IN THE COURT OFAPPEAL
AT NYERI
(CORAM: WAKI, JA (IN CHAMBERS)
CIVIL APPLICATION NO. NAI. 33 OF 2011

BETWEEM

DORCAS WAIRIMU MURIITHI .....APPLICANT

AND

JOHN KABUTHA .....RESPONDENT

***(An application to strike out the notice of appeal in an intended appeal against the judgment of the High Court of Kenya at Nyeri (Makhandia, J.) dated 30th November, 2009* in**

H.C.C.C. NO. 6 OF 1997)
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R U L I N G

The matter before me is the motion dated 25th January, 2011 seeking an order under ***rule 4*** of the rules of this Court for extension of time to file and serve a record of about appeal out of time. The decision intended to be challenged on appeal was made by the High Court (Makhandia, J.) on 30th November, 2009 which is a period of one year and two months before the application was filed. In terms of ***rule 4***, I have unfettered discretion to extend the period but the discretion must be exercised judicially or, put another way, upon some reason and legal principles. Some of those principles are now well settled and, accordingly, I have to consider, among other factors, the length of delay, the reasons for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, whether the matter raises issues of public interest and so forth – see **Fakir Mohamed v Joseph Mugambi & 2 others, C.App. NAI. 332/04**. There is also a duty cast on me under ***section 3A*** and ***3B*** of the Appellate Jurisdiction Act to ensure that the overriding objective of civil litigation is observed and enforced; that is, to facilitate the just, expeditious, proportionate and affordable resolution of disputes.

The background facts to the application may be summarized from the judgment of the High Court as there are no pleadings, or proceedings exhibited with the application.

The respondent is the wife of one ***Muriithi Kabutha*** who, before his death, was the registered proprietor of land parcel no. **Aguthi/Mung'aria/201**. Thereafter, the respondent commenced succession proceedings and was registered as the owner of the said parcel of land in 1989. In his lifetime, the deceased had allowed or temporarily licensed the applicant to occupy a small portion of the land whereon he constructed a timber house for his residence. The deceased did so because the applicant was the son of his sister who had died leaving the young applicant orphaned. That was in 1953. Other than the construction of the house, the applicant did not use any part of the land for cultivation. He would reside therein until he found his own land elsewhere. From the evidence on record, he ended up finding his own

land and also leased other farms for cultivation.

After acquiring legal ownership of the property, the respondent sought to terminate the licence and asked the applicant to leave in 1994. The applicant protested that he and given Shs.1,500/= to the deceased to save the land from being auctioned and he would therefore not leave until the money was refunded. The matter was taken before elders and the applicant accepted the refund of Shs.1,500/= which the respondent made and he undertook to vacate. He did not, whereupon the respondent served him with a written notice to vacate in October, 1996 and followed up with a suit for trespass in default of compliance in January, 1997.

The applicant contended in the suit that he had been resident on the land for 44 years since 1953 and was therefore entitled to half portion of the whole land through adverse possession, which he counterclaimed.

The respondent called four witnesses to prove her case while the applicant testified on his own. They were all represented by advocates at the time. Upon evaluating the entire evidence, the High Court found that the applicant had indeed occupied a small portion of the land with the authority or licence of the deceased husband of the respondent until the licence expired on the death of the deceased, or with the transfer and subsequent registration of the property in the name of the respondent or when the notice by the registered owner was issued to vacate; that there was no evidence that he was in adverse possession of the property or had acquired interest therein between 1989 and 1996, a period of eight years; and that there was no issue of any trust either pleaded or proved. It held that the applicant was a trespasser who ought to give vacant possession of the small portion he occupied; said to be about 1/8 of an acre. He was given 45 days from the date of judgment on 30th November, 2009 to vacate, but he subsequently obtained an *ex parte* order for stay of execution of the judgment pending appeal.

The applicant's advocate timeously filed and served a notice of appeal and applied for copies of proceedings and judgment on the same day. The court registry notified the advocate that the copies were ready for collection on 24th March, 2010 and the advocate informed the applicant about it on 21st April, 2010, and cautioned him that the time to appeal would expire on 24th May, 2010. The advocate sought further instructions, but the applicant went silent.

His explanation on what transpired until he resurfaced in person with the motion now before me is contained in the affidavit in support of the motion. He deponed *inter alia*, thus: -

"9. That I had given my then advocate full instructions to file appeal on my behalf but were declining to file without their fees earlier indicated of Kshs.40,000 paid. Attached is their demand letter marked JK 7.

10. That the said amount is beyond my ability to raise and so I tried to plead with them but finally they declined to file my appeal.

11. That I don't reside in Nyeri town where the said firm is and so I take sometime to travel to town.

12. That I am only a small farmer who earns his living by working as daily casual labourer.

13. That I have been advised to make this application in person so as to raise my issues with this court.

14. That no prejudice will be caused to the respondent in any way if the orders sought are granted."

Essentially he was explaining away the delay by pleading impecuniosity. That, of course, is not a good reason considering that ***rule 112*** (now rule 115) of the Court's rules is always available for any litigant who can show that he/she is impecunious. In any event, he did not need an advocate if he could not afford one, and would have taken the same action he has now taken representing himself. It took more than nine months since his advocate wrote to him on 21stApril, 2010 to make up his mind. Indeed, it is clear that he was woken up from his slumber by the respondent when she filed an application to strike out the notice of appeal in November, 2010, and still took another two months or so to file the motion now

before me. There is an averment in his affidavit that the court file had gone missing between 25th March, 2010 when he was notified that copies of proceedings and judgment were ready and 23rd July, 2010 when he collected them, but I am skeptical about the assertions considering that there are no proceedings exhibited with the application. That unsatisfactory explanation for the delay would thus compound it further. In all the circumstances I find the delay of more than one year and two months inordinate and the explanation for it unacceptable.

The applicant further pleads that there would be no prejudice to the respondent if the application was granted, and further that his appeal has good chances of success. On the other hand the respondent finds nothing in the draft memorandum of appeal to challenge the factual findings made by the trial court. She further protests that she has been unduly frustrated in enjoying the fruits of her judgment when the applicant had gone to sleep.

The dispute, of course, relates to land and I have considered that land matters are held dearly by everyone in this country. That alone, however, does not justify the flouting of rules and principles which are beyond technicalities. The overriding objective was clearly violated in this case and such violation militates against equitable remedies.

The merits of the appeal would obviously be in the province of the appellate court.
But it is a matter I may possibly consider as a factor in determining the application for extension of time. As stated earlier, there are no pleadings or proceedings exhibited with the application. But I have examined the analysis of the facts and circumstances recorded before the superior court and I have looked at the draft grounds of appeal intended to be argued; and I do not share the applicant's view that it has overwhelming chances of success.

All in all, I am not satisfied that the applicant is deserving of the orders sought and consequently I order that the application be and is hereby dismissed with costs.

Dated and delivered at Nyeri this 2nd day of December,2011.

P.N. WAKI
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JUDGE OF APPEAL

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

DEPUTY REGISTRAR