



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT SUCCESSION CAUSE NO.46 OF 1991

IN THE MATTER OF ESTATE OF STEPHEN GICHOHI GITHAIGA (DECEASED)

VERONICA WANJIRU GICHOHI.....1ST APPLICANT

TERESA WANJIKU GICHOHI.....2ND APPLICANT

BETWEEN

ELIZABETH WANJIKU GICHOHI.....1ST RESPONDENT

RUTH WANGARI GICHOHI.....2ND RESPONDENT

RULING

1. Is section 4 (4) of the Limitation of Actions Act cap 22 applicable to a summons for Revocation of grant brought under s.76 of the Law of Succession Act Cap 160 Laws of Kenya?
2. That is the issue for determination.
3. The matter herein is in relation to the Estate of Stephen Gichohi Githaiga who died intestate on 21st April 1981.
4. The cause was filed by two Widows Elizabeth Wanjiku and Ruth Wangari Gichohi and the certificate of confirmation of grant was issued on 4th June /1992 – where the Estate comprising of Othaya/Kiandemi/322 and Ndunduri/Mirangine/372 were shared equally between them.
5. By Summons of Revocation of Grant dated 20th December 2017, George Mathenge Gichohi and Jackson Kagunda Gichohi sought the revocation of the grant under s.76 of the Laws of Succession Act and rule 44 of the P&A rules through the firm of Waiganjo Mwangi & Co. Advocates. The main fact for the same was that their mother was a wife of the deceased yet the two petitioners never informed or involved her in the Petition.
6. Upon service, the administrators filed a preliminary objection dated 7th November 2018 through the firm of Macharia Muraguri Advocates.
7. The preliminary objection is made of 6 paragraphs in three pages.
8. It was agreed that counsel would file and exchange written submissions then highlight the same.
9. Mr. Muraguri argued the preliminary objection for the respondents.
 - That the summons for revocation of grant dated 20th December 2017 was time barred by virtue of s.4(4) of Cap 22 Laws of Kenya.
 - That the certificate of confirmation was issued in 1992 –26 years ago far above the 12 years provided for under Cap 22.
 - That Cap 160 was not exempt from Cap 22 as seen from s.42 of the same.
 - That the case of Re: **Estate of Josephine Magdalene (2016) eKLR** cited by the applicant was not binding on this court. That this decision was not conclusive in that though the Judge said that Cap 22 was not applicable to Cap 160 he also brought in the issue of “reasonableness” in determining whether the matter was time barred or not.
 - That the applicant in the summons for revocation of grant had not complied with Rule 44(2) of the P&A Rules requiring him to show the extent to which the estate had been administered.

- That the estate had been administered and distributed into multiple subdivisions and transferred to 3rd parties who were not parties to this cause.
- That this court now had no jurisdiction as the matters were now in the purview of the Environment and Land court.
- That there was no estate remaining and the grant was spent.

10. In his rejoinder, Waweru Macharia for the applicant argued that what was before the court was not a preliminary objection and fell out with the test laid in **Mukhisa Biscuits vs West End Distributors [1969]EA 696**

- That what was before the court was not a pure point of law but arguments based on facts which could only be dealt with during the hearing of their summons for revocation of grant.
- That in the context of **Re: Josephine Magdalene** a summons for revocation of grant is not an action as envisaged under s.4 (4) of the Cap 22.
- That the wording of s.76 Laws of Succession Act was clear – a summons for Revocation of Grant could be brought at any time, and the time was not limited.
- That the issue of distribution of the estate was a matter of fact to be established at the hearing. That s.93 of the Law of Succession Act only protected purchasers and not heirs and for as long as the property was still with the family then it remained within the provisions of s.76 Laws of Succession Act. That purchasers who purchased land under grant obtained fraudulently would be affected by outcomes.

11. I have carefully considered the rival submissions s.4 (4) of the Cap 22 states

An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

12. S.42 provides for the exception thus: **Exclusion of certain proceedings:**

(1) This Act does not apply to-

(a) criminal proceedings; or

(b) matrimonial proceedings; or

(c) an action to recover possession of Trust land; or

(d) proceedings by the Government to recover possession of Government land, or to recover any tax or duty, or the interest on any tax or duty, or any penalty for non-payment or late payment of any tax or duty, or any costs or expense in connection with any such recovery; or

(e) proceedings to which the Public Authorities Limitation Act (Cap. 39) applies; or

(f) forfeiture proceedings under the East African Customs Management Act, 1952 (No. 12 of 1952), or the East African Excise Management Act, 1952 (No. 13 of 1952), of the High Commission; or

(g) proceedings in respect of the forfeiture of a ship or an aircraft; or

(h) civil proceedings brought under the National Social Security Fund Act (Cap. 258.), for the recovery of any contributions or any other sum and any penalty or interest thereon; or

(i) civil proceedings brought under the Higher Education Loans Board Act 1995, (No. 3 of 1995), for the recovery of any loans owed to the Board including any penalty or interest thereon; or

(j) a proceeding to recover an amount for which a person is liable under section 51 or 52 of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003) or a proceeding under section 55 or 56 of that Act;

(k) actions, including actions claiming equitable relief, in which recovery or compensation in respect of the loss of or damage to any public property is sought.

