



REPUBLIC OF KENYA



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**SYO v MMK (Family Miscellaneous Application E002 of 2025)
[2025] KEHC 13117 (KLR) (17 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13117 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
FAMILY MISCELLANEOUS APPLICATION E002 OF 2025**

JN NJAGI, J

SEPTEMBER 17, 2025

BETWEEN

SYO APPLICANT

AND

MMK RESPONDENT

RULING

1. The Applicant herein has filed an application dated 6th May 2025 seeking for the following orders:
 1. Spent
 2. That there be stay of proceedings and/or further proceedings in MCHCCE001 of 2023 at Hola Senior Principal Magistrate's Court pending the hearing and determination of this application inter parties.
 3. That this Honourable court be pleased to review, vary and/or vacate orders by setting aside and/or staying interim orders made on 25th March, 2025 in MCHCCE001 of 2023 made in favour of the Respondent against the Applicant.
 4. That the Applicant, the Respondent do submit to (DNA Test) to determine paternity.
 5. That the DNA test be ordered at American or British Embassy at a date to be agreed upon by the parties herein in any event within 14 days of this order.
 6. That leave be granted to the Applicant to appeal out of time against the interim orders issued in the Lower Court on 25th March 2025.
 7. That costs of this application be in the cause in any event.
2. The application is based on the grounds stated on the face of the application and supported by the affidavit of the Applicant sworn on the 6th May 2025.



3. The grounds in support of the application are that the lower court made an order for a DNA to be conducted to determine the paternity of the minor who is the subject of this application. That after attempts to conduct the same failed, the court ordered that the DNA sampling be conducted by the government pathologist at the court premises. It was further ordered that the parties were at liberty to avail their own pathologists. That on the date appointed for the sampling, the government pathologist did not turn up but his private pathologist was present and he took samples from the Applicant and the minor. That on 3rd March the government pathologist turned up in court and took samples from the Applicant, the Respondent and the minor. That the matter came up in court for mention on 25th March 2025 for the government pathologist to present her report. That the government pathologist did not turn but the court went out to read the results from the Applicant's private pathologist that indicated that he was the father to the minor. That without the court waiting for the report from the government pathologist, the court went ahead to issue some interim orders that the Applicant do meet the schooling, medical and clothing needs of the minor pending hearing and determination of the matter. The court further made an order for the Applicant to supply a copy of his identity card to the respondent to facilitate registration of the minor to acquire his birth certificate for schooling purposes.
4. The Applicant states that the Respondent is threatening to execute against the Applicant yet the report of the court appointed pathologist is not yet out. Further that on the day his private pathologist was collecting samples from them, he exchanged his mobile phone number with the court's assistant to share a certain document implying that his contacts were no longer private. That he has as a result lost confidence in the report the government pathologist is going to furnish to the court and neither does he believe in his private pathologist's report since his mobile phone number was exposed during sampling at court. He now prays for orders that a fresh DNA test be conducted at a neutral facility such as the American or British Embassies.
5. The Applicant further states that the delay in filing the appeal was occasioned by the fact that he sought for certified copy of proceedings from the trial court which to date have not been supplied to him. That it is in the interest of justice that the prayers sought herein be allowed. That in the event that the orders made by the lower court are executed against him, he stands to suffer great prejudice and/ or irreparable damage.
6. The application was opposed by the Respondent vide her Replying affidavit sworn on 9th June 2025 in which she states that the report of the Applicant's pathologist was read in court on 25th March 2025 that indicated that the Applicant was the biological father of the minor herein. That the court proceeded to make the orders referred to above. That on 13/5/25, the trial court read the report of the government pathologist which also found the Applicant the father to the minor.
7. The Respondent asserts that parties were given an opportunity to bring their pathologists of their choice during DNA sampling. That there is no reason why the Applicant did not employ the services of the British or American Embassies at that time. Therefore, that the application herein is a delaying tactic to prevent the matter being heard to its conclusion. The Respondent annexed to her Replying Affidavit both reports from the Applicant's pathologist and that of the government pathologist, marked "MMK 1" and "MMK 2" respectively. The Respondent urged the court to dismiss the application.
8. The application was canvassed by way of written submissions of the counsels appearing for the respective parties.



