the interests of the purchasers will remain valid.

33. The applicants sisters Jackline Mabuti Mbogo, Cecilia Wangechi Mararo, Julian Wangechi Mararo, Julian Njoki Benard and Wakagio Kithumbi have deponed that they are daughters of the deceased and that the deceased had distributed his estate and made it clear that any

piece of land could only be registered in the name of a son and distribution was in the name of his four sons. They dispute the applicant's contention that they were not aware of the Succession. They objected to the application for revocation of grant by the grants.

34. This shows that there cause was not filed secretly nor did the respondents act fraudulently. The distribution was in accordance with the wishes of the deceased as elaborated in the affidavit of David Kabugua Njega. In the affidavit on the mode of distribution at Paragraph 12 of the affidavit Sworn on 10-12-2012 he depones that the share of Damaris Njoki who is the mother of the applicants was given to her two sons Cyrus Muthike and Patrick Muriuki who were to hold in trust for any other child (ren) in their mother's house.

35. The provision was made for all the Children from the applicant's mother's house and their applicants claim if any is with the two sons of Damaris Njoki who were registered in trust for all the children in their mother's house.

There was therefore a provision made for the children.

36. This issue of coming to seek revocation of grant after a long delay has been dealt with in the High Court and there has been diverse views

This Court takes into account situations where a beneficiary or interested party may not be aware or informed of proceedings regarding a deceased's estate and not by being indolent, but by circumstances beyond their control, are deprived of contesting and or establishing one's proprietary or beneficial interest or right merely due to limitation of actions. Articles 22, 27, 48, 50 (1) & 159 2(d) Constitution empower each person, party's to lodge and ventilate their cause in court and upon being heard, determined on its merits. There is every indication that the applicants were aware of the proceedings in this case and became aware of the distribution of the estate. All these can only be determined by hearing of the application and determination on merit.

In re-Estate of Charles Ngotho Gachunga (Deceased) [2015]Eklr

The Court held;

“It is argued that the application has come in too late. In other words the same was filed after an in ordinate delay which has had the effect of rendering it time barred due to effluxion of time. The answer to this submission is that the office of administrator is for life. He can be called to account at any time so long as he is still alive. Needless to say that Section 76 of the Act does not impose any time limitations within which an application for revocation of grant ought to be filed.....

I have already made a finding in paragraph 12 hereof that there was a violation of or non -compliance with Section 51(2) (g) of the Law of Succession Act and Rule 7 (1) (e) (i) of the Probate and Administration Rules. Such violation amounted to a significant defect in the proceedings leading up to the making of the grant. The non –disclosure of the applicants, whether innocently or otherwise, amounted to a concealment of important matter from the court and it had the effect of a misrepresentation of the true state of affairs. “

This view is based on the provision of Section 76 of the Act which has not put any limitation on the time for filing of an application for revocation of grant.

It is also true that the Limitation of Actions Act does not apply to the Law of Succession Act as the Law of Succession was enacted after the Limitation of Actions Act. The Provision of Section 25 of the Interpretation and General Provisions Act implies that the recent amended written be construed to be the one with the Amended Law. It provides that where one written law amends another written law, the amending written law, shall in so far as it is consistent with the tenor thereof and unless the contrary intention appears, be construed as the one with amended written law.

The limitation of Actions Act will therefore not apply under Section 76 of the Act. The other view is that where the party comes to Court too late, the court will refuse to allow the application due to the effluxion of time. In a persuasive decision in the matter of the estate of **Kamau Thuku** – deceased supra, Justice Rawal while holding that the delay in bringing the application was not explained and being aware that there is no time limit under Section 76 of the Act stated that -

“ The grant of probate is confirmed long time ago and it shall be unfair to upset the settled estate, at least in the circumstances of this case.”

In the matter of the Estate of **Stanley Kamau Karanja (deceased) Justice L. A. Achode** stated;

“ Indeed Section 76 of the Law of Succession Act states that a grant may at any time be revoked or annulled by the Court if it finds that it was obtained fraudulently by making of false statements or concealing material facts. This may appear to place no bare limit within which an application for revocation may be brought. The probate court is a Court of Equity and has very wide discretion to aid the interest of Justice. However, Equity aids the vigilant and not the indolent..... it is therefore my considered view that the interest of the applicant has been extinguished by effluxion of time since the suit property has already been transferred to innocent third parties who had no notice. The estate is no longer available to enable her to enjoy her right of life interest and the administrator of the estate whom she should have brought her claim has also died.”

My view is that Section 76 of the Act does not place any limitation as to the time when an application for revocation of grant may be brought or when the court can of its own motion revoke the grant. It is for the court to consider the application filed at any stage to see whether it meets the threshold for revocation of grant.

This is intended to serve the interests of Justice. **Section 76 of the Act** must be considered together with **Section 83 of the Act** which defines the duties of Personal representatives. Since the duties and the role of personal representative which is defined under **Section 3** is not limited, It is subject to revocation of grant death or final distribution of the deceased's estate to the satisfaction of all the beneficiaries and parties who have an interest in the estate. The duties are not limited. The intention of Parliament is that there be no limitation under **Section 76 of the Act** and the duties of an administrator. The court must therefore consider the application under Section 76 irrespective of effluxion of time.

The applicants have raised the issue that the trial magistrate had no jurisdiction. This cause was filed in 1993 as Succession

37. If a case is made out for revocation of grant under the powers donated under **Section 76 of the Act** for revocation of grants the court has discretion to revoke the grant or make other orders as may meet the ends of Justice.

The applicants in this case took too long to come to court. Their right have been extinguished by the effluxion of time. Other than revoke the grant they have the option of demanding their right from the administrator. I am persuaded in this by Justice Musyoka in the case of Justice Musyoka in the Estate of **Charles Ngotho Gachunga Succession Cause No. 687 of 1984 Nairobi.**

“ It is argued that the application has come too late. In other words the same was filed after an inordinate delay which has had the effect of rendering it time barred due to exffluxion of time. The answer to this submission is that the office of the administrator is for life. He can be called to account at any time so long as he is still alive. Needless to say Section 76 of the Act does not impose any time limitation.”

38. The applicants have raised the issue that the trial magistrate had no jurisdiction. This cause was filed in 1993 as **Succession Cause Number 306 of 1993** in the Senior Resident Magistrate Court at Kerugoya. The value of the estate was given as Kshs; 100,000/=. I take Judicial notice that over the years in this Country the value of the real estate (land) has sky rocketed. That could have been the value of the Land back then as nineteen years is a long time. The value given was the estimated value of the property at that time not now.

Section 48 of the Law of Succession Act back then gave magistrates' court jurisdiction to entertain Succession matter where the value of the estate did not exceed Kshs; 100,000/=. There is no prove that the value of the estate back then exceeded the jurisdiction of the trial magistrate. The ground is without merits.

39. I have considered all the evidence, the submissions and the law, I find that the application has not met the threshold for revocation of grant. The application is without merits. This being a dispute involving members of the same family, I will not make any orders as to costs.

The application is dismissed.

Dated at Kerugoya this 29th Day of May 2020.

L. W.GITARI

JUDGE