



**MMW v JWM & another (Civil Appeal E074 of 2024)
[2024] KEHC 13393 (KLR) (Civ) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E074 OF 2024

SN RIECHI, J

OCTOBER 31, 2024

BETWEEN

MMW APPELLANT

AND

JWM 1ST RESPONDENT

JNW 2ND RESPONDENT

RULING

1. The applicant vide a chamber summons dated 28th May 2024 filed under Section 3A,75,78,79G of the *Civil Procedure Act* and order 42 rule 1 of the Civil Procedure Rules and all enabling provisions of Law the applicant is seeking orders:-
 1. That the court be pleased to grant leave to the Appellant to appeal out of time against the Judgement made by the Hon. F. Terer (SRM), in Milimani Children's Case No. E1487 of 2021 on 8TH September 2023.
 2. That a stay of execution in MCCHCC E1487 of 2021 be granted pending the hearing and determination of this application and the Appeal.
 3. That Pending the hearing and determination of this Application and the Appeal, this Honourable Court be pleased to order and direct the 1st Respondent to grant the Appellant/ Applicant both virtual and physical access to the minors.
 4. That The costs of this application be provided for.
 5. Any other orders that meets the ends of justice.
2. The application is premised on the grounds that;



1. That the Honourable Magistrate F. Terer (SRM) delivered a judgment in Milimani Children's Case No. E1487 of 2021 on 8th September 2023.
2. That as per the said judgment, legal and actual custody of the minors was granted to the 1st Respondent and the Applicant herein was to only access the children subject to the 1st Respondent's concurrence.
3. That during the proceedings and at the time of judgment, the Appellant/ Applicant was residing outside the country in Canada wherein she had been granted an opportunity to further her studies.
4. That the Applicant completed her studies and has secured a flexible job in the said country Canada which allows her to freely come in and out of this country for purposes of visitation and general caring for her children.
5. That since the judgment, the 1st Respondent has continued to deny the Applicant access to the minors, confiscating their phones and cutting all forms of communication with the Applicant. That It is only when the Applicant came to Kenya in April and with the assistance of her advocates and the local police that the 1st Respondent allowed the minors to see their mother, the Applicant herein.
6. That during the months of April and May 2024 when the Applicant was within the Country, she was able to see and care for the children. However, once schools reopened and the minors went back to school, the 1st Respondent barred all communication with the Applicant and 1st respondent has continued to deny her access ever since.
7. That the Applicant has been barred from seeing or speaking to her children via virtual communication by the 1st Respondent.
8. That the Applicant intends to visit the country on regular occasions, within which she intends to spend time with her children and also craves for the ability to speak to the minors virtually while in Canada.
9. That the Appellant is aggrieved by the decision of the Court, which granted full custody to the 1st Respondent and which has made it impossible for her to access and communicate with her children.
10. That at the time of Judgment, the Applicant was out of the country. She only managed to return in April 2024 wherein she sought the services of an Advocate for purposes of filing this Appeal. The Advocates made an Application for certified typed proceedings together with a copy of the judgment and decree in order to lodge this Appeal.
11. That the Thirty days requirement for appealing to the High Court has already lapsed, and the Certified typed proceeding are yet to be availed.
12. That meanwhile, the time of appeal has run out.
13. That the delay in filing the Appeal was not intentional but was occasioned by the Applicant's absence in the Country together with the long procedures of Court while obtaining the certified proceedings.
14. That if the judgment of the lower court is not stayed and the orders herein granted, the 1ST Respondent is likely to keep denying the Appellant/Applicant the required concurrence in order to access the minors



15. That it is in the interest of justice that the Appellant be allowed to appeal the judgement of the Honourable SRM F. Terer out of the prescribed time.
16. That the Respondents will not be prejudiced in any way if the said leave is granted.
3. The application is also supported by the affidavit of MMW sworn on the even date in which she briefly stated that she is the biological mother of the minors CCW, LLM and MMW whereas the 1st Respondent herein is their biological father. She deponed that the 1st Respondent filed a custody case at Milimani Children's Court being MCCHCC E1487 OF 2021 against appellant and her sister the 2nd Respondent herein. She deponed that a judgment which was delivered on 8th September 2023 by the Honourable F. Terer. She averred that per the said judgment, legal and actual custody of the minors was granted to the 1st Respondent and the applicant was ordered to access them only subject to concurrence by the 1st Respondent.
4. The applicant averred that during the proceedings and at the time of judgment, she was residing in Canada wherein she had been granted an opportunity to further my studies. The applicant averred she has completed her studies and have secured a flexible job in Canada which allows her to freely come in and out of the country for purposes of visitation, providence and general caring for my children. The applicant stated she intend to visit the country on regular occasions, within which she intends to spend time with my children. The applicant stated that at the time of Judgment, she was out of the country.
5. The applicant averred she only managed to return in April 2024 wherein I sought the services of an Advocate for purposes of filing this Appeal. The applicant stated her Advocates made an Application for certified typed proceedings together with a copy of the judgment and decree in order to lodge this Appeal. she refeered to annexed to the application a copy of the request for certified proceedings as evidence in support.
6. The applicant stated thirty days requirement for appealing to the High Court had already lapsed, and the Certified typed proceeding are yet to be availed and the time of appeal has run out. The applicant stated the 1st Respondent is likely to keep denying her the required concurrence in order to access the minors. The applicant stated the delay in filing the Appeal was not intentional but was occasioned by her absence in the Country together with the long procedures of Court.
7. In response the 1st respondent filed a replying affidavit to the applicant's chamber summons which is dated 29th July 2024 and inter alia contended that:-
 - i. The instant application violates order 9 Rule 9(a) and (b) and Rule 10 of the Civil Procedure Rules,2010 having been filed by new Advocates without leave of the court.
 - ii. That extension of time is only granted at the discretion of the court to deserving parties and the applicant has not demonstrated the need for extension of time to file an appeal out of time.
 - iii. That extension of time and granting the orders sought would be prejudicial to the respondent and the children's well being will n=be disrupted.
8. By the consent the parties canvassed the application by way of written submissions. The applicant filed written submissions dated 15th October 2024 through The CRADLE. The respondent filed written submissions dated 23rd October 2024 through the firm of J.W.& Frank Advocates LLP. The parties in their submissions reiterated averments in their respective affidavit and I do not need to reproduce the same.
9. From the application, revival affidavit and submissions the main issues for determination are as follows;



- i. Whether or not this court should grant leave to the appellant to appeal out of time against judgement made on 8th September 2023.
 - ii. Whether or not this court should grant an order of stay of execution in MCCHCC E1487 OF 2021 pending appeal.
 - iii. Whether or not pending the appeal this court should direct 1st respondent to grant the appellant both virtual and physical access to the minors.
10. On the 1st issue the applicant is seeking order to file the appeal of time. The applicant submitted that she was not able to appeal within the stipulated timeline because during the proceedings and at the time of judgment, the Appellant/ Applicant was residing outside the country in Canada wherein she had been granted an opportunity to further her studies.
 11. The applicant submitted that she only managed to return in April 2024 wherein I sought the services of an Advocate for purposes of filing this Appeal. The applicant submitted her Advocates made an Application for certified typed proceedings together with a copy of the judgment and decree in order to lodge this Appeal. The applicant submitted thirty days requirement for appealing to the High Court had already lapsed, and the Certified typed proceeding are yet to be availed and the time of appeal has run out.
 12. The applicant submitted the 1st Respondent is likely to keep denying her the required concurrence in order to access the minors. The applicant submitted the delay in filing the Appeal was not intentional but was occasioned by her absence in the Country together with the long procedures of Court.
 13. The respondent submitted that the applicant has not demonstrated the need for the extension of time to file appeal out of time.
 14. The applicant's instant appeal is premised on Sections 79G of the *Civil Procedure Act* which provide for filing of appeals from the subordinate courts and for enlargement of time respectively. Section 79G provides as follows:

79G. 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 preSUBPARA tion and delivery to the appellant of a copy of the decree or order.

