



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO.224 OF 1991**

**IN THE MATTER OF THE ESTATE OF THE NJIHIA KIHICO HIKA – (DECEASED)**

**TABITHA WANJIRU.....APPLICANT**

**VERSUS**

**JOTHAM KIHICO HIKA.....1ST PETITIONER**

**JAMES NGANGA HIKA.....2ND PETITIONER**

**AND**

**RAKERI WANJIRA.....OBJECTOR**

**JUDGMENT.**

**INTRODUCTION.**

1. Njihia Kihoko Hika (Deceased) died on the 18/8/88. Jonathan Kihiko Hika and James Nga'nga Hika took out letters of administration in respect of the estate of the deceased. That grant was confirmed on 30/3/93.

2. Tabitha Wanjiru (hereinafter the applicant) has moved this court vide a summons dated 28th day of September, 2012 for orders that:

i. Spent

ii. **THAT** the Respondents herein JOTHAM KIHICO HIKA and JAMES NG'ANG'A HIKA by themselves, their agents, servants and/or employees and all persons claiming under them be restrained from transferring, interfering, disposing, selling, alienating, subdividing, leasing, charging and/or in any other manner intermeddling with the estate of the deceased in particular:-

a) NYANDARUA/MUMUI(364-370), Measuring 100.46 Acres

b) NYANDARUA/MUMUI(116), Measuring 0.247 Acres

c) CEMI CEMI GILGIL SCHEME, Measuring 1 Acre.

iii. **THAT** this Honourable Court be pleased to issue a Conservatory Order preserving the estate of the deceased until the hearing and determination of this Application and Cause.

iv. **THAT** status quo be maintained.

v. **THAT** costs of this application be in the cause.

3. The application is premised on the following grounds:

a) The grant issued herein was obtained by means of untrue allegation of facts essential in a point of law to justify the grant and that the same was obtained secretly without the knowledge, consent, involvement and consultation of all beneficiaries entitled.

- b) The grant was also obtained fraudulently and by concealment of material particulars of the case.
- c) The respondents are in the process of distributing the estate in terms of the said grant.
- d) The Applicant was left out as a beneficiary and was disinherited, others misplaced while others unduly enriched by Double Distribution and the distribution does not represent the true position on the ground and the wishes of the deceased.
- e) The estate is in great danger of being wasted, disposed off, alienated, and transferred to strangers to defeat the ends of Justice
- f) Spent

1. The applicant has sworn and filed an affidavit on the 28/9/12 in support of the application.
2. The application is opposed and a joint reply affidavit by Jotham Kihiko Hika and James Ng'ang'a Hika is on record.
3. It is the respondent's case that confirmation and distribution of the estate has been done faithfully by the two administrators as per the grant issued by the Honourable court. Each beneficiary including the objector (mother to the applicant) has its own share and everyone has sold and buyers have developed the parcels.
4. The applicants mother was given 9 acres and she did not complain of the size. She sold one acre out of it. Revocation of the grant at this stage shall prejudice the whole estate.
5. The hearing proceeded ex parte as despite evidence of proper service being on record, the respondents and/or their counsel did not appear on the date set.
6. The applicant testified that she is a daughter of the deceased. She is the only daughter of Rakeri Wanjira, a wife of the deceased herein. She was not consulted when the succession cause was filed. She was not given any property. She seeks that the grant be revoked.
7. This evidence is not controverted and is borne out of the record herein. In the affidavit sworn in support of the summons for confirmations of grant, the respondents listed down the children and dependants of the deceased as follows:-

- a) Spola Njeri Hika - 72 years.
- b) Muthoni Njihia – 70 years.
- c) Rakeri Wanjira – 67 years.
- d) Jotham Kihika Hika – 54 years.
- e) Peter Kimani Hika – 53 years.
- f) James Ngang'a Hika – 40 years.

8. It is plainly clear that the applicant was not included as a beneficiary. Even in the replying affidavit filed, there is no denial that the applicant was not included. There is no denial she is a daughter of the deceased. The only assertion is that her mother Rakeri Wanjira was given 9 acres and she did not complain. It must be remembered that a beneficiary is entitled to inheritance directly and not through another beneficiary or dependant.
9. There is an attempt in the replying affidavit to indicate that the deceased had left a will disinheriting married daughters. This attempt fails on the basis that the succession herein was intestate according to the documents filed.
10. **Section 76** of the **Law of Succession Act** provides the grounds on which a grant may be revoked as follows:

**“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;**
- d) **That the person to whom the grant was made has failed, after due notice and without reasonable cause either –**

**i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or**

**ii) To proceed diligently with the administration of the estate; or**

**iii) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or**

**e) That the grant has become useless and inoperative through subsequent circumstances”.**

11. At the time of his death, the deceased had 3 wives including Rakeri Wanjira the mother to the applicant. The applicant was a daughter of the deceased by Rakeri Wanjira. In the affidavit in support of the petition for letters of administration intestate, the administrators did not include the applicant as a beneficiary.

