REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYAT AT NAIROBI

SUCCESSION CAUSE NO. 520 OF 1992

IN THE MATTER OF THE ESTATE OF SALOME NYAKIRIMA (DECEASED)

(Ruling on Summons dated 7th February 2003 filed by George Itotia

Nganga filed on 7th November 2003)

RULING

The applicant seeks for an order that the judgment pronounced herein on 31st October 2000 by Rawal J. be reviewed. The applicant's Summons is supported by his affidavit sworn on 7th February 2003 and a further affidavit sworn on 19th December 2003.

The gist of the two affidavits and the grounds upon which the application is premised are as follows:

That vital evidence was omitted from the record of proceedings.

That Salome Nyakarima had no land to bequeath as she was not awarded any land according to the will of the deceased.

According to the applicant's submissions the deceased was his stepmother and wife of the late Justus Nganga Ruingi (deceased) who died in 1973 leaving two widows. The applicant is the son of the 1st widow Thamaru Njeri and the respondent is the daughter of the second widow the deceased herein Salome Nyakirima who was survived by four daughters.

It would appear that upon the death of the late Justus Nganga Ruingi there were succession proceedings in the magistrate's court in Limuru and Kiambu culminating with the judgment in the Kiambu Senior Resident Magistrate which was pronounced on or about 2nd September 1980. It is clear that the deceased was registered as proprietor of Title Number Limuru/B Ririon/1402 being a beneficiary of her late husband. When the deceased died and through a written will, she bequeathed the above parcel of land to her daughters and appointed the respondent as the executor and trustees of her will.

The applicant herein filed an objection to the issuance of the grant of probate. The objection was heard and it is clear from the proceedings of the court that the applicant herein testified. He also called Joseph Kiratu Karanja who gave evidence in support of his case. Judgment was pronounced on 31st July by Hon. Rawal J. whereby the Grant of Probate was issued to Mary Wanjiku Kimaru as the executor of the will.

Following the said judgment the applicant in this matter filed a Notice of Appeal and an application for extension of time to file and serve a Notice of Appeal and Record of Appeal outing time was dismissed. In dismissing the application the Judge of Appeal Hon. A.B. Shah had this to say:

> "The unexplained delay of 15 months is inordinate. It disentitles the applicant the exercise of my discretion under rule 4 of the Rules of this court.
>
> Another factor that has weighed on my mind is that the intended appeal is really not arguable but I say no more on this as it does not full within my province as a single judge, to decide the point"

Since the applicant had chosen to file an appeal, and indeed filed a Notice out of Time, he should have followed that route of Appeal to its logical conclusion. In my view he should have pursued a reference before a full bench as abandoning that cause he had chosen now has disentitle him from using the provisions of Order 44 of the Civil Procedure Rules regarding review which provides

> 1 (1) " Any person considering himself aggrieved –
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> a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred or
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> b) by a decree or order from which the appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was posed or the order was made, or on account of some mistake or error apparent on the face of record, or for any other sufficient reason, desires to obtain a review of judgment to the court which passed the decree or made the order without unreasonable delay."

The applicant had an opportunity to call and adduce all his evidence during the hearing of the objection. It is not at all clear to me what are the new facts or evidence which has just come to his knowledge and the reasons why the same was not presented to court during the trial.

The applicant submitted at length how the deceased herein did not have land to bequeath in a written will because his father left an oral will which was reduced into writing by the applicant whereby he left his land to his four sons. It would seem that the applicant is mixing the issues of his father's estate with that of his step mother.

If the applicant was dissatisfied with the distribution of his father's estate he should also have pursued an appeal of the judgment of the subordinate court. There having been no appeal the deceased herein was registered as proprietor of the suit premises in 1978 about 26 years ago. Having been an absolute owner, under the provisions of Section 27 of the Registered Lands Act, she was free to deal with her land as she deemed fit.

In that regard and pursuant to the provisions of Section 5(2) of the Law of Succession Act the deceased bequeathed her parcel of land to her daughters.

The applicant's other contention is that the applicant had no sons, she was survived by married daughters who have no right to inherit. This preposition is not supported by the Law of Succession as there is no provision that stipulates that married daughters are excluded from inheriting from their mother. The deceased herein was survived by her married daughters and she had the freedom to dispose of her estate and she did so according to the Law. The applicant has inherited from his mother's household and he is only dissatisfied with his sisters getting the portion of their mother's house.

His dissatisfaction is not founded in law. The applicant's application also offends the provisions of order 44 especially the requirement restated in the Court of Appeal for Eastern Africa: the decision of Gulam Hussein Mulla Jiravanji & Another vs Ebrahim Mulla Jiranji Law Report of Kenya 1929-1930 page 141 whereby it was held.

> "That it is the duty of a party who wishes to appeal against or apply for a review of a decree or order to move the court to draw up and issue the formal decree or order"

The applicant failed to draw the decree against which he is seeking for review.

I have therefore given due consideration to the applicant's application, I have analyzed the same and I have come up with all the issues highlighted in this ruling the upshot of which the applicants application for review dated 7th February 2003 and filed on 7th November 2003 fails and I therefore dismiss the same.

I would award costs of this application to the respondent.

It is so ordered.

Ruling read and signed on 19th March, 2004.

MARTHA KOOME

JUDGE