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

I Will refer to Section 95 of *Civil Procedure Act* which provides thus:-

95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time enlarge such period, even though the period originally fixed or granted may have expired.
 15. The applicant has explained that she did not appeal against the learned magistrate's judgement of 8th September 2023 because she was out of the country. She also submitted that she has applied for copies of proceedings which are yet to be furnished.
 16. Article 53 (2) of *the Constitution* requires that the court gives the best interest of the child SUBPARA mount consideration in any matter concerning the child, while Article 50 (1) of *the Constitution* guarantees fair hearing of disputes that may be resolved by application of law.



17. In balancing the parties' interests in the matter under the respective constitutional provisions, and granting the necessary SUBPARA mountcy to the obvious best interests of the children, I consider that the justice of the case requires this court to allow the applicant to file appeal out of time against the judgment delivered on 8th September 2023 and, in the interests of an expeditious disposal of the dispute, the Memorandum of appeal dated 28th May 2024 is deemed properly filed and the appellant to pursue the appeal within the next 30 days from date hereof and the appeal be heard on priority basis.
18. On the 2nd issue the applicant is seeking stay of execution pending appeal this court need to determine whether the Applicant has satisfied the requirements set out in Order 42 Rule 6 of the Civil Procedure Rules. It is trite law that for application seeking stay pending appeal the Applicant must meet the statutory requirements set out in Order 42 Rule 6 which are: -
- (2) No order for stay of execution shall be made under sub rule (1) unless-
- (a) The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
19. The applicant has submitted that the 1st respondent has continued to deny her access to the minors, confiscated their phones and cut off all communication. The applicant This dispute revolves around the rights of two children under Article 53(2) of *the Constitution* and section 8 of the *Children Act*, this court should determine whether the trial court, in reaching the decision it did, considered the principle of what is in the best interest of the children.
20. I have analyzed the judgment delivered on 18.9.2023. It is my find that the appellant is seeking to stay the execution of the orders, the order emanating from the judgement were issued in the best interest of the minors and consequently incapable of been stayed. There is therefore nothing in the judgement that can be stayed as it will not be acting in the best interest of the minors.
21. On the issue whether this court should direct 1st respondent to grant the appellant both virtual and physical access to the minors. I note that the trial court in the judgement delivered on 8th September 2023 issued the following order in respect of the access of the minors and I quote;
- “.....The 1st Defendant to access them as follows:
- a. Virtually (through phone, video calls or any other medium) taking into account their daily routine and content restrictions;
- b. Physically in Kenya subject to concurrence by the Plaintiff”
22. The appellant herein has complained that the respondent has denied her virtual access to the minors and he has gone ahead and confiscated the minors phones to block the applicant virtual access to the minors as ordered by the trial court.
23. It is my considered view that the applicant being biological mother of the children and reside and work in Canada has a right to communicate to the minors. This court therefore make the following orders in the best interest of the child. The 1st respondent is hereby ordered to avail the minors for communication with the applicant during weekends specifically on Saturdays and Sunday between 12.00PM and 6.00PM East Africa Time.
24. In the result, the application dated 28th May 2024 is determined as follows;



1. The applicant is allowed to file appeal out of time within the next 30 days from date herein.
2. The order of stay of execution in MCCHCC E1487 OF 2021 is hereby declined.
3. The 1st respondent is hereby ordered to avail the minors for communication virtually with the applicant during weekends specifically on Saturdays and Sundays between 12.00PM and 6.00PM East Africa Time.
4. When the applicant is in Kenya the 1st respondent to avail the minors to the applicant during weekends and school holidays.
5. The applicant to prosecute the hearing and determination of the appeal within 90 days.

DATED AT NAIROBI THIS 31ST DAY OF OCTOBER 2024.

S. N. RIECHI

JUDGE

