



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**CIVIL APPEAL NO.60 OF 2015**

**S W O.....APPLICANT**

**VERSUS**

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

**RULING**

1. The applicant through his Notice of Motion dated 25<sup>th</sup> June 2015 filed under certificate of urgency sought orders for enlargement of time to file an appeal against the ruling and orders delivered by the Children's Court on 10<sup>th</sup> April 2015 in Children's Case No. 1249 of 2015. In the ruling the Children's court imposed parental responsibility on the applicant over a minor who is not biologically his. Being aggrieved by the said ruling the applicant intends to file an appeal.
2. It is the applicant's case that after the delivery of the ruling by the lower court his advocates moved with speed to obtain a certified copy of the ruling but the same was only availed on 20<sup>th</sup> May 2015 through no fault on the part of his advocate. Further, that the applicant is yet to receive typed proceedings despite applying for the same. The applicant states that it would be unfair and unjust if he were to be penalized because the machinery of justice was impaired in facilitating access to the certified ruling; that parties herein stand to suffer irreparable emotional, psychological and financial loss unless the time to appeal is enlarged to enable the real issues to be addressed on appeal; and finally, that it is in the best interests of the child and in the interests of justice that this court enlarges the time to file an appeal as the chances of success are high.
3. The respondent in her replying affidavit dated 17<sup>th</sup> September 2015 opposed the application stating that no certificate of delay has been filed to authenticate the allegation of delay on the part of the court registry. Secondly, that the applicant has failed to attach a draft memorandum of appeal for the court's consideration. She further stated that the ruling/orders that the applicant seeks to challenge are already being executed and as such he cannot be appealing against them as the intended appeal is already overtaken by events.
4. **Section 79G of the Civil Procedure Act** sets out the time within which an appeal from an order or a decree from a subordinate court can be made. It 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.”**

Further, **Order 50 rule 6** empowers the court to enlarge time. It provides that;

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”**

5. The decision to grant or not to grant extension of time to file an appeal is discretionary. Such discretion is exercised judicially with justice of the case being the primary consideration. Each case depends on its merits. The applicant has to show that the delay is not inordinate and has to give plausible explanation to the satisfaction of the court why it occurred. He has to show what steps he took to ensure he came to court as soon as was reasonably practicable. (**Aviation Cargo Support Limited –v- St. Mark Freight Services Limited [2014]eKLR**). The court will consider the effect which the failure to comply had on each party, and the effect which the granting of the relief would have on the respondent (**Nicholas Kiptoo Arap Korir Salat –v- IEBC & 7 Others [2014]eKLR**).
6. The ruling that the applicant sought to challenge was delivered on 10<sup>th</sup> April 2015. The application was filed on 25<sup>th</sup> June 2015. The delay was just over two months. On 13<sup>th</sup> April 2015, two days after the ruling, the applicant’s advocate applied for certified copy of the ruling and proceedings. On 7<sup>th</sup> May 2015 counsel wrote to the registry complaining about the failure on the part of the court to avail the ruling and proceedings. She was saying that the registry was frustrating her client’s efforts to seek review and/or appeal the decision. It is only on 20<sup>th</sup> May 2015 that a copy of the ruling was availed. By this time, he could not file the appeal without the extension of time.
7. The respondent opposed the application on the basis that the applicant had not complied with the orders he sought to appeal against. She stated that he had not filed certificate of delay to show that the registry had delayed him in the processing of the ruling and proceedings. She complained that he had not attached a Draft Memorandum of Appeal, and stated that the application was an abuse of the process of the court. The applicant filed a further affidavit to deny that he was in any contempt. He stated that he had filed a Draft Memorandum of Appeal. Regarding the certificate of delay, his case was that the same was only required at the filing of the appeal.
8. I note that the applicant annexed a Draft Memorandum of Appeal to the application, and therefore it is clear on what grounds he seeks to challenge the ruling. The matter is not frivolous. This is a case where the minor in question has a putative father whereas the court found that the applicant has parental responsibility over it. Secondly, it is clear that the applicant applied for certified copy of ruling and proceedings and that by the time he was given by the registry the time for appeal had passed. The correspondence bears him out. There was no need for a certificate of delay in the matter. Thirdly, the applicant seeks to exercise his right of appeal. This is statutory and constitutional right. Fourthly, the respondent has not indicated how she will suffer, or be prejudiced, by the applicant being allowed extension of time to appeal. If there is any inconvenience or prejudice, costs should be able to deal with the situation.
9. I am satisfied that the delay in this case was not inordinate and the applicant has satisfactorily explained what led to the delay. He was not the guilty party as far as the delay was concerned. I find that the justice of the matter requires that the application be allowed. I extend time by 14 days to get the applicant to file appeal against the ruling of the lower court. The costs of the application shall be paid to the respondent.

**DATED and DELIVERED at NAIROBI this 24<sup>th</sup> day of November 2015**

**A.O. MUCHELULE**

**JUDGE**