



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. E037 OF 2021**

**IN THE MATTER OF SB AND AB (MINORS)**

**AB.....APPLICANT/APPLICANT**

**VERSUS**

**SS.....RESPONDENT**

**RULING**

1. This dispute relates to two children: SB born on 29<sup>th</sup> November 2011 and AB born on 15<sup>th</sup> October 2013. They are the children of the applicant AB and the respondent SS who got married on 4<sup>th</sup> April 2009 under Hindu marriage law. On 10<sup>th</sup> April 2018 the respondent filed a plaint against the applicant seeking that they be granted joint legal custody over the children, she be granted care and control of the children with the applicant having access, the applicant be stopped from using police to harass her and that he be restrained from exposing the children to his extra-marital affairs. The plaint was filed along with a notice of motion seeking the same orders and also that the applicant be ordered to continue paying Kshs.36,000/= per month as had been agreed as his contribution towards the maintenance of the children.

2. Following oral hearing, the Honourable G.M. Gitonga (Senior Resident Magistrate) of the Children Court at Milimani delivered a judgment on 22<sup>nd</sup> January 2021 in which he ordered that the applicant takes care of the children's school fees and all school related expenses including transport and to take care of their medical needs; the respondent to take care of their clothing needs; the applicant to take care of their food by remitting Kshs.20,000/= during the two weeks the children were to be with the respondent; the parties to equally share joint legal and actual custody; the applicant to have actual custody, care and control of the children every first two weeks of the month and the respondent to have them during the last two weeks of the month; that during either time the parties to communicate with the children; and that the parties to equally share the children during school holidays and during festivities.

3. The applicant was dissatisfied with the judgment and on 5<sup>th</sup> May 2021 filed an appeal against it and the orders. Certainly, the appeal was filed out of time without leave. This is one of the prayers in the application dated 7<sup>th</sup> May 2021 seeking that the court enlarges time for the filing of the appeal so that the appeal be deemed to be filed within time. The second prayer was that there be stay of execution of the judgment delivered on 22<sup>nd</sup> January 2021 pending the hearing and determination of the appeal.

4. The applicant's case was that he was then represented by Mohamed & Samnakey Advocates who failed him by not filing the appeal despite instructions. It was when he instructed the present advocates (Chigiti & Chigiti Advocates) that they were able to file the appeal dated 5<sup>th</sup> May 2021. The appeal was filed out of time. The previous advocate went abroad and it took time for the applicant to secure his file to be able to instruct the new advocates. He contended that he had a good appeal which he should be allowed to have heard. He feared that if the application is not allowed he will be faced with execution which will destroy the whole substratum of the intended appeal thus rendering it nugatory. He swore that the application had been brought without delay.

5. The respondent's response was that the application was an abuse of the process of the court, had been filed months after the decree had been issued, and that the delay had not been explained. The respondent stated that the explanation regarding the advocate being abroad was not plausible. She stated that prior to the judgment the applicant was contributing Ksh.36,000/= per month without complaint, and that the amount had been lowered to Kshs.20,000/= per month which was fair. Her case was that the applicant was gainfully employed and therefore adjudged amount was fair and reasonable. She stated that she was not herself, financially stable. Lastly, she asked that if the application is granted the applicant should be asked to furnish security for the performance of the decree.

6. Mr. Chigiti (SC) for the applicant and Mr. Mwangambo for the respondent each filed written submissions which I have read and

considered.

7. **Article 53** of the Constitution and **section 4(3)** of the **Children Act (Cap 141)** are clear that in any matter concerning a child the court should treat the interests of the child as the first and paramount consideration. Therefore, in dealing with this application the best interests of SB and AB shall be the paramount consideration in order to safeguard and promote their rights and welfare regarding their custody, maintenance, education, and medical. The court shall ensure that their rights and welfare are not compromised or disrupted by the orders that it shall give.

8. The question whether or not to enlarge time to file appeal is important. This is because a party who is aggrieved by an order or decree that is appealable is entitled to appeal as a constitutional imperative. Of course, the **Civil Procedure Act** regulates the time for filing of appeals. **Section 79G** of the **Civil Procedure Act** provides 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 applicant of a copy of the decree or order:**

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

9. When the applicant filed his appeal on 5<sup>th</sup> May 2021, the time for filing of the appeal had passed by 2 months and a few days. It was filed out of time and that is why he sought that it be regularised by extension of time. The respondent opposed any extension by submitting that, first, the delay in filing was inordinate; secondly, the delay had not been satisfactorily explained; and thirdly, allowing the application would not be in the best interests of the children.

