



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 131 OF 2019**

**M.I.....APPELLANT**

**VERSUS**

**M.B.....RESPONDENT**

**RULING**

1. The respondent M.B. is a German citizen who works and lives in Dubai. The applicant M.I. is a Kenyan national who lives in Kilifi. She is not employed. The two met in 2012 and begun a relationship. On 1<sup>st</sup> December 2013 they got a son. The respondent filed a cause at the Children Court at Nairobi (**Cause No. 532 of 2018**) seeking legal and actual custody of the child, and the maintenance of the baby. The applicant counterclaimed seeking medical cover, maintenance of Kshs.250,000/= school fees of the child at an international school and general damages. The parties testified. On 27<sup>th</sup> September 2018 a judgment was delivered giving joint legal custody to the two. Physical custody during school days was given to the respondent and to the applicant during school holidays. This meant that the respondent goes with the child to Dubai where he lives, takes care of its education and related expenses, and makes sure he brings the child to the applicant during school holidays. During the school holidays, the applicant was ordered to be given Kshs.30,000/= by the respondent for the child's upkeep.

2. It would appear that the applicant has since refused to hand over the child to the respondent. This is despite several efforts and orders of the court. There is a warrant of arrest against her. There is no order staying the execution of the orders of the trial court. There is no appeal so far filed against the judgment.

3. The applicant has an unqualified obligation to obey the orders given against her, unless they are discharged, and/or reviewed. She has come to this court for the stay of the orders of the trial court. This entails the exercise of judicial discretion. A party who seeks the exercise of the court's discretion in his favour must demonstrate good faith, and his hands have to be clean.

4. The applications dated 14<sup>th</sup> November 2019, 7<sup>th</sup> November 2019 and 15<sup>th</sup> November 2019 refer. The firm of Musyoki Mogaka & Co. Advocates is allowed to come on record for the applicant. The stay of execution of the judgment delivered on 27<sup>th</sup> September 2018, an injunction to restrain the respondent from taking the child out of jurisdiction and the lifting of the warrant of arrest against the applicant are the substantive orders sought by the applicant. She seeks that these prayers be granted pending the hearing and determination of the intended appeal. The applicant has, however, not sought leave to appeal out of time. This is because under **section 79G** of the **Civil Procedure Act**, she was required to appeal within 30 days, but has not.

5. Under **Order 42 rule 6** of the **Civil Procedure Rules**, an order to stay the execution of decree or order can only be granted where there is a pending appeal. If there is no appeal, the court would not have jurisdiction to entertain the application regarding stay.

6. Assuming that the applicant has sought leave to appeal out of time, because there is filed a draft memorandum of appeal, there was no reason at all given why she did not file an appeal on time. Why did she delay for about one year before making the application? What difficulties did she face that stood in her way, now that she says she was aggrieved by the judgment that was delivered on 27<sup>th</sup> September 2018?

7. The power to grant leave to appeal out of time entails the exercise by the court of judicial discretion. The applicant has to place before the court sufficient material to persuade it that the discretion should be exercised in his favour (**Mwangi -v- Kenya Airways Ltd [2003]eKLR**). The court will consider the period of delay; the reason for the delay; the degree of prejudice which could be suffered by the respondent if the extension is granted; and whether such prejudice cannot be compensated by the award of costs. Further, the court would ensure that an applicant who genuinely seeks to appeal should not be locked out of exercising that right.

8. In the instant case, the period of delay is long and there was no explanation for the delay. It is noted that the applicant has been represented since the inception of this case over the child.

9. However, like was observed in the foregoing, there was no request for leave to file the appeal out of time. Even in the issues for determination in the written submissions by the applicant, the issue of leave to file the appeal out of time was not mentioned.

10. I find no merits in the application which I dismiss with costs.

DATED and DELIVERED at NAIROBI this 28<sup>TH</sup> day of NOVEMBER, 2019.

A.O. MUCHELULE

JUDGE