



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 546 OF 2016**

**NAKURU PACKERS LIMITED.....PLAINTIFF**

**VERSUS**

**ERICK NJENGA WATITU ( Suing as personal**

representative of the Estate of MONICA

**NYAMBURA WATITU( Deceased).....DEFENDANT**

**RULING**

***(Application to file an appeal to the Court of Appeal out of time; jurisdiction to do so lies with the Court of Appeal; application dismissed)***

1. The application before me is that dated 15 June 2015 filed by one Erick Njenga Watitu. It is an application said to be brought pursuant to the provisions of Order 43 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. The applicant seeks the following orders :-

*(i) That the Honourable Court be pleased to allow the applicant to lodge an application for leave to appeal out of time and proceed with the intended appeal.*

*(ii) That costs be in the appeal.*

2. The application is opposed and before I go to the gist of it, I better first put matters in perspective.

3. This suit was commenced through a plaint which was filed on 18 March 2002. The plaintiff pleaded that it is the owner and entitled to possession of the land parcel LR No. 9035 Lanet, Nakuru District. It was pleaded that in the year 1996, the defendant entered the said land and took possession of it. In the suit, the plaintiff sought vacant possession and damages for trespass. The defendant filed defence and counterclaim and averred inter alia that she has been on the land for more than 20 years, and further pleaded that she bought the land jointly with her late husband, one Amus Watitu Gitau, and that it should be declared that the said land is held in trust for her. She sought orders for cancellation of the title of the plaintiff. The plaintiff filed an application to strike out defence and for summary judgment. That application was allowed by Visram J, (as he then was) on 29 September 2003. In essence the defendant was ordered to deliver vacant possession within 14 days of the ruling, and in default, an eviction order to issue.

4. On 13 October 2003, the defendant lodged a Notice of Appeal against the said ruling. She also filed an application for stay of execution pending appeal. That application was decided by Musinga J (as he then was) on 1 December 2003, vide which he allowed the application, on the condition that the defendant would provide security in the sum of Kshs. 3,500,000/= within 30 days of the ruling. It seems as if this was not done, and orders of eviction, were issued and executed. The matter lay quiet from the year 2004 until this application was filed on 18 June 2015.

5. The applicant is the son of Monica Nyambura Watitu, the original defendant. He has averred that the original defendant died on 9 August 2011 and he obtained letters of administration ad litem on 22 July 2014. He has deposed in his supporting affidavit that the suit land is family land and has stated that they were brutally evicted after the orders of 29 September 2003. He has referred me to the Notice of Appeal that was lodged by his late mother on 13 October 2003. He feels that he has an arguable appeal thus this application.

6. In his submissions, Mr. Wamwayi, for the applicant mentioned that the application should read that it is brought pursuant to the provisions of Section 75 of the Civil Procedure Act, and not Section 43 of the said statute. He stated that his client wishes to file an appeal out of time

following the Notice of Appeal filed by the late defendant.

7. Mr. Muthee for the respondent submitted inter alia that the orders sought cannot be granted by this court. He further pointed out that the ruling sought to be appealed was made on 29 September 2003, and that save for the Notice of Appeal, no other step was taken to file an appeal.

8. I have taken note of these submissions. Mr. Wamwayi did state that his application is based upon the provisions of Section 75 of the Civil Procedure Act. It provides as follows :-

**75. Orders from which appeal lies**

*(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—*

*(a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;*

*(b) an order on an award stated in the form of a special case;*

*(c) an order modifying or correcting an award;*

*(d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;*

*(e) an order filing or refusing to file an award in an arbitration without the intervention of the court;*

*(f) an order under section 64;*

*(g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;*

*(h) any order made under rules from which an appeal is expressly allowed by rules.*

*(2) No appeal shall lie from any order passed in appeal under this section.*

9. The above provision of the law merely lays down what orders are appealable. I really do not see its place in the current application. What the applicant wants is to be allowed to file an appeal out of time, and in my view, it is the provisions of the Appellate Jurisdiction Act, Cap 9, which apply, for what the applicant wants is to file an appeal to the Court of Appeal, against the ruling of Visram J, made on 29 September 2003.

10. I am afraid that this court does not have jurisdiction to give the orders prayed for. The most that this court can do, in so far as extension of time for purposes of appealing to the Court of Appeal is concerned, is only limited to extending time for filing a Notice of Appeal. This is pursuant to the provisions of Section 7 of the Appellate Jurisdiction Act, which is drawn as follows :-

*7. The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired :*

*Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.*

11. From the above, it will be seen that the jurisdiction of this court is limited to extending time for the filing of a Notice of Appeal and no more. That is not what I have before me, for the Notice of Appeal was already filed, and within time. What has not been filed is the appeal itself.

12. The time for filing the appeal is provided in Rule 82 of the Court of Appeal Rules, which directs that an appeal be filed within 60 days of the filing of the Notice of Appeal. If the applicant wants that time extended, then he may need to consider applying to the Court of Appeal for extension of time, for it is the Court of Appeal which has the jurisdiction to extend time for the periods prescribed in the Rules. This is pursuant to Rule 4 of the Court of Appeal Rules which provides as follows :-

Extension of time

*The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.*

13. The definition of "Court" under Rule 2 of the same rules, is that the same refers to the Court of Appeal. I therefore have no jurisdiction to entertain this application.

14. Apart from the above, I would still have dismissed this application for the reason that it has been filed by a stranger. The defendant in the case was Monica Nyambura Watitu who is now deceased. I have seen from the annexed Limited Grant of Letters of Administration Ad Litem, that she died on 9 August 2011. There has so far been no application for substitution pursuant to the provisions of Order 24 of the Civil Procedure Rules. The applicant cannot present himself in these proceedings, unless and until he first applies to be substituted for the deceased litigant, and such application is allowed. He has not done so and I do not think that he has audience before this court.

15. For the above reasons, I have no option but to dismiss the application with costs.

16. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 27<sup>th</sup> day of February 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of :-**

Mr. Muthee for the respondent.

No appearance on the part of M/s Wamwayi & Co. for the applicant .

Court Assistant : Janepher Nelima

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**