



J N v J N N (Civil Appeal E011 of 2021) [2022] KEHC 584 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 584 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E011 OF 2021
FN MUCHEMI, J
APRIL 28, 2022**

BETWEEN

J N (SUING THROUGH NEXT FRIEND AND MOTHER N W K) . APPLICANT

AND

J N N RESPONDENT

RULING

1. This application dated 21st April 2021 is brought under section 22 (1) & (2), 80 and 82 of the *Children's Act* and article 165 of *the Constitution* seeking leave to file appeal out of time against the decision by the Senior Principal Magistrate in Karatina Children Case No 8 of 2020. .
2. The respondent filed a Replying Affidavit dated 28th June 2021 and a Further Replying Affidavit dated 28th September 2021 in opposition on the application.

Applicant's Case

3. It is the applicant's case that failure to file the Memorandum of Appeal and Record of Appeal on time was occasioned by the disruption and closure of Karatina Law Courts due to covid 19 pandemic. She further states that the trial court delivered judgment on 27th October 2020 and later a ruling on 16th February 2021. Being aggrieved with the ruling, the applicant is desirous of lodging an appeal but the time has since lapsed. She therefore prays that this application ought to be heard at the earliest opportune time to enable her file her memorandum and record of appeal. Moreover, the minor is scheduled to report to school on 15th March 2021 and thus the court ought to hear this application urgently so as not to disrupt the minor's schooling.
4. The applicant contends that she has an arguable appeal with a high chance of success and as such prays that the court allows her application.



The Respondent's Case

5. The respondent argues that the application ought to be dismissed as it lacks merit because the applicant has not applied for typed proceedings in the trial court notwithstanding the pandemic. Moreover, the respondent contends that despite covid 19 persisting, the applicant ought to have applied for typed proceedings and judgment online.
6. The respondent further states that he pays school fees for the minor and thus the issue of school re-opening is a none issue further that the minor's grandmother passed away on 5th September 2021. Moreover, prior to her passing on, the minor was not going to school as there was no one to look after her and thus the applicant removed her from school and that the minor does not attend school anymore. The respondent urges the court to allow him to take his daughter to a boarding school.
7. Parties hereby disposed of the application by way of written submissions.

The Applicant's Submissions

8. I have perused the applicant's submissions and note that she has made submissions on the intended appeal and not the application to file the appeal out of time.

The Respondent's Submissions

9. The respondent relied on his replying affidavit and submits that the application has no sufficient grounds to be sustained. The respondent then made submissions on the appeal itself reiterating that the minor's grandmother passed away and the child is suffering at the hands of the applicant.

Issues for determination

10. The main issue for determination herein is whether the court should exercise its discretion to grant the applicant leave to file her appeal out of time.

The Law

Whether the court should exercise its discretion to grant the applicant leave to file her appeal out of time;

11. 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.

12. 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.



13. 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.

14. Similarly in the case of *Paul Musili Wambua v Attorney General & 2 others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

15. The applicant said that she was unable to lodge her appeal on time because of the closure of the courts due to the covid 19 pandemic. I have perused the judgment of the trial court and note that the same was delivered in open court on 27th October 2020 in the presence of both the applicant and the respondent. I have also noted that the applicant did not annex any evidence that she applied for the typed proceedings or judgment. The applicant filed her draft memorandum of appeal on 26th April 2021, which was around 5 months after the statutory period for filing an appeal. It is also worth noting that during that time courts were easing their restrictions on the physical attendance of parties in court.
16. It is a matter of fact that courts did not close during the Covid period but scaled down their operations and at the same time ensured that essential services were rendered to the public. The scaling down of operations started in March 2020 and by October 2020 when the ruling was delivered, the operations had been upscaled to the extent that services including applying and supply of proceedings were being offered. The applicant in my view, did not require proceedings to file the appeal. She ought to have lodged the appeal through a memorandum of appeal and attached a copy of the ruling which it was her right to be supplied as a party. The applicant has not even annexed any correspondence to the Executive officer requesting for proceedings before filing this application.



17. However, it is noted that the physical custody of the minor was given to the respondent the father of the child and limited access to the maternal grandmother. The applicant is said to have re-married leaving her minor child with her mother. 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 in the judgment and the ruling. 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. The court may penalise her for the prolonged delay if it decides to exercise its discretion in her favour. This court must have regard to the best interest of the child in an application of this nature.
18. For the foregoing reasons, this application is allowed in the following terms:-
- a. That the applicant shall file her appeal within seven (7) days failure to which these orders will be vacated.
 - b. That the applicant will meet the costs of this application and costs will be in the cause.
19. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 28TH DAY OF APRIL, 2022.

F. MUCHEMI

JUDGE