12. The failure to include the applicant was irregular and amounted to an abrogation by the administrators of their duties.

13. Guided by the decision by the Court of Appeal in Justus Thiora Kiugu and 4 others V. Joyce Nkatha Kiugu and Another, [2015] eKLR, the statutorily provided mode of distribution of deceased estate will only be departed from when all beneficiaries agree on an alternative mode of distribution. Where a beneficiary is affected, such a beneficiary must willingly renounce their claims. In the absence of such a renunciation, the court must apply the law of succession.

14. Be that as it may, from the record herein, it's clear that vide an application dated 7/12/95 the applicant herein and Rakeri Wanjeri moved this court for similar orders like the ones in the present application.

15. In a considered ruling dated 18/12/96 this court (S.C. Ondeyo J) delivered itself stating inter alia that the application dated 7<sup>th</sup> December, 1995 was an attempt to go round the orders made by the court on 31<sup>st</sup> October, 1995 dismissing yet another application by Rakeri Wanjira for revocation of grant.

16. As way back as 31<sup>st</sup> October, 1995, the applicant herein knew of the dismissal of the application for revocation of grant by her mother Rakeri Wanjira. And whereas it was within her rights to make an application like the one before court independent of the mother, she goes ahead to join her mother in an application dated 7<sup>th</sup> December, 1995 seeking similar orders like the ones herein which application was dismissed on 18<sup>th</sup> December, 1996

17. This renders the application herein *res judicata*. In any event, the applicant has unjustifiably sat on her laurels for far too long. She had knowledge of the confirmed grant over 20 years ago. In the passage of time the character of the estate must have drastically changed. There is affidavit evidence on record that the estate has been sold to 3rd parties who have made substantial developments on the land. Such purchasers have the protection of the law under **Section 93(1) and (2) of the Law of Succession Act** which provides:

**“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.**

**A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funerals and testamentary or administration expenses, duties and legacies of the deceased have not been discharged not provided for.”**

18. The applicant is guilty of 'laches'. The Black Law disctionary defines laches as:

1. Unreasonable delay in pursuing a right or claim

2. It is 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 the relief is sought.

Surely, in the circumstances of the this case, application herein is affected by 'laches'.

Equity aids the diligent and not the indolent.

19. As S.C. Ondeyo, J stated in her ruling dated 18<sup>th</sup> December 1996, the time taken to file the present application and considering it is filed after 2 applications seeking revocation of grant were dismissed, is evidence that the applicant herein hopes to get through the back door orders prayed for in the earlier dismissed applications.

20. Litigation must come to an end. Delay defeats equity. In view of the changed character of the estate herein and the earlier orders dismissing similar prayers before rendering this matter *res judicata*, I must find and hold that the application herein fails.

21. The delay on the part of the applicant is inexcusable. She litigated over the same matter as a party jointly with her mother as an applicant. The period between the issuance and confirmation of grant shows that the applicant was disinterested in the estate and the application herein

is an afterthought.

22. For the above stated reasons, the delay on the part of the applicant is inexcusable. The delay renders any orders on revocation inappropriate given the lapse of time involved.

23. I cite with approval the decision of this court (Achode, J) in **In the Matter of the Estate of Stanley Kimani Karanja (deceased)**, [2015] eKLR. The court 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 false statements or concealing material facts. This may appear to place no time 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 not in dispute that the deceased whose estate is in question died in 1962 or that both properties were sold.....**

**It is therefore my considered view that the interests of the applicant have been extinguished by effluxion of time since the suit property have since been transferred to innocent 3rd parties who had no notice.....”**

24. Our instant suit falls on all fours with this decision.

25. With the result that the summons for revocation dated 28th September, 2012, is shereby dismissed. This being a family matter, each party to bear its own costs.

**Dated, Signed and Delivered in open Court this 7th day of February, 2017.**

**A. K. NDUNG’U**

**JUDGE**