IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 161 OF 2015 (UR 130/2015)

BETWEEN

MURAYA WANDUNGU……....APPLICANT

AND

NAOMI WANJIRU NDUNGU……..…..…RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Osiemo, J) delivered on 27th June, 2006

in

HCCC NO. 137 OF 2003)

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R U L I N G

The parties herein have been in and out of court for several decades, the original suit, namely, SRM Civil Case No. 144 of 1993 before the Senior Resident Magistrate Court in Naivasha, having given rise to several applications, which have eventually culminated into the application before me.

It is important in order to put this application in its proper perspective, to recapitulate albeit briefly, the history of this matter. As stated earlier, the original suit was filed before the SRM Court in Naivasha. The same was however transferred to the Chief Magistrate Court in Nakuru. From the record before me, it appears that before the matter could be heard, Mr. Kimatta, learned counsel appearing for the defendant then, (the respondent in this application), raised a preliminary objection on a jurisdictional issue.

It was Mr. Kimatta's contention that the matter related to trespass to land, an issue which fell squarely within the ambit of the Land Disputes Tribunal. He therefore, applied to the court that the matter be referred to the Land Disputes Tribunal in accordance to the Land Disputes Tribunal Act of 1991. That application was resisted by the plaintiff, (present applicant) through his learned counsel, Mr. Akhaabi.

The learned Magistrate H. Owino (as she then was), made a finding to the effect that the question of ownership of land and that of trespass on the said land were intertwined and she ruled that the matter fell

within the realm of Section 3 of the Land Disputes Tribunal Act. The matter was therefore referred to the Land Disputes Tribunal, not by consent of the parties, but by an order of the court.

After the Tribunal became seized of the matter, it sent summons to the parties, in the usual way, but being unhappy with the order of referral, the applicant herein refused/neglected to attend the hearing. His boycott of the proceedings is admitted in paragraph 5 of the supplementary affidavit sworn on 17th February, 2016.

The matter before the Tribunal therefore, proceeded in his absence and the award of the Tribunal was sent to the Magistrate's Court for adoption as judgment of the court. Under the Land Disputes Tribunal Act, the applicant had two options either to file an appeal before the Provincial Tribunal Board or to move to the High Court on Judicial Review and seek that the award be quashed. He decided to pursue the latter option, and filed Judicial Review Miscellaneous Application No. 63 of 2001.

That application was heard by Rimita, J who nonetheless dismissed it. From what I can glean from the record before me, the applicant filed before this Court, a notice of appeal and filed an application seeking stay of execution of Rimita J's orders. That application was dismissed by this Court after learned counsel for the applicant failed to convince the Court that the intended appeal was arguable, or that the appeal would be rendered nugatory if the stay orders were not granted.

Undeterred, the applicant moved back to the High Court and filed a fresh suit HCCC No. 137 of 2003 seeking *inter alia*, a declaration that the Tribunal award dated 23rd June 1998 was a nullity. The respondent herein filed a defence in that suit and raised the issue of *res judicata*. This point was urged as a preliminary objection and the court upheld it thus scuttling the hearing of the main suit. Osiemo, J, erroneously in my view, made a finding to the effect that the appellant had appeared before the Land Disputes Tribunal, and even called witnesses. The court nonetheless found that the issues raised in that case were directly and substantially an issue in the case before the tribunal. The suit was consequently dismissed.

The applicant then moved the High Court in an application filed under **Sections 79** and **34 of the Civil Procedure Act** and **Order LI of the Civil Procedure Rules** seeking for leave to appeal out of time. It is instructive to note that the applicant had now back peddled and was actually seeking leave to appeal against the decision of the Magistrate made on 11th December, 1997, twelve (12) years after the decision had been made.

The learned Judge (Ouko J, as he then was) in dismissing the said application stated:-

> ***"I reiterate that the order in question was made in December, 1997, twelve (12) years before this application was filed. By any standards, that period is clearly inordinate."***

Two years later, the applicant moved to the High Court in Nairobi vide chamber summons dated 8th October 2012. One of the prayers in the chamber summons was that the ruling of Osiemo, J delivered six (6) years earlier be reviewed and or set aside. That application was heard and dismissed with costs by Ougo, J.

The applicant appears to have mulled over that dismissal before moving to this Court two years later, by way of this application dated 4th June 2015, made pursuant to **Rule 4** of the Rules of this Court. He is asking this Court to enlarge time within which to file and serve the notice of appeal and the record of appeal.

The application is supported by the applicants affidavit dated 4th June 2015.

I have carefully gone through the contents of the said affidavit. Nowhere does the applicant give reasons for the delay in filing the notice of appeal since 2006. His thrust is on the fact that he has never been heard, and that the impugned judgment contained falsehoods.

The applicant also filed a supplementary affidavit dated 17th has repeated the history of the dispute. Noteworthy however, February 2016 in which he is paragraph 14 of the said affidavit in which he deposes that Hon. Justice G.B.M. Kariuki made a finding in Civil Case No. 137 of 2003 to the effect that the elders had exceeded their jurisdiction. The appellant has annexed that Ruling and highlighted the sentence he seems to be relying on. It is worth noting however that the same Judge went ahead to make a ruling against the applicant, finding that the impugned decision had not been successfully invalidated and in effect remained valid. The one sentence was also obiter and cannot be said to have been a finding. Indeed the learned Judge only opined that the tribunal "*may have"* exceeded its jurisdiction but did not make a finding to the effect that the tribunal had exceeded its jurisdiction.

In opposing the application, the respondent relies on the affidavit sworn on 9th February, 2016. She has also given a chronology of events in this matter, which I have already gone through and need not rehash. The respondent maintains that the suit before Osiemo, J was properly dismissed for being res *judicata*. She has also averred that this application is being brought ten (10) years down the line and this amounts to an abuse of the court process. Moreover, she contends that the applicant is guilty of laches and the application should therefore be dismissed with costs.

Urging the application before me, Mr. Kamau Kinga, learned counsel appearing for the applicant relied on the affidavits I have referred to earlier. He maintained that the applicant has never been heard on the matter. He said that the applicant was given wrong advice by counsel previously appearing for him. He also submitted that the respondent would not be prejudiced if the application was allowed as she can be compensated by way of costs.

On his part Mr. Kimatta, learned counsel appearing for the respondent strongly opposed the application. He reiterated the contents of the applicant's two affidavits. He maintained that this application, as many others made earlier, amounts to abuse of court process, which this Court should move in to stem. He submitted that the delay of ten (10) years is inordinate by any standard and it has not been explained. He urged the court to dismiss the application with costs and put a cap to this litigation.

Having set out the history of this matter, I now turn to the discourse as to whether this application should be allowed or not.

The law in this area is now well settled. Indeed the same is well articulated in the authorities presented to me by learned counsel for the applicant. To start with it is a truism that the Court has unfettered discretion to grant or not to grant extension of time under **Rule 4.** This holds true today as it did in 1997 when this Court expressed itself as follows in the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application No. Nai 251 of 1997:-**

> ***"It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general 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 reason 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."***

To start with the first requirement, it is evident that this application was filed almost 10 years after the judgment the applicant intends to appeal against. This is by all means inordinate delay.

Has this delay been sufficiently explained? In my view, it has not. Indeed, in the affidavits before court, the applicant has not attempted to explain why the intended appeal could not be filed on time. Instead of filing an appeal, the applicant opted to move the court by way of review, presumably under **Order XLIV Rule 1(a) of the Civil Procedure Rules.**

Having opted to go the review way, it is debatable if he could, after failing to succeed, back pedal and file an appeal. I do not wish to delve into that area lest I be accused of overstepping my jurisdiction under **Rule 4 of the Rules of this Court.**

My considered finding however, is that the applicant has failed to give any good or sufficient reasons to enable me exercise my discretion in his favor.

On the issue as to prejudice that is likely to be occasioned to the respondent if the application is allowed, I do not agree with learned counsel for the respondent that the respondent can be adequately compensated by way of damages.

It is clear from the record that the suit land was sub-divided several years ago and title deeds issued for the same. Resuscitating this matter would totally disorganize the respondent who has had to battle over the said property for close to 30 years. That will definitely be prejudicial to the respondent.

On the last consideration as to whether the applicant has an arguable appeal, or not, my view is that he would still have to overcome several other hurdles before his appeal can be heard on merit. I would mention that the judgment of the learned magistrate which adopted the award of the Land Disputes Tribunal is still a valid judgment as it has not been vacated by any court of competent jurisdiction. That would be one of the hurdles the applicant would have to surmount even if he was to succeed in this application.

In sum therefore, after considering all the material before me, including the oral submissions of both counsel, I find that the applicant has failed to satisfy the threshold set for applications under **Rule 4** to succeed. This application therefore fails. The same is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 29th day of April, 2016.

W. KARANJA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR