



**MNM v CWW (Miscellaneous Civil Application E001 of 2024)  
[2024] KEHC 15035 (KLR) (27 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15035 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
MISCELLANEOUS CIVIL APPLICATION E001 OF 2024  
LM NJUGUNA, J  
NOVEMBER 27, 2024**

**BETWEEN**

**MNM ..... APPLICANT**

**AND**

**CWW ..... RESPONDENT**

**RULING**

1. Through a notice of motion dated 05<sup>th</sup> November 2024, the applicant is seeking the following orders:
  - a. That the applicant be granted leave to file appeal out of time;
  - b. That the attached draft memorandum of appeal be deemed as duly filed upon the orders above being granted and upon payment of requisite fees; and
  - c. That the costs of this application be provided for.
2. The applicant states that the impugned order by Hon. J.A. Otieno on 26<sup>th</sup> July 2023 was made in his absence and only learned of the order after it was served upon him by the respondent after his advocate ceased acting for him. He stated that the respondent moved to execute in line with the order and he was even committed to civil jail following a notice to show cause. He wishes to appeal against the order of the court, hence the application herein.
3. The respondent filed a replying affidavit deposing that the order issued by the trial court included the applicant paying an amount of money which he failed to pay. That she moved the trial court for orders committing the applicant to civil jail and the amount is now over Kshs.50,000/= and counting. That the case involved maintenance of a child and she urged the court to mind the child’s needs since she is suffering. She urged the court to order the applicant to pay the money before he can be heard on any appeal.
4. The court directed the parties to file their written submissions but only the applicant complied.



5. The applicant argued that before the trial, he had denied that he was the father of the child and a DNA test had been ordered. That while he was awaiting DNA results from KEMRI, he learned about the order and he was informed that the DNA results had already been brought to court. That the ruling was delivered in his absence and he was ordered to pay Kshs.6,000/= every month towards maintaining the child or he be committed to civil jail. He doubts the validity of the DNA results and would like to be heard on appeal.
6. The issue for determination is whether the court should grant the applicant leave to appeal out of time.
7. The timelines for filing of appeals are set under Section 79G of the *Civil Procedure Act* as follows:

“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 to the appellant 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 a good and sufficient cause for not filing the appeal in time.”
8. The court acknowledges that sometimes delay in filing an appeal may occur hence the proviso in the above-cited provision of the *Civil Procedure Act*. The proviso creates lee-way but only to an extent where the court may apply discretion on the matter and grant such orders if it is satisfied of the reasons for the delay and other factors. In the case of *Edith Gichungu Koine Vs Stephen Njagi Thoitbi* (2014) eKLR the court held thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
9. Being a discretionary relief, the circumstances of the case should guide the court in making its decision. The applicant stated that when the orders were made, he was not in court since according to him, the matter was awaiting the findings of a paternity test to establish whether or not he is the father of the minor. That following the paternity results, the court ordered him to pay Kshs.8,000/= as maintenance and to provide a medical cover for the child, among other orders.
10. The impugned order was made on 26<sup>th</sup> July 2023, the application herein is dated 05<sup>th</sup> November 2024. There is a delay of about one year three months in seeking leave to appeal out of time. The applicant’s explanation for the delay is not plausible. However, in the interest of justice and considering that the case involves a child, and what is paramount is the best interest of the child.
11. Therefore, I find that the application has merit and it is hereby allowed with orders as follows:
  - a. The applicant is hereby granted leave to appeal out of time against the order of the trial court issued on 26<sup>th</sup> July 2023;
  - b. The applicant is hereby ordered to file a memorandum of appeal within 21 days of this ruling failing which the entire appeal shall stand dismissed; and
  - c. There shall be no order as to costs.
12. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2024.**



**L. NJUGUNA**

**JUDGE**

..... for the Applicant

..... for the Respondent

