



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 60 OF 2018

IN THE MATTER OF THE ESTATE OF WAMBUI NGURIO NG'ETHE "A" alias WAMBUI UGURIO NG'ETHE (DECEASED)

WANJIRU MBURU..... APPLICANT

VERSUS

NAOMI WAIRIMU KIMANI.....1ST RESPONDENT

MARGARET NJERI KIMANI.....2ND RESPONDENT

JANE WANJIKU KIMANI.....3RD RESPONDENT

RULING

1. The summons for revocation of grant dated 9th November 2017 was filed on 15th January 2018 by Wanjiru Mburu (hereafter the Applicant) seeking to have the grant issued in the Nairobi Succession Cause No. 354 of 1995 revoked. On grounds inter alia that her siblings **Naomi Wairimu Kimani, Margaret Njeri Kimani and Jane Wanjiku Kimani** (hereafter the 1st to 3rd Respondents, respectively) who were the Petitioners obtained the grant fraudulently by making of false statements or by concealment from the court of material facts therein concealed material facts resulting in the rightful beneficiaries of the estate being disinherited.

2. The summons was met with a preliminary objection by **Hannah Wambui Njeri and Jeremiah Kimani Njeri** (children/beneficiaries of the estate of the 2nd Respondent, now deceased) The preliminary objection is premised on grounds that the Applicant's summons is time-barred under the doctrine of laches and effluxion of time having been filed more than twenty two (22) years since the confirmation of the grant.

3. Pursuant to directions given by the Court, the preliminary objection was to be canvassed first, by way of written submissions. On behalf of the estate of the 2nd Respondent, it was submitted that the application for revocation of grant was time barred under the doctrine of laches as it was filed more than 22 years after the grant was confirmed. Reliance was placed on the case of **Tabitha Wanjiru V Jotham Kihiko Hika & 2 Others [2017] eKLR**. It was asserted that the Applicant had been indolent, and that the application had been brought after inordinate delay. Citing the maxim that equity aids the vigilant, not the indolent it was argued that the summons stands barred through effluxion of time. Several decisions were cited in support of the submissions including the case of **Monica Wangui Kimani & Another V Josphat Mburu Wainaina [2015] eKLR (In the matter of the Estate of Stanley Kimani Karanja (Deceased))**. The court was urged to dismiss the application.

4. On her part, the Applicant submitted on the summons reiterating the material in her affidavit, despite the clear directions of the Court that the preliminary objection be heard first. Nonetheless, on whether her application was time barred, the Applicant submitted that she had not been aware of the earlier succession proceedings and that once she became aware, she brought the instant application. She relied on the case of **Re Estate of Charles Ngotho Gachunga (deceased) [2015] eKLR** to answer the objection by asserting that the office of administrator is for life and he is liable to be called upon to render an account at any time so long as he is alive. She pointed out that section 76 of the Law of Succession Act does not impose any limitation of time within which an application for revocation of grant ought to be filed. The 1st Respondent did not submit on the preliminary objection.

5. The court has considered the material canvassed in respect of the preliminary objection and perused the record of the cause, or what remains of it. The petition for grant and some other related pleadings are missing. Be that as it may, it is evident from the record that the deceased herein, **Wambui Ngurio Ng'ethe "A"** died on 21st September 1992 and a **Succession Cause No. 304 of 1994** filed in the **SRM's Court, Kiambu**.

The cause was published in the Kenya Gazette of 20th August 1994 under gazette notice no. 5021 dated 23rd June 1994.

6. It appears that the cause was subsequently transferred to the High Court and assigned a new number being **Nairobi High Court**

Succession Cause No. 354 of 1995 wherein a grant of letters of administration was made to **Naomi Wairimu Kimani, Margaret Njeri Kimani** and **Jane Wanjiku Kimani** on 17th March 1995. The grant was confirmed by **Mwera J.** on 27.10.1995. Under the confirmed grant, the sole asset of the deceased's estate being land parcel **LR. No.Komothai/Kiratina/64** was shared equally between the three children of the deceased, namely, **Naomi Wairimu Kimani, Margaret Njeri Kimani** and **Jane Wanjiku Kimani**.

