



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**FAMILY DIVISION**

**CIVIL APPEAL No. 18 of 2017**

**G M D alias S M D.....APPELLANT/APPLICANT**

**VERSUS**

**S A M.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 12.6.17, the Appellant/Applicant seeks in the main orders that:

**1. Spent.**

**2. THAT the Honorable Court may be pleased to grant the Applicant leave to Appeal against the decree and Judgment delivered on the Judgment dated 17<sup>th</sup> November 2016 and then his review Ruling delivered on the 17<sup>th</sup> February 2017 over the children's custody and maintenance's by Mohamed S Mwambele (KADHI) In Civil Case No 179 OF 2016, out of time accompanied with the filled memorandum of Appeal and a notice of motion dated on the 18<sup>th</sup> May 2017**

**3. THAT custody order is made vesting the legal custody of the said issues upon the Appellant, the Respondent does make adequate contributions towards present or future educational and medical expenses incurred in respect of the said children as and when the same may arise.**

**4. THAT the Respondent do pay to the Appellant the Sum of Ksh 30,000/= per month through the Appellant as interim maintenance payable before the 5<sup>th</sup> day of every month in respect of the issue of the relationship between the Appellant and Respondent namely**

**5. THAT the Honorable Court may be pleased to issue an order for the Appellant to collect her items and/or properties out of the Respondent house and the OCPD Kisauni, Administration Police Kisauni Sub County, OCS Bamburi Police Station to I maintain laws and orders.**

**6. THAT the Honorable Court may be pleased to summon the two F S and S S on the same date and day**

2. The Application is premised on the grounds set out therein and in the affidavit of the Appellant/Applicant sworn on 12.6.17.

3. The brief background of this matter is that the parties herein were married under Islamic law on 17.9.07 at Mombasa and are blessed with 3 children, all minors. The Appellant/Applicant KCC No. 179 of 2016 seeking dissolution of the marriage, eddah maintenance, dowry payment release of her personal belongings and costs. By a judgement of the Hon. Kadhi dated 17.11.16, the Hon. Kadhi ordered that the Respondent pays school fees and provides clothing, food, medication and monthly maintenance of Kshs. 2,000/= for the children. Custody of the children was granted to the Appellant/Applicant with unlimited access to the Respondent. It was a condition that the children attend madrassa and not attend church and in default custody would be granted to the Respondent.

4. By an application dated 22.11.16, the Respondent sought stay of execution and review of the judgement. In his Ruling of 17.2.17, the Hon Kadhi vacated the order of custody and granted custody of the older children F and S to the Respondent. The custody of the youngest child was granted to the Appellant/Applicant. Both parties were granted unlimited access to the children. The monthly maintenance was reviewed downwards to Kshs. 1,000/=. The Appellant/Applicant being aggrieved by the Ruling and Judgement of the Hon. Kadhi preferred this Appeal albeit out of time. She therefore seeks that the Appeal be admitted though filed out of time.

5. The parties herein are unrepresented. Their pleadings are rudimentary focusing on the issues raised in the Memorandum of Appeal filed herein and not the present application. Nevertheless the Court has considered the Application with a view to making orders that will meet the ends of justice herein.

6. Prayers 3 and 4 are the subject of the Appeal herein and this Court cannot delve into them.

7. At the hearing of the Application, the Appellant/Applicant stated that she was not in Court when the ruling of the Hon. Kadhi was delivered. When she went to inquire about the case, she found that the ruling was delivered without her knowledge. She prayed that the Appeal be allowed even if she filed it late. The Respondent opposed the Application. He claimed that the Appellant/Applicant was notifying of the Ruling but she failed to attend Court. She later went to the Court and got the ruling after 1 week. She therefore had ample time to file the appeal within time.

8. On prayer 5, the Appellant/Applicant averred in her affidavit that the Respondent allow her to collect her items and documents but that the Respondent refused to obey the Court order. She further averred that her information is that the Respondent has married another wife thus making it difficult for the Appellant/Applicant to collect her items and documents. In his response, the Respondent averred that the Appellant/Applicant was given 2 weeks by the Hon. Kadhi to collect whatever she was claiming. Upon her request, the Respondent delivered to the Appellant/Applicant's mother's house where she was staying, the items including bed, sofa, tv, dining table, curtains, utensils and her clothing. She admitted before the Kadhi that she got the items. That this Court directed her to collect her documents from the Respondent's house but she failed to do so. The Appellant/Applicant has told the Court severally that her documents are in the Respondent's house and she is unable to get employment without them. This Court gives her the benefit of doubt.

9. On prayer 6, the Appellant/Applicant did not provide any reasons why she would want the Court to summon the 2 children F S and S S. The same is therefore declined.

10. The Civil Procedure Act at Section 79G provides that:

***“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.”***

11. The Ruling that is sought to be appealed against was delivered on 17.2.17. The Appeal was filed on 18.5.17 about 3 months after the said ruling was delivered while the Application for leave to appeal out of time was filed on 12.6.17 almost 4 months after delivery of the Ruling. The reason given is that the Ruling was delivered in the Appellant/Applicant's absence. This is not denied by the Respondent although he says she got the Ruling a week after delivery. I have considered that the Appellant/Applicant is unrepresented and further that a delay of 3-4 months is not inordinate in the circumstances. An order for extension of time for filing an appeal is discretionary. The Court is persuaded to exercise its discretion in favour of the Appellant/Applicant.

12. In light of the foregoing, I do make the following orders:

- i) The Application dated 12.6.17 is allowed.
- ii) The Appellant/Applicant is granted 30 days within which to file the record of appeal and in default the leave herein granted shall lapse.
- iii) The OCS Bamburi Police station is directed to escort the Appellant/Applicant to the Respondent's house to collect all her belongings including personal effects and documents and to ensure law and order is maintained.
- iv) Mention on 7.3.18 to confirm compliance.
- v) Each party to bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 26<sup>th</sup> day of January, 2018**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Appellant/Applicant**

.....**for the Respondent**

.....Court Assistant