



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**CA NO.17 OF 2009**

*(Appeal arising from BGM CM CH. NO.17 OF 2008)*

**BONVENTURE FREDRICK**

**CHANGALWA .....APPELLANT**

**~VRS~**

**R.M.C & E.K (suing thro' V.K as guardian ad  
litem) .....RESPONDENT**

**RULING**

The Applicant Bonventure Fredrick Changalwa in his application dated 09/10/2009 seeks for leave to appeal against the ruling of Bungoma Resident Magistrate made on 21/01/2009. Upon granting the said order, the Applicant prays that this appeal be deemed as properly filed.

The facts leading to the application are that the Applicant was the Defendant in Bungoma Children's Case No.17 of 2008. A preliminary objection was heard by Resident Magistrate Ms P. Achieng and dismissed. The Applicant challenges the ruling of the court in this intended appeal. An application for leave to appeal against the ruling was dismissed by the court. It is the Applicant's contention that the magistrate erred in rejecting the preliminary objection and subsequently dismissed the application for leave to appeal against the court's ruling.

The application is opposed on grounds that the Applicant is guilty of laches and that this appeal is incompetent. Further that the application is an abuse of the due process of the court. It was argued that filing an appeal before leave was obtained is unprocedural.

On the issue of laches, I note from the record that the preliminary objection was dismissed by the Resident Magistrate on 21/01/2009. Leave to appeal against the ruling dismissing the objection was

refused on the 23/09/09. The Applicant filed this appeal on 18/02/2009. The application for leave to appeal against the ruling was filed in the Resident Magistrate's Court on 03/02/2009. After it was refused on 21/09/2009, the application before me was filed on 09/10/2009 which was only 18 days after the court's ruling. From the chronology of events marked by the above given dates, I find that the Applicant is not guilty of laches as alleged. This application was filed without delay.

The Resident Magistrate refused the Applicant leave to appeal against the ruling on grounds that the appeal had already been filed at the time the application was heard. The procedure is that leave to appeal ought to be obtained before the appeal is filed. It is unprocedural to put the cart before the horse. The question which arises is whether, the failure to follow the procedure is fatal to this application and to the appeal.

The Applicant referred this court to **MILIMANI HCC CIVIL MISC. APPLICATION NO.753 OF 2004. AHMEDNASIR & CO. –VRS- NATIONAL BANK OF KENYA LTD** where the Applicant lodged a notice of appeal before obtaining leave to appeal. Later he filed an application for leave under Order XLII Rule 1 (2), (3) and (4) of the Civil Procedure Rules. The court held that it was not necessary to obtain leave before lodging the notice. The application for leave to appeal was allowed.

In the second case of **JOSEPH K. MARIGI –VRS- ANNE KADENGE NAIROBI HCCC NO.107 OF 2005** the Applicant had sought leave to appeal against the ruling of the magistrate in the lower court which was refused. The High Court held that it was procedural to move to the High Court for similar orders.

These are the circumstances of the application before me. However what is controversial is whether the application can be entertained after the appeal has already been filed. Should this court dismiss this application, the Applicant may have result to other legal Avenues which will be time consuming. Being a children's matter, expeditions disposal of the case is of utmost importance. Delay may result to hardship on part of the children whose rights of provision depend on the outcome of the case. It is necessary that the contentious issue of jurisdiction of the court be tackled. I refer to section 3 of the Civil Procedure Rules which provides that the court must have regard to the overriding objection of the suit as opposed to technicalities or procedural issues. The spirit of the section is that the main suit or appeal should be heard and determined expeditiously instead of wasting time on preliminary issues and numerous applications. In the application before me, the Applicant has a right of appeal with leave. The appeal has already been filed, unprocedurally though. If the appeal is struck out, the parties will go back to square one and it will be expensive for them in way of costs and time.

Based on all the above considerations, I hereby allow the application as prayed. The leave to appeal against the ruling of the Resident Magistrate of 21/09/2009 is hereby granted. This appeal is hereby deemed filed. The costs of this application to be in the cause.

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**F. N. MUCHEMI**

**JUDGE**

Ruling dated and delivered on the 10<sup>th</sup> day of March, 2011 in the presence of Mr. Situma for Mr. Kiarie for the Applicant and Mr. Murunga for the Respondent.

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**F. N. MUCHEMI**

**JUDGE**