



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BOMET**

**HIGH COURT MISCELLANEOUS APPLICATION NO. 30 OF 2015**

**L R & M C (Suing as the father, mother and next friend of  
A C)-----APPLICANTS**

**VERSUS**

**C K-----RESPONDENT**

**RULING**

1. The Notice of Motion dated 26<sup>th</sup> June 2015 and filed on 1<sup>st</sup> July 2015 seeks leave for the Applicants to file appeal against a Ruling by Hon. G. Kiage on 17<sup>th</sup> September 2014 out of time.
  2. Its supported by the grounds on the face of the application among them is the fact that an application to set aside the Ruling before another Magistrate Hon. P Achieng was declined.
  3. The Application is supported by an affidavit by Mr. Kirwa advocate for the Applicant who has given the background to this matter.
  4. The bottom line is that the Applicants had filed a Children's matter No. 39 /2014 at Bomet Senior Resident Magistrate's Court, which was never heard but final orders have been made.
- The matter involves a minor whom the Applicants claim is their child.
5. The Respondent who says she is barren says she was given this child at the nursery at Tenwek Hospital.
  6. Upon the request of the parties when they appeared before the Learned Trial Magistrate on 26<sup>th</sup> June 2014 the Court made an Order that a DNA Test be carried out to determine paternity.
  7. The necessary samples were taken and on 17<sup>th</sup> September 2014 the police officer P.C Ombeta who was facilitating the process of the DNA presented the results to the Court.
  8. The results showed that the Applicants were excluded as the biological parents of the minor.
  9. Upon the receipt of these results the Learned Trial Magistrate immediately dismissed the Applicants' suit with costs.

He further ordered that the child the subject of the suit be restored back to the Respondent.

10. It is this order by the Learned Trial Magistrate that has aggrieved the Applicants who wish to appeal against it.

11. The Respondent filed a Replying Affidavit opposing the application. She says the DNA results conclusively determined the case and there was nothing more to be heard.

12. Mr. Kirwa explained the reason for the delay in filing an appeal as the Ruling to their application dated 19<sup>th</sup> September 2014 which was delivered on 11<sup>th</sup> June 2015. He filed this application on 26<sup>th</sup> June 2015.

He informed the Court that the suit was never heard and no defence had even been filed.

He urged the Court to allow the application as the Applicants' had an arguable appeal. He cited the case of ***John Gakobo Macharia Vs. KPLC*** Misc. No.654/08 (NRB) where Justice Ringera Ag. J.A ( as he then was) laid the conditions for issuance of such orders.

13. Mr. Kenduiywa for the Respondent opposed the application submitting that through the application dated 24<sup>th</sup> June 2014 the suit was heard and determined. Further he submitted that the Applicants did not have an arguable appeal. Maybe for correction of the record the above quoted case was decided by Justice H. Okwengu (as she then was) and not Justice Ringera Ag. J.A (as he then was).

14. Granting leave to appeal out of time is a discretion of the Court.

***Section 79 G. of Civil Procedure Act 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”.*

15. In the case of ***Bagajo Vs. Christian Children Fund inc*** (2004) 2KLR 73 Justice Ringera Ag. J.A (as he then was) gave the following guidelines with regard to the exercise of such discretion:-

*(a) The length of the delay in lodging the notice and record of appeal;*

*(b) Where applicable, the delay in lodging the application for extension of time, as well as the explanation thereof;*

*(c) Whether or not the intended appeal is arguable;*

*(d) The prejudice to the respondent if the application is granted;*

*(e) The public importance, if any, of the matter; and*

*(f) Generally the requirements of the interest of justice in the case.*

17. It is true from a reading of the record from the lower Court that the Respondent had not filed a defence in the Children's suit.

18. The record also shows that the matter came on 17<sup>th</sup> September 2014 to confirm whether the DNA results were ready or not. It was not a hearing.

19. It is also true that on 17<sup>th</sup> September 2014 it is only the Respondent who was present in Court. Neither the Applicants nor their counsel were present.

20. The Court received the results, read them and dismissed the suit. Its not clear whether these results were at any point made known to the Applicants and Respondent before they were presented to the Court.

21. The dismissal orders were made on 17<sup>th</sup> September 2014. The Applicants filed the application for review on 19<sup>th</sup> September 2014. The Ruling for the said application was delivered on 11<sup>th</sup> June 2015. The present application was filed on 26<sup>th</sup> June 2015. In all fairness there was no inordinate delay by the Applicants in pursuing this matter.

22. I have seen a draft of the Memorandum of appeal and the issues raised touch on the manner in which the Learned Trial Magistrate handled the Children's suit and the DNA results.

*i. Was the DNA result the final determiner of the issues in the Children's suit or was it part of the evidence to be adduced in the said suit?*

*ii. Were the parties entitled to know of the results of the DNA before any pronouncement by the Court on the same.*

23. I am persuaded that the issues being raised by the Applicants are quite noble and they should be given an opportunity to argue them.

I therefore allow the application, and grant the Applicants leave to file appeal out of time.

24. The Memorandum of appeal should be filed within 21 days from today's date.

**Dated, Signed and Delivered in Open Court this 28<sup>th</sup> day of September 2015.**

**H.I.ONG'UDI**

**JUDGE.**