7. There was a subsequent summons by **Naomi Wairimu Kimani**, for the annulment of the grant which was filed on 2/10/1996, but which appears to have been compromised on 7/10/96 when the parties appeared before **Kuloba J.** (as he then was) for the hearing of the earlier summons dated 12/06/1996 by the 2nd and 3rd Respondents seeking that the Deputy Registrar (DR) of the Court be authorized to sign all requisite forms to facilitate transmission of the suit property to beneficiaries. It appeared from the supporting affidavit to that summons that the 1st Respondent had not cooperated with her siblings in that regard. A consent was however recorded before **Kuloba J.** (as he then was) allowing the application seeking to authorize the DR to sign requisite transmission forms.

8. Nothing happened in the cause for the next 22 years until the summons filed 15th January, 2018 by the Applicant seeking revocation of grant, which was met by the preliminary objection which is the subject of this ruling. In May, 2018, the cause was transferred to this Court. The Applicant claims to be a daughter of the deceased herein and complains inter alia in her rather brief affidavit supporting the summons, that the administrators fraudulently obtained the grant and did not fairly distribute the estate thereby disinherited certain beneficiaries.

9. There is no dispute that the delay of 22 years in bringing the instant summons is lengthy and would require a proper explanation from the Applicant before a conclusion can be made that the delay is unreasonable or inordinate. It is not acceptable for the Applicant to attempt to offer an explanation by way of submissions as she has done. However, it is trite that there is no limitation period under section 76 Law of the Law of Succession Act for the filing of summons for revocation. Secondly, the Respondents are yet to respond to the summons and therefore it is not possible for the court to establish whether and how they stand to be prejudiced by the application. Their attempt to demonstrate this by submissions is equally improper. These are disputed matters, clearly.

10. In my considered view, beyond the undisputed duration of the interval between the confirmation of grant and the present summons, the questions whether there was unreasonable delay or that the Respondents stand to be prejudiced are matters of fact that need to be ascertained before the court can find the Applicant guilty of laches and therefore debarred from seeking revocation. **Black's Law Dictionary, Fourth Edition** defines laches as:

"1. Unreasonable delay in pursuing a right or claim.....in a way that prejudices the party against whom relief is sought....."

2.The equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought."

11. As to what constitutes a proper preliminary objection, the Court of Appeal for Eastern Africa stated in the timeless case of **Mukisa Biscuit Manufacturing Co. Ltd v. Westend Distributors Ltd (1969) EA 696 (per law JA)** that:

"..... a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit."

12. **Sir Charles Newbold P**, stated for his part that:

"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 has to be ascertained or if what is sought is the exercise of judicial discretion".

13. In the case of **Oraro v Mbaja (2005) KLR 141, Ojwang J** (as he then was) reiterated the foregoing by stating that:

"A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."

14. Applying the foregoing tests to the preliminary objection raised herein, the court is not satisfied that it raises pure points of law. The matters upon which it is premised ought to be canvassed during the hearing of the summons for revocation and may well become relevant considerations in the determination thereof. In the circumstances the preliminary objection is not properly taken and is hereby dismissed.

15. In view of the age of this cause and taking note of a pending application dated 11th December 2018 seeking to have the evidence of the administrator, **Naomi Wairimu Kimani** said to be aged over 100 years taken, the court directs that early dates be taken before the Judge for her directions. Parties will bear own costs in respect of the preliminary objection.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 13TH DAY OF MAY 2021.

C. MEOLI

JUDGE

In the Presence of:

For the Applicant: Ms. Ndichuh/b for Mr. Mburu Machua

For the Respondents : N/A.

Kevi Ndege: Court Administrator.