



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MURGOR, JA)

CIVIL APPLICATION NO. 74 OF 2018

BETWEEN

ERICK NJENGA WATITU

(Suing as personal representative of the

Estate of Monica Nyambura (Deceased) .....APPLICANT

AND

NAKURU PACKERS LIMITED.....RESPONDENT

*(Application for leave to file an Appeal out of time and Eric Njenga Watitu to be joined as appellant in place of the late Monica Nyambura Watitu (Deceased) in ELC No. 546 of 2016 being appeal from the ruling of (Visram, J (as he then was)) on 29<sup>th</sup> September, 2003)*

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RULING

By a Notice of Motion dated 9<sup>th</sup> April 2018, the applicant **Erick Njenga Watitu (Suing as personal representative of the Estate of Monica Nyambura (Deceased))** has sought for time to be extended to file an appeal out of time. The application is premised on grounds that the defendant in the trial court deceased had intended to file an appeal against the decision of the High Court (*Visram, J as he then was*) made on the 29<sup>th</sup> September, 2003; that unfortunately, the deceased was taken ill for a long period and subsequently died on 9<sup>th</sup> August, 2011; that the applicant who is a son of the deceased has obtained Grant of Letters of Administration Ad Litem and intends to pursue the appeal on her behalf; that the matter concerns family land known as L.R. No. 9035 Lanet (***the disputed land***) where the applicant and the deceased were residing only to be evicted by the respondent. It was contended that the intended appeal was arguable.

In the affidavit in support of the application, the applicant deponed that the disputed land was registered in the name of *Amos Watitu*, his father who held it in trust for the deceased and the family.

In a replying affidavit by **Prabhulal K. Shah**, one of the directors of the respondent's company and duly authorized by its Board of Directors to swear the affidavit on its behalf, it was deponed that the right to appeal from the ruling was not provided for as the matter of right and the applicant was obligated to seek leave of the High Court or this Court to appeal against the ruling; that neither the deceased nor the applicant had sought leave to appeal and therefore, the Notice of appeal was improperly before Court and this Court has no jurisdiction to hear and determine this motion.

Furthermore that, the applicant obtained the Limited Grant Ad Litem of the deceased's Estate for the purpose of filing the appeal on 22<sup>nd</sup> July, 2014 about three (3) years after the deceased demise, and had failed to explain the delay of four (4) years, or the cause of the delay in filing the application for substitution of the deceased; that the delay was inordinate and the respondent will be greatly prejudiced if the application is allowed because the applicant seeks to reopen litigation that was determined by the High Court nineteen (19) years ago.

An application for extension of time is governed by **rule 4 of** this Court's Rules. Under **rule 4**, it is settled that, the Court has unfettered discretion on whether or not to extend time for filing of an appeal. In so doing, the discretion should be exercised judiciously and not whimsically, having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. These principles were outlined in the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where this Court stated;

***“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”***

Beginning with the length of delay, the ruling of the High Court was issued on 29<sup>th</sup> September 2003, and this application was filed on 9<sup>th</sup> April 2018 which is a period of 15 years. The applicant has explained that the reason for the delay was that his mother took ill and subsequently died on 9<sup>th</sup> April 2011; that he obtained Letters of Administration Ad Litem for the purposes of pursuing the intended appeal on 22<sup>nd</sup> July 2014. Though the applicant has not demonstrated that between 29<sup>th</sup> September 2003 and 9<sup>th</sup> April, 2011 that his mother was ill and therefore incapable of filing the appeal, I am prepared to accept that her death was caused by a debilitating illness, which would explain the delay in filing the appeal during that period.

This would leave the period after her death to be explained. The applicant says that it took him another 3 years to obtain the Letters of Administration Ad litem which would explain the delay between the demise of the deceased and when the Letters of Administration Ad Litem were obtained. But there is still the period between the time the Ad Litem letters were obtained and the time of lodging this application, a period of 4 years that must be explained. The applicant has not provided any explanation for the delay during this period. Without such explanation, it can be concluded that the delay in filing the intended appeal was not explained.

As concerns the likelihood of success of the intended appeal, it is the applicant’s contention that the disputed land belonged to his father and was held in trust for his family. The trial court found that his father had sold the disputed land to the respondent and that since there was nothing to show that fraud or anything untoward had occurred between the applicant’s father and the respondent, the court concluded that a legitimate sale had taken place. The deceased was subsequently evicted therefrom. The question that would arise is whether there is anything left for the intended appeal to salvage, since the matter has been overtaken by events? My view is that, given the turn of events since the High Court’s ruling, the success of the intended appeal 19 years later is unlikely, not to mention the prejudice that both parties will be faced with arising from the inordinate delay in filing of the intended appeal.

When all factors are summed up, I am not persuaded to exercise my unfettered discretion to allow the application, which I accordingly dismiss. I order each party to bear their own costs.

***It is so ordered***

***DATED and delivered at Nairobi this 7<sup>th</sup> day of August, 2020.***

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**