IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, J.A IN CHAMBERS))

CIVIL APPLICATION NO. NYR. 55 OF 2015

BETWEEN

ROBIN GITHINJI …….…. APPLICANT

AND

PETER WANJOHI WARUI.....…….. RESPONDENT

(Being an application for extension of time to file and serve the notice of appeal, memorandum of appeal and record of appeal out of time against the judgment of the High Court of Kenya at Embu (Ong'undi, J.) dated 7th June, 2012 and further amended on 3rd May, 2013

in

H.C.C.C. No. 83 of 1998)

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RULING

1. **Robin Githinji** (Robin), the applicant herein, seeks my discretion under **Rule 4** of the Rules of this Court for grant of the following order:

> ***"1. That the Court do grant an extension of time to the applicant to file and serve the notice of appeal, memorandum or appeal and record of appeal."***

There is no mention in that prayer about the judgment intended to be challenged, but in the heading of the application filed on 27th November 2015, Robin intends to challenge the Judgment of Ong'undi J delivered on 7th June 2012 and amended on 3rd May 2013.

2. It is trite that the exercise of my discretion under ***Rule 4*** is unfettered and does not require establishment of *"sufficient reasons"*. Nevertheless, it ought to be guided by consideration of the factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others – See ***FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS, Civil Application Nai. 332 of 2004*** (unreported). There is also a duty now

imposed on the Court under ***Sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.

3. What is the background to the application?

Robin filed suit in the High Court in Kerugoya claiming that **Peter Wanjohi Warui** (Peter), the respondent herein, had trespassed on his plot number 90 (plot 90) in Kutus Town. He also sued the Kerugoya/Kutus Town Council for complicity in that trespass, but later withdrew the suit against the Town Council. Peter for his part denied the trespass and contended that he was occupying his own plot in Kutus town. After hearing evidence in the matter as well as submissions from learned counsel for both parties, the trial court, Ong'undi J. found that indeed Plot 90 was allocated to Robin and lawfully belonged to him, despite an unsuccessful attempt by the Town Council to subdivide it. The court also found that Peter was also lawfully allocated plot No.592 in Kutus town which was lawfully his. More importantly, the court found that the two plots were separate and therefore there was no tresspass by Peter and an eviction order would thus not issue. The court opined that if any cause of action was due, then it was against the Town Council but the suit against it had been withdrawn. Those findings and decision were made on 7th June 2012.

4. If Robin was not satisfied with that decision, he would have filed a notice of appeal pursuant to **Rule 75** of this Court's Rules, to challenge it. But none was filed. Instead he waited for another 10 months or so, on 17th April 2013, when he decided to seek clarification of the judgment of the court in relation to the sizes of plots 90 and 592 respectively. On 3rd May 2013, Ong'undi J. made that clarification under **Section 99** of the **Civil Procedure Act**, confirming that plot 90 measured 100ft by 100ft while plot 592 measured 50ft by 100ft.

5. Once again, if Robin was not satisfied with that clarification, he would have filed a notice of appeal to challenge the corrected judgment pursuant to the relevant Rule. But he did not. Instead, he waited for over two years until 18th June 2015 to seek a further clarification on the clarification made earlier, as to the size of plot 90 and whether plot number 592 was part of plot 90. That application was rejected by Muchemi J. who replaced Ong'undi J. on the basis that the sizes of the two plots were clarified by the court on 3rd May 2013 and the court could not sit on appeal in its own decision. That was on 7th November 2015.

6. Once again, Robin is not challenging that Ruling as there is neither notice of appeal filed to challenge it, nor an application to extend time in respect of the Ruling. As stated earlier, he now wishes to go back to the original judgment made more than three and a half years ago to challenge it, hence the application before me.

7. I think, with respect, that Robin has himself to blame for taking the trial court on a wild goose chase seeking clarifications when it was desirable to challenge the original judgment on the merits. Having chosen that route which appears to have taken him to a *cul-de-sac,* he cannot now be heard to go back to square one and start all over again. It is like choosing to pursue a review of a decision instead of an appeal and reverting to the appeal process when the review process hits a dead end. The Court frowns on such procedure which is an abuse of court process.

8. And so it is with the application before me. It comes more than three years too late and has no cogent explanation for the delay. A well advised litigant would have filed a notice of appeal in accordance with the Rules as that is a formal and cheap process. The perceived non-clarity of the original judgment was not even drawn to the attention of the court within a reasonable time! It came more than 10 months later. As correctly submitted by learned counsel for the respondent, Mr. Wachira, the applicant simply appears to have gone to sleep. Equity does not aid the indolent, particularly now that it is a requirement of the law to comply with Sections **3A** and **3B** of the **Appellate Jurisdiction Act**. It is my finding that the Rules of the Court were flouted in this matter and that deprives the applicant of a favourable exercise of my discretion. At all events, as learned counsel for the applicant, Mr. Ngigi Karomo readily conceded, the

applicant is not without a remedy as clearly pointed out by the trial court. It was through his own volition that he chose not to pursue such remedy.

9. The upshot is that this application has no merit and I order that it be and is hereby dismissed with costs.

Dated and delivered at Nyeri this 3rd day of February, 2016.

P. N. WAKI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR