IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), SICHALE & KANTAI, JJ.A)

CIVIL APPLICATION NO. NAI. 161 OF 2015

BETWEEN

MURAYA WANDUNGU ……...……. APPLICANT

AND

NAOMI WANJIRU NDUNGU ……...…… RESPONDENT

(An application for extension of time within which to file and serve the Notice of Appeal and Record of Appeal out of time from the ruling of the High Court of Kenya at Nairobi (Osiemo, J.) dated 27th June, 2006

in

H.C.C.C NO. 137 OF 2003*)*

****

RULING OF THE COURT

1. Before us is a reference by the applicant challenging the decision of a single Judge of this Court (W. Karanja, J.A) dated 29th April, 2016. The learned Judge of Appeal in exercise of her discretion under ***Rule 4*** of the ***Court of Appeal Rules*** (the Rules) declined to extend time within which the applicant could file and serve a notice of appeal and record of appeal out of time against the decision of the High Court (Osiemo, J.) dated 27th June, 2006.

2. A reference under ***Rule 54 (1)*** of the Rules is not like an appeal and in dealing with the reference the full Court is not really concerned with the merits or demerits of the decision of the single Judge. Rather, it is only required to investigate whether or not the single Judge has misdirected himself/herself on matters of fact or law in exercising his/her unfettered discretion. See ***Attorney General –vs- James Alfred Korosso [2010] eKLR***. In ***Moru Farmers Co-operative Union Ltd. –vs- Abdul Aziz Suleman (No 2) [1966] EA 442*** Newbold, P as he then was, had this to say,

> ***"May I pause here to deal with one point which counsel for the respondent made. He submitted, rightly, as a matter of law, that the court on an appeal and presumably on a reference of a single judge, will not interfere with the exercise of the discretion of the judge from whom the appeal or reference is brought unless it is clear that the judge was wrong and had exercised his discretion on improper grounds."***

Furthermore, this Court in ***Purshottam Ramji Kotecha & Another –vs- Sanjay Narandas Pau & another [2005] eKLR*** expressed that;

> ***"In dealing with the decision of a single Judge, it is irrelevant that the members of the full Court would have reached a decision contrary to that of the single Judge. The discretion under Rule 4 is exercisable by the single Judge and the full Court is not entitled to substitute its discretion for that of the single Judge."***

3. In order to put the reference into context, it is imperative to set out the history of this matter, *albeit* in summary. A dispute arose as to the interests of the parties herein in respect of Nyandarua/Karati/392 (suit land) causing the applicant to file suit in the Senior Resident Magistrate's Court at Naivasha seeking *inter alia* eviction of the respondent who he claimed was a trespasser. On the other hand, the respondent maintained that the applicant held the suit land in trust for her late husband and prayed for it to be equally subdivided between the parties. Later on the suit was transferred to the Magistrate's Court at Nakuru where at the instance of the respondent's counsel and despite protest by the applicant's counsel, the dispute was referred to the Nyandarua Land Dispute's Tribunal (hereinafter referred as the Tribunal). Aggrieved by the said decision, the applicant chose not to participate in the Tribunal proceedings which culminated in an award being issued in favour of the respondent on 23rd June, 1998. Subsequently, the award was adopted as a judgment of the subordinate court.

4. Thereafter, the applicant unsuccessfully tried to have both the decision of the Tribunal and that of the subordinate court quashed vide judicial review proceedings which were dismissed. Giving it another go, the applicant filed another suit in the High Court being H.C.C.C No. 137 of 2003 seeking several declaratory orders and the eviction of the respondent from the suit land. In response, the respondent through her advocate raised a preliminary objection to the effect that the suit was *res judicata* on the basis that the matters therein had been heard and determined. Osiemo, J. after hearing both parties on the preliminary objection agreed with the respondent and dismissed the applicant's suit by a ruling dated 27th June, 2006. That is the ruling which is the subject of the intended appeal. Unyielding, the applicant filed yet another application dated 8th October, 2012 seeking the review and setting aside of the impugned High Court ruling. That application also suffered the same fate as the previous applications and was dismissed.

