



REPUBLIC OF KENYA



KENYA LAW
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**NM v MWW (Civil Appeal E013 of 2022)
[2022] KEHC 16397 (KLR) (Family) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16397 (KLR)

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

**FAMILY
CIVIL APPEAL E013 OF 2022**

**MA ODERO, J
DECEMBER 16, 2022**

BETWEEN

NM APPELLANT

AND

MWW RESPONDENT

JUDGMENT

1. Before this court is the notice of motion application dated February 2, 2022 by which the applicant NM seeks the following orders:-
 - “1. Spent.
 2. That the court be pleased to grant leave for the applicant to file his appeal out of time against the ruling made by Hon Oluoch (Ms) on December 17, 2021.
 3. That the costs of this application be in the cause.”
2. The application was premised upon order 50 rule (6) and order 51 rule 1 of the *Civil Procedure Rules* cap 21 Laws of Kenya and all enabling provisions of the law and was supported by the affidavit of even date sworn by the applicant’s advocate, Oscar Avedi.
3. The respondent, MWW opposed the application through the replying affidavit dated June 3, 2022. The application was canvassed by way of written submissions. The applicant filed the written submissions dated June 16, 2022 whilst the respondent relied entirely on her replying affidavit.



Background

4. The genesis of this application is the ruling delivered on December 17, 2021 by Hon C C Oluoch Chief Magistrate in Nairobi Childrens Case No 1527 of 2018. The defendant (the appellant) filed an application dated September 28, 2021 seeking the following orders:-
 - (a) Spent.
 - (b) That the minor be transferred to a school agreeable between the plaintiff/applicant and the defendant/respondent pending the hearing and determination of the suit.
 - (c) That in the alternative, the plaintiff/respondent be compelled to pay school fees and school related expenses for the minor until such time when both parties shall agree upon a mutual school pending the hearing and determination of the suit.
5. The trial magistrate dismissed the defendant's application and ordered him to continue paying the minor's school fees at [Particulars Withheld] school. Being aggrieved by the said ruling, the applicant sought to file an appeal out of time.
6. The applicant's advocate avers that although the matter was not listed on December 17, 2021, he joined the court session virtually but experienced bad network connection. That he managed to connect later but there was no sound and as such the ruling was delivered in his absence.
7. The advocate states that it was only after the christmas vacation break, he was able to trace and peruse the court file on January 20, 2022. He stated that the ruling made reference to a different matter and/or contained facts unrelated to the matters in issue in the application. That the applicant was aggrieved by the said ruling and seeks to file an appeal out of time. He argued that the applicant has an arguable and meritorious appeal with a likelihood of success.
8. On her part, the respondent deponed that the applicant has not explained why he did not file the appeal on time. She argued that error referred by the applicant is minor and does not disturb the ruling as it is. She stated that the intended appeal is premature as the applicant has not observed the doctrine of exhaustion. Further, that the memorandum of appeal does not raise any arguable points of law or fact. She argued that the minor stands to suffer prejudice because of endless litigation which is likely to destabilise the minor's education. She urged the court to dismiss the instant application with costs.

Analysis And Determination

9. I have considered the application before this court, the affidavit in reply as well as the written submissions on record. The only issue for determination is whether the prayer for leave to appeal out of time is merited.
10. In deciding whether or not to grant extension of time the factors the court is required to consider are:-
 - The period of delay
 - The reason for the delay
 - The arguability of the appeal
 - What prejudice is likely to be suffered by the respondent if the extension of time is grant.
11. The applicant concedes that he failed to file an appeal within the time specified by law. The ruling was delivered on December 17, 2021. No action was taken by the applicant until 2nd February almost two (2) months after the ruling.



12. The applicant's advocate attributes to the delay due to the christmas vacation. He also states, that the ruling was delivered in their absence because of technical hitches. It is a fact that technology does have its own peculiar challenges. It is a fact that many a time parties are unable to see or hear each other clearly on the online platform. It is not entirely unfathomable that miscommunication may occur. Further the fact that no visitors were allowed access to the court registry during the covid-19 pandemic means that the applicant's advocate was not able visit the registry to confirm the contents of the ruling.
13. In the case of *Stanley Kaboro Mwangi & 2 others v Kanyamwi Trading Company Limited* [2015]eKLR the principle upon which a court may favourably exercise its discretion to grant leave to appeal out of time were stated as follows:

“The principles guiding the court on an application or extension of time premised upon rule 4 of the rules are well settled and there are several authorities on it. The principles are to the effect that the power of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the court that he is entitled to the discretion being exercised in his favour.

It is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the memorandum and record of appeal. The court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case *M/s Portreizt Maternity v James Karanga Kabia*, Civil Appeal no 63 of 1997 where the court stated:-

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised.” [own emphasis]

14. I find that the applicant has given a satisfactory explanation for the delay in filing an appeal the explanation is in my view reasonable, given the challenges often faced by parties in virtual hearings. I have also perused the memorandum of appeal dated February 2, 2022 and I am satisfied that there is an arguable appeal. I find that no prejudice will be visited upon the respondent if leave is granted as she will have ample opportunity to oppose said appeal.
15. I therefore allow prayer (2) of the notice of motion dated February 2, 2022. The appellant be and is hereby granted leave to file appeal out of time. The said appeal to be filed and served within thirty (30) days of the date of this ruling. The applicant will bear the costs for this application.

DATED IN NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

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MAUREEN A. ODERO

JUDGE