Applicant's Submissions

9. The Applicant submitted that the court has unfettered discretion under section 80 of the Civil Procedure Act and under 45 Rule 1 of the Civil Procedure Rules to make review orders. Reliance was placed in the case of Republic v Advocates Disciplinary Tribunal Ex parte Appollo Mboya (2019) eKLR High Court of Kenya Judicial Review Division Misc. Application No.317 of 2018 where Mativo J. (as he then was) stated as follows:

Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

10. Also cited was the case of Tokeni Mambili and others v Simion Litsanga (2004) KLR where the court stated that:

In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

11. The Applicant contends that they have identified errors apparent on the face of the record that warrant review, being varied, vacated and /or being set aside and or staying interim orders made on 25th March 2025. That if the said errors are not corrected and a fresh DNA test ordered to be taken at a neutral facility, the Applicant shall suffer substantial damage and/or loss and miscarriage of justice.

12. The Applicant submitted that it is the constitutional right of the minor herein under Article 53 (1) (e) of the Constitution that a DNA test be conducted in a neutral place as there is no other way of determining who the father is.

13. On whether leave should be granted to file the appeal out of time, the Applicant submitted that the test as laid out under section 79G of the Civil Procedure Act is whether the applicant has satisfied the court that he has good and sufficient cause for filing the appeal out of time. The case of Diplack Kenya Limited v William Muthama Kitonyi (2018) KLR was cited in this respect. Further reliance was placed in the case of Paul Musili Wambua v Attorney General & 2 others (2015) KLR where the court stated that:

It is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.



Respondent's submissions

14. The Respondent submitted that the trial court made an order for a DNA to be conducted. That parties were directed to avail pathologists of their choice. That the report of the Applicant's own pathologist indicated that he is the father to the minor. That the Applicant had all the right to take the samples to the British or American Embassies. That the prayer being sought now is an afterthought and a delaying tactic meant to deny the minor his rights.
15. It was submitted that the Article 53(2) provides that "a child's best interests are of paramount importance in every matter concerning the child." That the application should be dismissed in view of the fact that DNA results from two pathologists have proved that the Applicant is the father to the subject minor.

Analysis and determination

16. I have considered the grounds in support of the application, the pleadings and the submissions.
16. The application is made pursuant to the provisions of Order 45 Rule 1 and 2 of the Civil Procedure Rules, Sections 1A, 1B and 3a of the *Civil Procedure Act*, Sections 4(2) and 3, 6(1) and (2) of the *Children Act* and Articles 53(2) and Articles 165(6) of *the Constitution* of Kenya 2010. The issues for determination are:
 - (1) Whether the application for review is merited.
 - (2) Whether the court should order stay of proceedings at the lower court and fresh DNA testing to be conducted.
 - (3) Whether the application to file appeal out of time is merited.

Application for review

17. Applications for review are provided for under Section 80 of the *Civil Procedure Act* and Order 45 Rules 1 and 2 of the Civil Procedure Rules, 2010. Section 80 of the *Civil Procedure Act*, 2010 confers the courts with unfettered discretion to review their orders. The section provides as follows:

Any person who considers himself aggrieved: -

 - a. By a Decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgement to Court which passed the decree or made the Order and the Court may make such order thereto.
18. An applicant for review must first show that no appeal has been preferred against the order sought to be reviewed or that no appeal is allowed in the circumstances of the matter sought to be reviewed. In this case the Applicant has filed an application for review and at the same time seeks to file an appeal. A party cannot file a review application and an appeal at the same time. The review application is therefore legally untenable.
19. That notwithstanding an application for review must meet the threshold stipulated under Order 45 rule 1 of the Civil Procedure Rules, 2010 which provides that a review application can only be ordered if the following grounds exist: -



- a. There must be discovery of a new and important matter of evidence which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
 - b. There was a mistake or error apparent on the face of the record;
 - c. There were other sufficient reasons; and
 - d. The application must have been made without undue delay.
20. An applicant under Order 45 must prove the above ingredients before the court can exercise its unfettered discretion to grant the orders. In *Asset Recovery v Charity Wangui Gethi and 3 Others* (2020) eKLR, the Court of Appeal had this to say: -

“In an application for review, as envisaged under Order 45 of the Civil Procedure Rules, the grounds which ought to be established are conclusive. An applicant must establish: that there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or made; that there has been a mistake or error apparent on the face of the record or: any “other sufficient reason”. The ground “other sufficient reason” has been held to be consonant with the first two grounds: See *Kuria v Shah* [1990] KLR. Additionally, the applicant must exhibit that he acted expeditiously.”

21. In the case of *Mohamed Fugicha v Methodist Church in Kenya (Through its registered trustees) & 3 others* [2020] eKLR it was held that:

The process of review was not intended to give the party an opportunity to appeal, and where review is sought, the party has to demonstrate to the satisfaction of the Court, how if at all, it erred in the exercise of its discretion.

22. The Applicant submitted that there are errors apparent on the face of the record of the lower court that warrant review. Though the Applicant did not come out clearly as to what these errors were, he alluded that the trial court made errors in making interim orders in the matter before the report of the government pathologist was released.