5. Ultimately, the applicant tried his hand in this Court and filed an application dated 4th June, 2015 seeking extension of time to file notice of appeal and record of appeal out of time. The grounds in support of the application were that the learned High Court Judge erred by finding that the applicant had consented to the dispute being referred to the Tribunal contrary to what was on record; that the applicant was condemned unheard; that the applicant's suit has never been heard on merit; that the applicant had engaged the services of several firms of advocates to defend him but they failed to do so; and that the respondent's advocate has since applied for the sale by public auction of the applicant's parcel described as Gatamaiyu/Gachoire/1521 to settle the taxed costs of Kshs. 500,000/=. The applicant also alluded to a conspiracy between the learned High Court Judge and the respondent's advocate to deprive him of the suit land.

6. In response, the respondent deposed that the impugned ruling of the High Court had been heard more than 10 years prior to the application for extension of time; that the applicant was guilty of laches; that the applicant was bent in denying her the fruits of her judgment; and that litigation ought to come to an end.

7. Mr. K. Kinga, learned counsel for the applicant, while reiterating the facts summarized hereinabove maintained that the Tribunal lacked jurisdiction to hear and determine the dispute. According to him, despite the numerous applications filed by the applicant his suit had not been determined on merits hence the matter was not *res-judicata*. He faulted the learned Judge of Appeal for misdirecting herself on the application for extension of time. Mr. Kinga urged the Court to allow the applicant pursue the intended appeal.

8. Mr. D. M. Kimata, learned counsel for the respondent, in opposing the reference argued that the Judge

of Appeal properly exercised her discretion. He submitted that the applicant had failed to demonstrate how the Judge of Appeal had misdirected herself. In his view, the suit before the High Court was *res judicata* since the issues therein had been heard and determined by the Tribunal notwithstanding the fact that the applicant chose not to participate in the Tribunal proceedings. Mr. Kimata further submitted that the applicant had not given any explanation for the delay of almost 10 years in filing the intended appeal.

9. It is trite that in an application under ***Rule 4*** of the Rules, before a single Judge exercises his/her unfettered discretion to grant an extension of time, he/she must take into account such relevant factors as, the length of delay, the period of delay, the chances of success of the appeal, and any prejudice that the respondent may suffer in the event the application is granted. See ***Mwangi –vs- Kenya Airways Ltd [2003] KLR 486 and Leo Sila Mutiso –vs-Rose Hellen Mwangi Civil Application No. Nai. 255 of 1997***. Consequently, the reference turns on whether or not the single Judge misdirected herself in exercising her discretion.

10. Having perused the record we concur with the single Judge that the applicant had not demonstrated any sufficient reason for the delay of about 8 years in filing the notice of appeal. We also cannot help but note that in as much as the applicant deposed that he had instructed several advocate firms to defend him he did not demonstrate what role, if any, they played in the delay. In

Joseph Muriithi Njiru –vs- Teresa Wanja Raymond [2008] eKLR, this

Court observed,

> ***"The learned single Judge looked for any explanation for the delay and found none. He then went on to consider other issues such as the chances of the intended appeal succeeding, the prejudice to the respondent if the time was extended and so on, but in our view, having found that the delay of ninety days remained wholly unexplained, it was really not necessary to consider these other issues."***

With regard to the arguability of the intended appeal, we agree that the applicant would first have to overcome the hurdle of the award of the Tribunal which was adopted as a judgment of the court and which has still not been vacated by any court.

11. All in all we find no reason to interfere with the exercise of the single

Judge's discretion. Consequently, the reference lacks merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 30th day of September, 2016.

P. KIHARA KARIUKI, PCA

……

JUDGE OF APPEAL

F. SICHALE

……

JUDGE OF APPEAL

S. ole KANTAI

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR