REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CASE NO. 24 OF 2017

IN THE MATTER OF THE ESTATE OF SERAH NJERI GATHU (DECEASED)

R U L I N G

1. This ruling relates to the summons filed on 20th June 2017 and expressed to be brought under rules 67 and 73 of the Probate and Administration Rules, seeking that this court extends time to enable the Applicant to seek leave to appeal against orders made on 31st January 2014, and that the court be pleased to grant leave to appeal out of time regarding the said orders. The Applicant also prays that an order to maintain the *status quo* be issued, pending the hearing and determination of the intended appeal, and that there be stay of execution of the orders issued on 31st January 2017 pending the hearing and determination of the appeal.

2. The application is supported by the affidavit of **Julia Wanjiru Gathu.** Much of the affidavit is taken up with contentious matters which properly belong to the intended appeal. It appears from that affidavit that the Applicant asserts herself to be a beneficiary of the estate of the deceased herein and who, with others have been embroiled in litigation against the Respondent, and are aggrieved that **Njagi J,** (as he then was) by his decision delivered on 20th July 2012 determined that the Respondent was entitled to benefit from the estate as an adopted child of the deceased, and by subsequent rulings by **Musyoka J** on 31st January 2014 and 20th January, 2017 giving effect to that decision. A notice of appeal filed on 7th February 2014 in respect of the decision by **Musyoka J** on 31st January 2014 was not served. Hence an application by the Applicant for stay of review orders in the said ruling, [but stated erroneously as granted 3rd February 2014] failed, the court observing in its ruling on 30th January 2015 that under Rule 77(1) of the Court of Appeal Rules, it was doubtful that there was a valid notice of appeal.

3. The Applicant now blames her previous lawyers for this eventuality. The Applicant has attached a draft memorandum of appeal to the further affidavit filed on 11th October, 2017, which despite the clear observations by **Musyoka J** in his ruling on 30th January 2015 (for stay of orders made in review ruling), refers to a non-existent ruling delivered on 3rd February 2014, and dated 31st January 2014.

4. The Respondent and grant holder pursuant to the orders of **Musyoka J** on 31st January 2014 filed an affidavit in opposition to the instant motion. Restating the history of the litigation, she takes the position that the Applicant ought to seek extension of time to apply for leave to appeal out of time in the Court of appeal and that in any event, the Respondent is already in occupation of the suit property and stay orders therefore of no avail; that the Applicant and other beneficiaries occupy their own portion of the suit land and there is no possibility that they will suffer any loss.

5. The court directed that the motion be canvassed by way of written submissions. For the Applicant, it was reiterated that the Applicant only realized that no appeal had been filed in respect of the orders of 31st January 2014 upon the Respondent applying to the court for possession of the suit premises, hence the filing of this application. It is contended through restatement of the history of the matter, that the Applicant has a meritorious appeal and will suffer prejudice as she and other beneficiaries have been in long occupation of the suit property.

6. Regarding the errors of the Applicant's former advocates, it is argued that their sins ought not to be visited on the Applicant. For this proposition reliance was placed on the case of **Philip Chemowolo and Ano. V Augustine Kubende [1982 – 1988] KAR 103** and **Jacob Kinyua Kigano v Tabitha Njoki Kigano Nyeri Court of Appeal Application No. 10/2013.** Nontheless, the submissions appear to suggest, again erroneously, that the previous advocate's misstep was failure to file the record of appeal after the notice of appeal had been filed. Citing the decision of **Musyoka J** on 20th January 2017 that effectively put the Respondent in possession of the suit property, the Applicant submits that the Respondent will not suffer prejudice.

7. For her part, the Respondent contends that the application was filed in June 2017, some three years since the decision sought to be appealed from, that the delay is inordinate and the explanation given unsatisfactory as the Applicants are responsible for the progress of their case. Counsel cited the case of **Aviation Cargo Support Ltd v St. Mark Freight Services Ltd [2014] e KLR** in support of the above submission and asserted that where delay is inordinate, the merits of the appeal are inconsequential.

8. The Respondent views the multiplicity of applications by the Applicant as an abuse of the court process, and moreover asserts that, the Applicant and other beneficiaries who are children of one deceased party, **Teresiah Nyambura Gathu** have not taken out letters of administration to enable them litigate on her behalf. The Respondent takes the position that the intended appeal is not meritorious.

9. Pointing to reference in the grounds of appeal to the decision of **Njagi J** in 2012, the Respondent argues that the intended appeal is frivolous as the draft memorandum of appeal refers to a finding which was not the subject of the ruling of 31st January 2014 by **Musyoka J.** Further that, this application ought to have been filed in the Court of Appeal. The Respondent asserts that the Applicant has not demonstrated likelihood of suffering substantial loss; that the portion of the suit property due to the Respondent is already registered in her name and she is in possession, and finally, no offer of security has been made by the Applicant.

10. The Court has duly considered the history of this matter and especially the fact that the Applicant's deceased mother **Serah Njeri Gathu** had lodged a notice of appeal, albeit erroneously stated to be in respect of the non-existent decision of **Musyoka J** given on 3rd February 2014. As **Musyoka J** clearly demonstrated in his ruling on 30th January 2015, no order or decision was made by the court on 3rd February 2014. From the affidavits sworn in support of the instant motion and the prayers therein, is clear that the ruling in respect of which the notice of appeal was intended was the one delivered on 31st January 2014.

11. Secondly, in his ruling delivered on 30th January 2015, **Musyoka J** expressed doubts regarding the validity of the notice of appeal filed on 7th February 2014 in view of the fact that it had not been served, as required under Rule 77(1) of the Court of Appeal Rules **Musyoka J** observed that:

> **"If this court were to find that the orders sought in the application dated 6th February 2014 (for stay) 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." (sic)**

12. The Applicant, rather than take cue from the remarks made by the Judge to take appropriate steps to remedy the situation in respect of the said notice of appeal opted instead to come before the same court with the instant application. The defect in the notice of appeal in respect of the ruling appealed from is not precluded from amendment under the Court of Appeal Rules in proper cases. Further, as **Musyoka J** observed, the Court of Appeal has discretion to extend time of service of a notice of an appeal, and the filing of the memorandum of appeal in appropriate cases. I presume that the notice to appeal filed on 7th February 2014 was filed pursuant to Rule 75(5) of the Court of Appeal Rules. The Court of Appeal also has the discretion to consider an application for extension of time to apply for leave to appeal.

13. In the circumstances, my considered view, in agreement with submissions by the Respondent's counsel, is that the Applicant's proper recourse after the ruling of **Musyoka J** on 30th January 2015, lay with them making the appropriate application in the Court of Appeal rather than lodging an application to this court, for the extension of time to apply for leave to file an appeal out of time and for stay of execution. Even though the notice of appeal in this case had been filed in the name of **Teresiah Nyambura Gathu,** the Applicant's mother who is now deceased, Rule 99 of the Court of Appeal Rules also provides for such a situation. Thus in my considered view, the appeal represented in the notice of appeal filed on 7th February 2014 could potentially be revived, amended and perfected as stipulated in the Court of Appeal Rules.

14. It is my view that in the circumstances of this case a notice of appeal having been lodged in good time on 7th February, 2014 and notwithstanding the errors therein, the Applicant ought to have approached the Court of Appeal. In the circumstances I would strike out the motion filed on 20th June 2017 and direct that the Applicant does approach and seek appropriate orders in the Court of Appeal in respect of the notice of appeal filed on 7th February 2014.

The costs of the application are awarded to the Respondents.

DELIVERED AND SIGNED AT KIAMBU THIS 11TH DAY OF JULY 2019.

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C. MEOLI

JUDGE

In the presence of:

Mr. Kariuki for the Applicant

Respondent – No appearance

Court Assistant - Nancy