10. At this stage, the court cannot deal with the chances the intended appeal will have. All that one can do is to bear in mind the facts of the case as shown by the record of appeal, including the judgment that is being attacked by the applicant.

11. It is now trite that in dealing with the application to extend time to appeal, the court will consider the length of the delay involved; the reasons for the delay; the possible prejudice, if any, that each party stands to suffer depending on how the court will exercise its discretion one way or the other; the need to balance the interests of the respondent who has a judgment and the applicant who has a constitutionally underpinned right of appeal; and the question whether costs will ameliorate any inconvenience or prejudice that the respondent may suffer if the application is allowed (**Karny Zahrya & Another –v- Shalom Levi [2018]eKLR**). Of course, these are not the only factors to be considered but they are the primary ones.

12. The question whether or not there has been inordinate delay in bringing the appeal will depend on the peculiar facts of the case (**Cecilia Wanja Waweru –v- Jackson Wainaina & Another [2014]eKLR**). The court will, among other things, look at the conduct of the applicant from the time the judgment was delivered to the time when he filed the application seeking extension of time.

13. The judgment sought to be appealed against was delivered on 22<sup>nd</sup> January 2021. The applicant stated that he instructed his advocates to appeal. The advocate travelled out of the country before taking any action. The applicant was forced to instruct another advocate. The new advocate filed a notice of change of advocate even before he had received the file from the advocate on record. The applicant sought his file from the old advocate which was not released until 14<sup>th</sup> April 2021. A consent dated 12<sup>th</sup> April 2021 to change advocates had been recorded. On 5<sup>th</sup> May 2021 the appeal was filed. It was submitted that the explanation by the applicant why the appeal was not filed on time was reasonable. The respondent thought otherwise. She submitted that the allegation that the advocate had gone out of the country had not been proved. I have looked at the rival averments. The fact that the applicant’s advocate went out of the country was not controverted. The same for the fact that the applicant had to change advocates who had to obtain the consent of the earlier advocate now that there was judgment. In short, I find that the explanation for the delay was not only plausible but was reasonable. In the circumstances, I find that the delay of just over two months was not inordinate. In any case, the delay has been explained reasonably. I further determine that the delay and inconvenience to the respondent can be compensated by costs.

14. In conclusion, therefore, I extend time for the filing of the appeal. The Appeal filed on 5th May 2021 shall consequently be deemed to be timeously filed.

15. The next issue is whether a case has been made for the stay of execution of the orders in the judgment until the appeal has been heard and determined. It was common ground that stay of execution of a judgment is provided for by **Order 42 rule 6(2)** of the **Civil Procedure Rules** which provides as follows:

**“(2) No order for stay of execution shall be made under subrule (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.”**

16. The conditions for stay are:-

a) proof of substantial loss if stay is denied;

b) that the application for stay has been made without unreasonable delay; and

c) the furnishing of security for the due performance of such decree or order as may ultimately be binding on the applicant.

17. In dealing with the question of stay of execution pending appeal the court must consider all the facts of the case, the primary consideration being the best interests of the children.

18. In the supporting affidavit the applicant swore that if the application is not granted he will suffer substantial loss. He did not, however, substantiate what loss that would be. The judgment equally granted the parties the legal and physical custody of the children. It was ordered that the applicant takes care of the education and medical care of the children, and gives the respondent Kshs.20,000/= per two weeks that she had custody of the children. This was a reduction from the Kshs.36,000/= that he had been paying. The respondent was to take care of the children's clothing needs. The court stated that it had taken into consideration that the parties had equal parental responsibility over the children, and had taken into consideration the financial means by the two. If the application is allowed and stay of execution granted, it means that the children will not go to school, or their medical needs catered for, or their food provided for until the appeal is heard and determined. The question is whether that will be in the best interests of the children. The answer can only be in the negative.

19. In conclusion, I extend time for the filing of the appeal and order that appeal dated 5<sup>th</sup> May 2021 will be deemed to be properly filed. The prayer for the stay of execution of the orders contained in the judgment dated 22<sup>nd</sup> January 2021 is refused.

20. The applicant has substantially been indulged. He will pay the costs of the application.

**DATED and DELIVERED electronically at NAIROBI this 28<sup>TH</sup> day of JANUARY 2022.**

**A.O. MUCHELULE**

**JUDGE**