23. In the case of *Muyodi v Industrial and Commercial Development Corporation and Another* EALR (2006) EA 243, the Court of Appeal while dealing with an issue of review described an error apparent on the face of record as follows:

“In *Nyamogo & Nyamogo -vs- Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”



24. In my view, the fact of the court reading the report of the Applicant's pathologist before the report of the government pathologist was presented does not amount to an error apparent on the face of the record. Similarly, the order made by the trial court for the Applicant to provide for the school, medical and clothing needs of the minor pending the hearing of the case does not amount to an error of law apparent on the face of the record. I have noted from the replying affidavit of the Respondent that the report of the government pathologist was subsequently presented before the trial court after the Applicant filed this application. I have also noted that the order for the Applicant to meet the afore said needs of the minor was made in the interim pending the hearing and determination of the matter by the trial court. I do not see any error apparent on the face of the record in that order and if there are any, they cannot be described as self-evident as to warrant review by this court.
25. The order made by the trial court for the Applicant to supply a copy of his identity card to the Respondent to enable the Respondent apply for the minor's birth certificate was made after a report of the Applicant's pathologist was received in court. I do not see any error apparent on the face of the record in the order, considering that the report of the government pathologist also found the Applicant as the father to the minor. I thereby do not find any merit in the review application.

Stay of proceedings and fresh DNA testing

26. The Applicant was seeking for stay of proceedings of the lower court pending the hearing and determination of his application inter parties. There was no application for stay of proceedings pending the hearing and determination of the intended appeal. The gist of the application was however to stay proceedings of the lower court pending the hearing and determination of the intended appeal.
27. An application for stay of proceedings is a serious matter that can only be granted in deserving cases. In the case of Peter Kariuku Mburu & another v Neema Shah (2021) eKLR, the court while dismissing an application for stay of proceedings cited the case of Kenya Wildlife Service v James Mutembei (2019) eKLR where the court stated that;

.....stay of proceedings is a grave judicial action which seriously interferes with a right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of is high and stringent.
28. The Applicant says that he has no confidence in the DNA report conducted by his private pathologist because the pathologist gave his phone number to a court assistant during the DNA sampling. That by doing so the phone number details of the pathologist became exposed. The Applicant did not explain how the exposure of the pathologist's mobile phone number to a court assistant during DNA sampling amounted to a professional misconduct as to warrant his DNA report being rejected.
29. The only reason the Applicant seems to give for losing confidence in the report of the government pathologist is that the pathologist failed to appear in court on the date appointed to present his report. In my view, that is not sufficient reason for rejecting the report. It is surprising that the Applicant was rejecting results whose outcome he had not seen. The Applicant has not shown convincing reasons for rejecting the DNA reports from his own pathologist and that of the government pathologist. There is no good reason given for this court to make an order for fresh DNA testing. Neither is there reason for stay of proceedings pending at the lower court.
30. The Applicant is further seeing for fresh DNA testing to be done. This amounts to him adducing further evidence in the case while he has not made an application seeking to adduce further evidence in the case during appeal. I do not see any merit in the application.



Enlargement of time

31. The court has discretion under Section 79G of the [Civil Procedure Act](#), 2010 to grant leave to file appeal out of time. The section 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.

32. The factors that the court has to consider in deciding on whether or not to grant an application to file an appeal out of time are as was laid out in the case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi*, cited with approval by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR where it was held: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly) the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”

33. The Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & Others* [2014] eKLR set the following guidelines for consideration in an application for enlargement of time:

- “(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- (3) Whether the court should exercise discretion to extend, is a consideration to be made on a case to case basis;
- (4) Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;
- (5) Whether there will be any prejudice suffered by the Respondent if the extension is granted;
- (6) Whether the application has been brought without undue delay; and
- (7)

32. The orders sought to be appealed against were made on 25th March 2025 and the instant application was filed on 6th May 2025. There was thereby a delay of less than a month, excluding the 30 days` time stipulated by the law for filing the appeal. The applicant says that he did not file the appeal in time as he was not supplied with copies of proceedings of the lower court. He however did not file anything to show that he made an application to the court to be supplied with copies of proceedings. There is thereby no reason why the Applicant did not file the appeal within 30 days period stipulated by the



law. The application to file the appeal out of time must have been an afterthought. It can only mean that the application is meant to delay the hearing of the matter pending before the trial court.

33. In the final end I do not find any merit in the application dated 6th May 2025. Accordingly, the same is dismissed with costs to the Respondent.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 17TH SEPTEMBER 2025.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Abdullahi for Applicant

Mr. Komora for Respondent

Court Assistant -

