



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL APPEAL NO. 8 OF 2017**

**(Formerly of Murang'a P&A Appeal No. 2 of 2013)**

**JULIA NYAMBURA alias JULIA NYAMBURA MACHARIA.....APPELLANT**

**VERSUS**

**PATRICK GICHUKI GACHIRI.....RESPONDENT**

**AND**

**MURANG'A P & A APPEAL NO. 2 OF 2012**

**BERNARD WAWERU GITHINJI..... APPELLANT**

**VERSUS**

**GITHINJI HACHO.....RESPONDENT**

**RULING**

1. On 17<sup>th</sup> July, 2012 the Appellant herein, Julia Nyambura Ng'ang'a alias Julia Nyambura Macharia filed her appeal against Patrick Gichuki Gachiri In the title of the memorandum, of appeal filed at Nyeri High Court as P&A No. 1/2012 the appeal is described as an

**“Appeal from the Judgment of the Senior Principal Magistrate’s Court Murang’a (per B. W. Kituyi, Resident Magistrate) in Succession Cause No. 193 of 1990 delivered on 18.6.2012” (sic)**

2. However, the record of appeal filed on 26<sup>th</sup> October 2015 relates to an appeal from the judgment of B. J. Ndeda delivered on 30<sup>th</sup> May, 2012 in **Succession Cause No. 447/05 Thika Law Courts**. The parties therein are **Bernard Waweru Githinji v Githinji Hacho** and was assigned the **No. P&A Appeal No. 2 of 2012**. The appeal filed by Julia had by 26<sup>th</sup> October 2015 been transferred to the High Court at Murang'a and assigned a new **No. HC P&A Appeal 2 of 2013** Estate of Julia Nyambura Ng'ang'a, Deceased.

3. On 26<sup>th</sup> September 2016 the said appeal came up before Waweru, J for directions. It was transferred to this court. On the date fixed for directions, the court directed that the Preliminary Objection filed on 23.10.13 be argued first. The Preliminary Objection is straight forward but it has turned out that there is a mix-up as to the date of filing of the appeal and of the judgment in respect of which the appeal was filed. The Preliminary Objection asserts that the Appeal was filed on 21<sup>st</sup> December 2012 in respect of a ruling/judgment delivered on 30<sup>th</sup> May, 2011. The Respondent through Mr. Kariuki submitted that the appeal, which he claimed was filed in December 2013 without leave ought to be struck out.

4. For the Appellant Mr. Ogutu argued that the judgment appealed from was delivered on 18<sup>th</sup> June 2012 and not 30/5/11 and that a certificate of delay was attached to the record of appeal while the date of delivery is evident from the record.

5. The court has perused the record and noted that:

a) The parties in P&A Appeal No. 1 of 2012 filed in Nyeri were Julia Nyambura Macharia and Patrick Gachuki Gachiri.

b) The appeal was in respect of a decision in Muranga **Succession Cause No. 193 of 1990** delivered on 18<sup>th</sup> June 2012. It was eventually transferred to the High Court at Murang'a and became **P&A Appeal No. 2 of 2013**.

c) The record of appeal filed on 26/10/15 however relates to different parties namely, **Bernard Waweru Githinji v Githinji Hacho** and is in respect of a different decision, in Thika **Succession Cause No. 447/05** delivered on 30/5/11 by B.J. Ndedo P.M. The Preliminary Objection raised therefore is in relation to that appeal, and not the one filed on 17/7/12 by Julia Nyambura Ng'ang'a. It is not clear how the record of appeal in respect of Thika Succession Cause No. 447/05 was filed in the wrong appeal file while the matter was pending before the High Court at Murang'a.

d) Moreover, the original lower court file forwarded to this court on 27<sup>th</sup> July 2017 relates not to the Murang'a Magistrate Court Succession Cause but to the Thika **Succession Cause No. 447 of 2005 In the matter of the Estate of Githinji Hacho**, Petitioner, David Njoroge Githinji.

e) From the record of appeal filed on 26/10/12, it appears that the appeal in respect of **Thika Succession Cause No. 447/05** was filed at Murang'a on 21/12/12 as **Succession Appeal No. 2 of 2012**.

6. It appears that the two separate **Murang'a appeals No. 2 of 2012** and **No.2 of 2013** were erroneously merged as the appeals were being processed at Murang'a. In the circumstances this court cannot rule on the Preliminary Objection raised as there is no memorandum of appeal relating to **P&A Appeal No. 2 of 2012** in respect of **Thika Succession Cause No. 447/05** before it.

7. In order to resolve this imbroglio, I direct that the following be done:

i) The record of appeal filed on 26<sup>th</sup> October 2015, all records related thereto and the original file in respect of Thika **Succession Cause No. 447/05** be removed from the present appeal file.

ii) The registry with the assistance of parties to the appeal in respect of **Thika Succession Cause 447/05** endeavour to trace the relevant appeal namely **Murang'a P&A Appeal No. 2 of 2012** and place the documents in (i) above therein so that it can proceed separately. I believe that the order of transfer by Waweru J on 26/9/16 properly related to P & A Appeal No. 2 of 2012 and not P&A Appeal No. 2 of 2013, the latter which properly belongs to the High Court registry at Murang'a.

iv) The appeal in **Nyeri P&A appeal No. 1 of 2012** which later became **Murang'a P&A Appeal NO. 2 of 2013** together with all the proceedings therein, including this ruling, and copies of correspondence related thereto be transferred back to the High Court at Murang'a so that the appeal can proceed in respect of the **Murang'a Succession Cause No. 193 of 1990**.

v) Photocopies of the proceedings relating to **Murang'a P&A Appeal No. 2 of 2013** including arguments in respect of the present Preliminary Objection are to be photocopied and placed in the appeal file (**Murang'a P & A Appeal No.2 of 2012**) relating to **Thika PM Succession Cause No. 447/05**, once it is found, and placed before me for directions

**DELIVERED, DATED AND SIGNED AT KIAMBU THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2018.**

**In the Presence of:**

Mr. Wambugu holding brief for Jesse Kariuki for Respondent

Appellant – Present

Appellants advocate - Absent

**C. MEOLI**

**JUDGE**