



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 13 OF 2010

CHARLES NDWIGA KANYERIA.....APPELLANT

VERSUS

AUGUSTINE MUTURI MAIRANI & ANOTHER..... RESPONDENT

An Appeal from the Judgment of HON. D.A. Onyango – RM

sitting at RUNYENJES in SUCC CASE NO. 26 OF 2009 delivered on 11/2/2010).

R U L I N G

In his application dated 05/08/2013 the appellant Charles Ndwiga Kanyeria seeks for orders that;

1. The order of this Honourable Court in its judgment delivered on 18th day of December 2012, including ruling and judgment be REVIEWED and set aside.
2. This matter be heard on merit by this Honourable Court.
3. Costs be provided for.

The application is grounded on the applicant's affidavit sworn on 5th August 2013 and on the grounds contained on the face of the application. He avers that the ruling delivered on 13th May 2010 and judgment dated 18/12/2013 have arrears apparent on the face of the record and that his pleadings in opposition were not thoroughly examined by the court resulting in a ruling and judgment which caused injustice to him. That his proposal for distribution of the estate and specifically for parcels L.R. Kyeni/Mufu/4207, 4208, 4210 and 4211 was grossly ignored. The applicant contends that he tendered sufficient evidence that the land parcels in question had been distributed by the deceased during his lifetime. Parcels No.4208 was in possession of the deceased's 2nd wife at the time deceased died. It was therefore wrong to distribute parcel to Anthony Nyaga who had his own land. Each of the deceased's older sons had been allocated their parcels of land by the deceased before his death. The land board had already given consent for transfer of L.R. No.4210 and 4211 to the applicant John Njagi Mairani. The applicant was already in actual possession of parcel No.4207 and had carried out extensive developments.

The respondents Augustine Muturi and Mwaniki Mairani opposed the application in their separate affidavits sworn on the 27th August 2013. They depone that this matter has already been finalized and certificate of confirmation of grant issued distributing the estate of the deceased.

The applicant was granted temporary stay on his own request to enable him to appeal against the judgment of the court. The applicant has failed to file and pursue his intended appeal and is now re-opening the case which has been concluded. The respondents argue that there are no errors apparent on the face of the record and that there are no new facts or evidence that has been discovered to justify

review of the ruling and judgment of the court.

By consent the parties relied on their affidavits in support and in opposition of this application.

The facts leading to this application are that the respondents were the administrators of the estate of the deceased Mairani Kanyeria in Runyenjes Succession Cause No.26 of 2009. The cause was fully heard between the parties in this application. The applicant here was dissatisfied by the judgment of the Senior Resident Magistrate Runyenjes and filed an appeal in this court (No.13 of 2010). The appeal was based on two issues;

1. That the deceased had already distributed two parcels of land of his estate namely L.R. NO.KYENI/MUFU/4210 and KYENI/ MUFU/ 4211 whereas the Land Board had already issued consent to transfer the parcels to the applicant which evidence were ignored by the Senior Resident Magistrate Runyenjes.
2. That the court based its judgment on assumptions that the deceased had already changed his mind on the gift to the applicant.

The applicant was the protester in the Runyenjes Succession Cause while the administrators were the applicants herein. This appeal was heard by Ongundi, Judge who found no merit in the appeal. She found that the applicant herein had been given a fair hearing by the Senior Resident Magistrate Runyenjes. However, based on the value of the estate of the deceased, she found that the Senior Resident Magistrate lacked jurisdiction to determine the matter. For that reason the orders of the Senior Resident Magistrate were set aside. The Judge made orders for grant of letters of administration to the respondents herein to carry out administration of the estate jointly and made orders for distribution of the estate afresh without interfering with the mode of distribution that had been adopted in the court below. The certificate of confirmation was accordingly issued.

The applicant was dissatisfied with the judgment of learned judge and now seeks to have the judgment together with the ruling of the Senior Resident Magistrate reviewed in this application.

It is on record that the applicant was granted orders for stay of the judgment on 11th June 2013 to enable him file an appeal. There is a copy of application in the court file dated 18/03/2013 in which he was seeking for orders to appeal out of time in Court of Appeal at Nyeri. It is not known whether the application was heard or whether it was successful.

On the outset, I wish to state that the ruling of the Senior Resident Magistrate was dealt with in this appeal and the grant and all other orders he had issued set aside. The Judge issued fresh orders to cure the hitch of lack of jurisdiction on the part of the Magistrate. This is a ruling that has been spent and it is now non-existent *per se* in view of the orders of the Judge made on 18th December 2012.

There is therefore no ruling to be reviewed as it is sought in this application. Even assuming that the ruling was still valid, this court would be acting *ultra vires* to purport to review a ruling that has already been subjected to an appeal and the issues therein dealt with. In this regard, the applicant's prayer is not properly before this court. It can only be said to be an attempt to delay the distribution of the deceased's estate.

As for the judgment for this appeal delivered on 18th December 2012, I find no new evidence of facts that have been presented before this court to justify reviewing the judgment of the learned judge. The grounds supporting review and the facts deponed in the applicant's affidavit are a duplication of the evidence he tendered before Runyenjes Senior Resident Magistrate's Court and before the judge on appeal. Reviewing of an appeal judgment is not an option for the applicant. The applicant ought to have appealed against that judgment which he has not done since he was given orders for stay of execution.

I find that his application has no merit and it is hereby dismissed. It is hereby so orders.

**DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 10TH DAY OF
DECEMBER 2014.**

F. MUCHEMI

J U D G E

In the presence of:-

Both parties present

F. MUCHEMI

J U D G E

10/12/2014