



**REPUBLIC OF KENYA**

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

**) SUCCESSION CAUSE NO. 1094 OF 2007**

**IN THE MATTER OF THE ESTATE OF SERAH NJERI – (DECEASED)**

**RULING**

1. The summons that I am called upon to determine is dated 6<sup>th</sup> February 2014. The applicant seeks stay of the review orders made on 3<sup>rd</sup> February 2014 pending an appeal that he intends to file at the Court of Appeal.
2. The application is premised on the grounds set out on its face and in the affidavit in support sworn by the applicant on 6<sup>th</sup> February 2014. She states that she is dissatisfied with the orders of 3<sup>rd</sup> February 2014 and intends to appeal against the said orders. She has indicated that intention by lodging a notice of appeal at the registry. She would like the *status quo* on the subject property maintained pending her appeal, and fears that the position would be altered irrevocably should the orders of 3<sup>rd</sup> February 2014 be enforced.
3. The respondent has opposed the application *vide* her reply in an affidavit sworn on 26<sup>th</sup> February 2014. She avers that no Notice of Appeal has been filed and served on her and that in any event the time allowed for filing and serving the same has already expired. She also states that the applicant has not applied for copies of the proceedings and ruling. She also submits that there is no evidence that she is transferring or selling the property to third parties.
4. The applicant reacted to this by filing a further affidavit sworn on 10<sup>th</sup> March 2014. She states that she had not been served with notice of delivery of the ruling and only got to learn of it on 4<sup>th</sup> February 2014. She nevertheless filed a notice to appeal on time on 7<sup>th</sup> February 2014 and also applied for copies of the proceedings and ruling for the purpose of pursuing appeal. She avers to be still within the period for filing appeal, but whether she will do so will depend on the certified copies of the proceedings and ruling being availed to her within time, otherwise the matter is beyond her control. She pleads that the justice of the situation requires that there be a stay to prevent her intended appeal being rendered useless.
5. To this affidavit, the respondent filed an affidavit on 14<sup>th</sup> March 2014, sworn on 13<sup>th</sup> March 2014, where she states that the Notice of Appeal filed in court on 7<sup>th</sup> February 2014 was not served on her nor on her advocates, despite the law requiring that the same be served within seven (7) days of its filing.
6. It was directed on 31<sup>st</sup> March 2014 that the said application be disposed of by way of written submissions. Both parties filed their respective written submissions. The applicant's written submissions were filed on 10<sup>th</sup> April 2014, while those by the respondent were filed on 24<sup>th</sup> April 2014.

7. The applicant's argument is that she has filed Notice of Appeal in respect of the decision in question. She submits that should stay not be granted the property in question is likely to be conveyed to third parties, putting it beyond her reach, which could have the effect of rendering the appeal nugatory.
8. The respondent takes the position that the Notice of Appeal filed on 7<sup>th</sup> February 2014 was not served at all contrary to the provisions of the Court of Appeal Rules, 2010. She submits that there is no appeal on record and therefore there is nothing to be rendered nugatory.
9. The record reflects that the ruling being challenged was delivered on 31<sup>st</sup> January 2014 in the absence of both parties. A Notice of Appeal dated 5<sup>th</sup> February 2014 was lodged in court on 7<sup>th</sup> February 2014 on behalf of the applicant. The applicant's advocates also sought for certified copies of the proceeding and ruling by a letter dated 4<sup>th</sup> March 2014 and filed in court on 12<sup>th</sup> March 2014.
10. The only issue for determination is whether the orders sought in the application dated 6<sup>th</sup> February 2014 are available for granting.
11. The application dated 6<sup>th</sup> February 2014 seeks stay of orders made in this matter on 3<sup>rd</sup> February 2014. The Notice of Appeal dated 5<sup>th</sup> February 2014, and filed herein on 7<sup>th</sup> February 2014, expresses an intention to file appeal against decision made 3<sup>rd</sup> February 2014.
12. I have closely perused the handwritten court record herein. I have not come across a minute of any event happening in this matter on 3<sup>rd</sup> February 2014. The only recorded events relate to a ruling that was delivered on 31<sup>st</sup> January 2014 and the certification on 7<sup>th</sup> February 2014 of the application dated 6<sup>th</sup> February 2014 as urgent. Nothing happened on 3<sup>rd</sup> February 2014. No decision or order was made on 3<sup>rd</sup> February 2014 as per the record before me. There can not therefore be a basis for filing appeal against an order that does not exist.
13. Issues have been raised relating to service of the Notice of Appeal dated 5<sup>th</sup> February 2014. The respondent argues that the same was not served on her. I note from the papers filed by the applicant that she is silent on whether or not the notice was ever served.
14. The provisions on the filing of a Notice of Appeal in respect of decisions of the High Court is governed by Rule 77 of the Court of Appeal Rules. Rule 77 (1) states –

***“An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.”***

15. The requirement of service of notice of appeal is mandatory. From the record before me, it is clear that the notice was not served as envisaged by Rule 77 (1) of the Court of Appeal Rules. The mandatory requirements of this Rule have therefore not been complied with. Rule 4 of the Court of Appeal Rules gives discretionary power to the Court of Appeal to extend time for such service.
16. If this court were to find that the orders sought in the application dated 6<sup>th</sup> February 2014 are grantable it would have to grapple with the issue as to whether or not there is a valid notice of appeal. Going by Rule 77(1) of the Court of Appeal rules my inclination is to find that there is no valid notice of appeal on record for it was not served within the time stipulated. I have no power to extend time for service thereof, and there is no evidence before me of exercise of the discretionary my power by the Court of Appeal, as granted in Rule 4 of the Court of Appeal Rules, extending the time of service of the said notice.
17. In the end, I find that the orders sought in the application dated 6<sup>th</sup> February 2014 are not available for granting. Consequently, the said application is hereby dismissed. The respondent shall have the costs

thereof.

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>th</sup> DAY OF January 2015.**

**W. MUSYOKA**

**JUDGE**