



**In re FBH & IB (Minors) (Civil Appeal E071 of 2024)
[2024] KEHC 9982 (KLR) (9 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9982 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E071 OF 2024**

RN NYAKUNDI, J

AUGUST 9, 2024

**N THE MATTER OF AN APPLICATION UNDER
THE CHILDREN ACT OF 2022 LAWS OF KENYA
IN THE MATTER OF FBH AND IB (MINORS)**

BETWEEN

**BAJ (SUING AS FATHER AND NEXT OF FRIEND TO THE
MINORS) APPLICANT**

AND

ZNH RESPONDENT

RULING

1. By a Notice of Motion April 15, 2024 the Applicant seeks the following orders;
 1. Spent.
 2. That in the best interest of the subject minors this Honourable Court do grant the Appellant/ Applicant leave to file appeal out of time.
 3. That pending the hearing and determination of this application the Honourable Court does issue a declaratory order that the Kadhis Court does not have jurisdiction over children cases and set aside the orders issued on 14th day of July, 2023.
 4. Spent.
 5. That this Honourable Court does issue an order compelling the Defendant/Respondent to produce the subject minors before this Honourable Court for the Court to ascertain their well-being.
 6. That the costs of this application be in the cause.



2. The application is premised on the following grounds;
 - a. That the Appellant/Applicant is the biological father of the minors herein whilst the Respondent is biological mother.
 - b. That the Respondent never served the Appellant with the pleadings from the Kadhis Court and she secretly granted sole custody of the subject minors.
 - c. That the Appellant/Applicant filed a Children's case at the Children's Court at Nairobi Case Number E084/2024 and the case was struck out on the basis that there was a determination at the Kadhi's Court Eldoret.
 - d. That the Appellant/Applicant filed the said case because he was not aware of the subject minors whereabouts.
 - e. That upon filing of the case and tracing the Respondents whereabouts through the help of the DCI Eastleigh the Appellant/Applicant served the Respondent with the Court pleadings.
 - f. That upon service the respondent filed a PO stating that the matter was already determined *ex parte* at the Kadhis Court Eldoret.
 - g. That the Appellant/Applicant was not aware of the case he was never served with the Court documents.
 - h. That despite there being orders against the Appellant/Applicant the Respondent cut off all communication between them since June 2023.
 - i. That the Appellant/Applicant has gone through an agonizing time trying to trace the whereabouts of the subject minors.
 - j. That the Respondent is adamant that she will not allow the Appellant/Applicant to see the subject minors,
 - k. That right from the minors' birth the Appellant/Applicant has been taking up parental responsibility of the subject minors, he has provided for all their needs.
 - l. That the Appellant/Applicant shares a special bond with the subject minor and the Respondents actions to deny the Appellant/Applicant access has caused the minors physiological trauma as they ask him why she does not love them.
 - m. That the Appellant/Applicant is desirous of exercising his parental rights and obligations over the subject minors.
 - n. That it is in the best interests of the minors that this Honourable Court grants the prayers sought herein above.
 - o. That the Appellant/Applicant will continue to take up parental responsibility of the minors.
 - p. That the Respondent will not suffer any prejudice.
 - q. That it is in the best interest of the minors that the orders sought herein are granted.
3. The application is further supported by the Affidavit sworn by the Applicant on 15/4/2024.
4. The application is unopposed.



Analysis and Determination

5. Having appreciated the pleadings on record. The main issue for determination herein is whether the Court should exercise its discretion to grant the Applicant leave to file his appeal out of time.
6. The Applicant's case is that he is the biological father of the minors herein and that he filed a Children's Case at Nairobi being MCCHCC No. E084 of 2024 which case was struck out on the basis that the same issues being raised therein were resolved *vide* Eldoret Kadhi's Court Case No. E005/2023. According to the Applicant he instituted the Children's Case because he was not aware of the aware of the subject minors whereabouts. He contends that he was also not aware of the proceedings filed at the Kadhis Court in Eldoret as he was never served. Additionally, the Applicant is also apprehensive that the Respondent will deny him his rights as the children's biological father. The Applicant is desirous of exercising his parental rights and obligations over the subject minors.

7. Section 79G of the [Civil Procedure Act](#) states:-

Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.

8. It is clear from the wording of section 79G of the [Civil Procedure Act](#), that before the Court considers extension of time, the Applicant must satisfy the Court that she has good and sufficient cause for seeking extension of time. This principle was enunciated in the case of [Diplack Kenya Limited v William Muthama Kitonyi](#) [2018] eKLR an Applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
9. The Supreme Court in the case of [Nicholas Kiptoo Korir arap Salat v IEBC and 7 others](#) [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated *inter alia* that:-

“The underlying principles a Court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
- c. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.



10. From onset that this case involves the welfare of a minor. Article 53 (2) of the [Constitution of Kenya](#), 2010 provides that ‘a child’s best interests are of paramount importance in every matter concerning the child.’ Likewise Section 8(1) of the [Children’s Act](#), 2022 directs Courts to give priority to the best interests of the child in all matters involving the welfare of minors. Therefore the rights of the minors supersede the wishes and interests of their parents.
11. Looking at the pleadings before the Kadhis Court is evident that the Applicant herein was not present when the said Court on its own motion allowed the hearing to proceed because of the documents filed by the Respondent herein without paying due consideration to the rules of natural justice that every party has a right to be heard. Article 47 (1) of the [Constitution](#) provides that every person has the right to administrative action that expeditious, efficient, lawful, reasonable and procedurally fair.
12. The decision in Eldoret KCDC No. E005 of 2023 was rendered on 14/7/2023, the Applicant herein filed the instant application on 19/4/2024 about 9 months after the said decision was rendered. The Applicant has justified the reason for delay as he was not aware of the proceedings therein as can be inferred from the record. Further, it is noted that the physical custody of the minors was given to the Respondent the mother of the children and limited access to the Applicant.
13. It is not in doubt that the Applicant was aggrieved by the orders of the Court and is desirous of appealing against the said orders. Despite the delay in filing of the appeal and bringing this application, I am of the view that the Applicant has a right to appeal. This Court must have regard to the best interest of the child in an application of this nature.
14. In regard to the other orders sought the same can be canvassed in the appeal as rendering a determination on the same will be pre-empting the appeal at this interim stage.
15. For the foregoing reasons, this application is allowed in terms of prayer (2) in the following terms:-
 - i. That the Applicant shall file her appeal within fourteen (14) days failure to which these orders will be vacated.
 - ii. Costs shall await the outcome of the appeal.
16. It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF AUGUST, 2024

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R. NYAKUNDI
JUDGE

