



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISCELLANEOUS CIVIL CASE NO. E028 OF 2020

NWM.....APPLICANT

VERSUS

JWM.....RESPONDENT

RULING

1. **NWM** (the applicant) has filed a notice of motion application dated 2nd December, 2020. He seeks by that application two prayers. Firstly, he seeks leave to file a memorandum of appeal out of time. He does not specify the suit against which he seeks to appeal out of time. The second prayer, in that application is for stay of execution of Children Case No. 25 of 2018, pending hearing and determination of the present application. In other words, going by that prayer, the prayer for stay of execution is spent now that this Court is finally determining the application. It follows that the only prayer that remains for consideration is the prayer to file an appeal out of time.

2. The background of this matter is that **JWM**, (the respondent) sued the applicant before Kiambu Children’s Court in Children’s Case No. 25 of 2018 seeking an order for payment for maintenance of a minor child. The said court issued an order on 17th August, 1918 requiring the applicant to provide maintenance for the minor. It is that order of 17th August, 2018 that the applicant seeks leave to appeal out of time.

3. The applicant in his affidavit in support of the application before me stated that he was first aware of the Children’s Court Ruling late August, 2018. Then, in apparent contradiction the applicant deponed that the children’s court’s ruling was delivered, without his knowledge during the period when there was COVID-19 pandemic.

4. The applicant further depositions do not support his prayer for leave to appeal out of time. They essentially relate to the merit of the Ruling of the children’s court.

5. I also wish to dissuade the application of his depositions that, the children’s court failed to consider his replying affidavit. There was no replying affidavit filed by the applicant before the children’s court. Had there been such a replying affidavit the applicant would have attached it to his present application – which he did not.

ANALYSIS

6. The Children’s Court Ruling against which the applicant seeks leave to file an appeal out of time was delivered on 17th August, 2018. That was not during COVID-19 pandemic as the applicant stated in his affidavit. The COVID-19 virus was first reported in this country in March, 2020. This is within the public domain. The applicant was required as provided under Section 79G of the Civil Procedure Act Cap 21, to file his appeal within 30 days from the date of the Children’s Court’s Ruling. Section 79G of Cap 21 provides: -

“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 good and sufficient cause for not filing the appeal in time.” (underlining mine)

7. Particular attention is drawn to the proviso in the above section. It is evident thereof that for the court to grant leave or to rather admit an appeal out of time, the applicant would have to satisfy the court that “he has good and sufficient cause for not filing the appeal in time.”

8. The applicant firstly erroneously stated that he was prevented from filing the appeal because the Ruling was delivered by the children’s

court during COVID-19 pandemic. As I have stated above, the appellant erred to so submit.

9. The applicant with one breath stated that the Ruling was delivered without his knowledge and in his absence, and with another breath stated the Ruling and all the pleadings before the children's court were served on him "late August, 2018". The obvious question that arises is what then prevented the applicant from filing his appeal against that Rulings of 17th August, 2018 within 30 days period. The applicant does not give an explanation for that failure.

10. I rely on the discussion in the case **DILPACK KENYA LIMITED VS. WILLIAM MUTHAMA KITONYI (2018) eKLR**, thus: -

*"27. Therefore, 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, since as was held in FEROZ BEGUM QURESHI AND ANOTHER VS. MAGANBHAI PATEL AND OTHERS [1964] EA 633, there is no difference between the words "sufficient cause" and "good cause". It was therefore held in DAPHNE PARRY VS. MURRAY ALEXANDER CARSON [1963] EA 546 that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.*

28. As to the principles to be considered in exercising the discretion whether or not to enlarge time in FIRST AMERICAN BANK OF KENYA LTD VS. GULAB P SHAH & 2 OTHERS NAIROBI (MILIMANI) HCCC NO. 2255 OF 2000 [2002] 1 EA 65 the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant."

11. The applicant did not give an explanation for delay in filing the appeal; he also did not attach the ruling, the subject of the appeal, for this Court to determine whether the proposed appeal is arguable; and the applicant failed to address himself to the likely prejudice that will be suffered by the minor child, whom he was ordered to pay for his/her maintenance. The notice of motion dated 2nd December, 2020 is unmeritorious.

DISPOSITION

12. In respect to the notice of motion dated 2nd December, 2020, I grant the following orders:-

- a. The application is dismissed with costs to the respondent.
- b. This file shall henceforth be closed.

RULING DATED AND DELIVERED AT KIAMBU THIS 21ST DAY OF FEBRUARY, 2022

MARY KASANGO

JUDGE

Coram:

Court Assistant : Maurice

For applicant : - Nicholas Wambua Mutuku : - Ms. Kimuto

HB Mr. Chimei

For Respondent : - Jackline Wayua Maingi : - N/A

RULING delivered virtually.

MARY KASANGO

JUDGE