



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Appli 50 of 2006**

**MOSES MBUGUA MBURU .....APPLICANT**

**VERSUS**

**MARY WANGU MAINA .....RESPONDENT**

**RULING**

By notice of motion dated 11.09.06 and filed on 12.09.05 stated to be brought under Sections 79 G and 3 A of the Civil Procedure Act, Cap. 21 and Order L rule 1 of the Civil Procedure Rules, the applicant applied for the following orders:

1. THAT the Court be pleased to admit the applicant's appeal out of time as upon receipt of the Court documents the applicant has not delayed in making the present application and/or filing the appeal.
2. THAT the costs of this application be provided for.

The grounds upon which the application is based are:-

- a) There is no unreasonable delay in making the application.
- b) The applicant's appeal has merit in that the learned trial Senior Resident Magistrate awarded excessive maintenance to the child.

The application is supported by the affidavit of Geoffrey Kamonde, Advocate for the applicant.

At the hearing of the notice of motion application, the applicant was represented by learned counsel, Mr. P.M. Kirori who held brief for Mr. G. Kamonde. The respondent was represented by learned counsel, Miss L. A. Machio.

Applicant's counsel submitted in essence that there was no unreasonable and inordinate delay in filing the application. The chronology of events may be summarized thus: Judgment by the trial Court in Nairobi children's Court Case No. 286 of 2004, Mary Wangu Magua vs Moses Mbugua Mburu was delivered on 30.01.06. Mr Kamande who acted for the defendant Mr Mburu in the lower court applied for uncertified copy of proceedings and certified copy of judgment on 3.02.06. Apparently there was delay in the proceedings and judgment being supplied. A certificate of delay was received by the present applicant's counsel on 4.08.06, i.e. about 7 months after application therefor. Mr. Kamonde who acted for the defendant Mburu in the lower Court is reported to have proceeded on leave on 27.07.06 and returned on 28.08.06. He filed the present notice of motion on 12.09.06, i.e. some 14 days after his return from

leave. He filed a draft Memorandum of Appeal concurrently with the notice of motion. The proposed grounds of appeal are:-

1. THAT the learned trial Magistrate erred and misdirected herself in awarding excessive maintenance against the appellant to the child.
2. THAT the learned trial Magistrate erred in law in rejecting the appellant's plea that the child should be educated in normal government schools.

Applicant's counsel pointed out that the child in question is around 6 years; that there is free primary education in public schools; and that the award of Kshs.8,000/= per month awarded against the applicant herein is excessive, having regard to his earnings.

Applicant's counsel submitted that if he is deemed to have erred by waiting for the trial Court's proceedings and judgment, his error as counsel should not be visited on the client. It is his case that the applicant's appeal against quantum for the award has merit and that the applicant should be given a chance for his appeal to go to trial.

On the other hand, respondent's counsel strenuously opposed the application. The respondent's case is basically that proceedings which the applicant's counsel said he was waiting for before filing appeal are not required for purposes of filing the appeal and that the delay in filing the intended appeal is excessive and an abuse of the Court process. Counsel for the Respondent to the present application pointed out that there was no disclosure when the trial Court delivered judgment on 30.01.06 of any intention of appeal. Also that when counsel for the applicant herein applied in writing for proceedings and judgment on 1.02.06, there was no indication for the purpose for which the proceedings and judgment were required. Respondents counsel added that counsel for applicant herein also acted for him in the lower Court and suggested that this obviated the need to have to wait for proceedings and judgment. Respondent's counsel submitted that applicant's counsel erred in waiting for proceedings and judgment which were unnecessary for purposes of filing appeal and that if the applicant is aggrieved by his counsel's error, he has the right of suit against him for professional misconduct. Respondent's counsel maintained that the intended appeal has no merit and that if the applicant considers the award of Kshs.8,000/= per month excessive, there are avenues under the Children Act, 2001 for review of the award which could have been resorted to but were not. In respondent's counsel's view, if the application is granted, the child will be prejudiced. Accordingly, respondent's counsel urged dismissal of the present application with costs.

In reply, applicant's counsel submitted that it is only after getting proceedings and judgment that he could prepare the record and grounds of appeal and that if the date of 4.08.06 when the certificate of delay was received is taken into account, the delay is not inordinate.

I have given due consideration to the rival arguments of the parties.

It was open to the applicant's counsel to rely on his notes of what transpired during the trial in the lower court for purposes of lodging a Memorandum and grounds of the intended appeal. The disadvantage in that approach is that the applicant would be proceeding on the basis of an unofficial record. His counsel opted to wait for the official record, which he applied for 3.02.06 but he did not pay for it until 7.02.06. The trial Court's judgment was delivered on 30.01.06. The gap there was about 7 days. That is not necessarily an inordinate delay. The Court record shows that the proceedings were certified on 31.07.06, ready for collection upon payment of Kshs.1,020/=, being the balance towards copying charges and that the said proceedings were collected by the applicant on 4.08.06. The certificate of delay dated 04.08.06 acknowledges that the delay was caused by pressure of work in the typing pool.

The applicant complains that the award of Kshs.8,000/= per month is excessive, having regard to his earning capacity.

I note from the lower court proceedings that the plaintiff there who is the respondent in the present application put the present applicant's earnings as Kshs.47,175/= per month. However, when his turn

came to testify, the applicant herein put his earnings as Kshs21,455/= and apparently produced a payslip to support that. The award made against him was that he remits a monthly maintenance allowance of Kshs.8,000/= for the child's maintenance with effect from 1.02.06 and that he also pays school fees for the child and all school related expenses.

He was also ordered to pay the costs of the suit. The applicant herein contends that paying Kshs.8,000/= monthly plus the child's school fees and all school related expenses monthly out of Kshs.21,455/= is excessive, hence his intended appeal.

Counsel for the respondent herein maintains that he could have applied for review of the award under the Children Act, 2001. While that may be so, I think it was also open to him to seek to challenge the award by way of appeal, which he seeks to do.

Respondent's counsel also submitted that if the present application, for the applicant to file appeal out of time is granted, the child will be prejudiced. In my respectful view that does not follow. Allowing the present application would merely enable the applicant to lodge his appeal out of time. Whether it will succeed or not is a different matter.

I am of the view that in the circumstances of this case, the delay in filing appeal is excusable and that the applicant is entitled to be heard on his complaint that the ward against him is excessive. The complaint is not frivolous as maintained by respondent and deserves to be considered on merit.

Accordingly, I make the following orders:-

1. The notice of motion application dated 11.09.06 is allowed and prayer 1 thereof granted, upon payment of necessary fees.
2. Costs shall be in the cause.

Delivered at Nairobi this 28<sup>th</sup> day of March, 2007

**B.P. KUBO**

JUDGE