13. The respondent argues that matters under the Law of Succession Act matters are not exempted under s. 42. He argues that the date of confirmation of the grant is deemed to be the date of judgment and 12 years should run from then. In that case then that his matter is time barred as the same was made 26 years ago.

14. I am looking at the two issues arising from these arguments: whether what is before this court is a preliminary objection, and whether s. 4(4) of Cap 22 applies to this matter.

15. On the 1st issue, a P.O was clearly defined in **Mukhisa Biscuit** and that definition has been upheld by numerous authorities. Per Law J:

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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

Per Sir Charles Newbold P:

A preliminary objection ...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 has to be ascertained or if what is sought is the exercise of judicial discretion

16. A reading of the P.O as filed raises factual issues that would require to be determined by way of evidence: for instance, whether the estate has fully been distributed and transferred to other parties not party to this cause, raising another point as to whether this court has jurisdiction. This issue can only be determined when evidence has been tendered as to the involvement of the alleged 3rd parties.

17. Hence although s. 4(4) of Cap 22 is a pure point of law which if argued successfully would bring this matter to an end, the fact that there are factual matters to be determined renders its purity questionable, which means that it cannot answer to the name preliminary objection.

18. Section.76 is clearly speaks for itself: -“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 if its own motion.....” and it goes on to list the circumstances under which this may happen – five sets of circumstances”.

19. It is clear from the wording of s.76 that it provides no limitation of time for as long as any or a combination of all of the circumstances set out under (a) to (e) are established.

20. I do agree with Musyoka J in **Re Josephina Magdalena** that a summons for revocation of grant is not an action. It is an application within the cause and it cannot be said to be governed by the limitation of Actions Act.

21. Muchelule J in **Re: Estate of Devchand Legdir Shah (Deceased) (2018) eKLR** was of the same view and agreed with Musyoka J in **Re Josephine Magdalena** in the following words: -

The Limitation of Actions Act prescribes periods for limitations of actions and arbitrations. The actions to which that statute applies do not include succession causes, or, at any rate, causes or actions governed by the Law of Succession Act. It covers such matters as actions founded on contracts and torts, actions to recover land and rent, actions to recover money, actions in respect of trust property or movable property of a deceased person, and related causes. In short, it envisages ordinary civil suits brought within the framework of the Civil Procedure Act and Rules. It does not envisage the special proceedings governed by such statutes as the Law of Succession Act (In re Estate of Josephine Magdalena Motion (Deceased) [2016] eKLR).

I find therefore that the substantive law governing succession cause under section.76 Law of Succession Act does not provide any limitation to the filing of a summons for revocation of the grant. Innocent parties who may have transacted with the personal representative appointed under the Act have a special protection under s. 93. That is a matter for evidence. Obviously there is a reason for not providing the limitation. If fraud is discovered, should it be limited by time? If the parties lied to court, should they benefit from their lies because of the lapse of time? If some minor was disinherited should that be stamped with okayness by the lapse of time? If the estate is never administered or the grant becomes imperative, should the estate be left in limbo because of time? Time may clarify issues, facts etc, but time cannot cover up some things.

22. It is clear that the act provides no limitation and hence the Cap 22 is not applicable to the Summons for Revocation of Grant.

23. With regard to the applicant’s failure to comply with Rule 44 (2) of the P&A rules that is a matter of procedure that would have to be dealt with in the hearing of the summons for revocation of grant. It has been held numerous times that rules of procedure are hand maidens of justice and not mistresses In **Microsoft Corporation Ltd & Another Vs Mitsumi Computer Garage Limited and Mitsumi (K) Limited, Milimani [2001] KLR 470** the court repeated the often stated statement that.

“Rules of procedure are the hand maidens and not mistresses of justice. [Though the point being made is clear, from a male perspective, perhaps we should find the male/other versions of this statement in the interests of gender sensitivity][It is fine with me to say that Rules of procedure] ... should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predictable manner not to fetter or choke it”.

I need not add more. In any event a party can be granted time to comply, and the inconvenienced party if at all, compensated by way of costs.

The preliminary objection must fail with costs to the applicants.

Dated, delivered and signed this 30th Day of April 2019 at Nyeri.

Mumbua T Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Mr. Kinuthia holding brief for Mr. Waiganjo for applicant

Ms. Macharia holding brief for Mr. Macharia Muraguri for respondents

Mr. Kinuthia: The applicants request for a mention date for directions on the Summons for Revocation of the Grant

Court: Mention on 12th June 2019 for directions

Judge