



SOB (Acting in her capacity as the next friend of the Minors) v FOB (Miscellaneous Case E054 of 2023) [2024] KEHC 8348 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CASE E054 OF 2023
SM MOHOCHI, J
JULY 4, 2024**

BETWEEN

SOB APPLICANT

ACTING IN HER CAPACITY AS THE NEXT FRIEND OF THE MINORS

AND

FOB RESPONDENT

RULING

1. By an Application dated 9th August, 2023 by way of Notice of Motion brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 42 Rule 6(1), (2) and (3) and Order 50 Rule 6 of the *Civil Procedure Rules*, the Applicant seeks for an order of leave to file appeal out of time.
2. The Application is supported by the grounds on the face thereof and the Supporting Affidavit sworn by the Applicant herself on the same day wherein she deposes that being dissatisfied by the trial Court's decision she wishes to appeal against the judgement/decree delivered on 29th July, 2022 in Nakuru CMCC No. 41 of 2016. The Court in her decision ordered that the Applicant takes care of the educational needs of J.P.K. and C.B. and the Respondent to cater for the educational needs of E.B. and M.T.N.
3. She stated that the judgment also required the Respondent to have custody of the minors every 2nd half of the school holidays, but the Respondent has not fulfilled the conditions set and the subjects have refused to stay with him forcing her to incur extra expenses. That the Respondent be compelled to pay for the expenses of the subject every 2nd half of the school holiday.
4. She went on to depose that E.B. and M.T.N. are almost completing tertiary education while J.P.K. and C.B. are still in primary and secondary school and therefore their education related needs are more demanding and prays that the Court does set aside the Lower Court judgment and grants to the Respondent Educational needs of all the minors and for to cater for food shelter clothing.



5. The Application was unopposed and the Court on 2nd May, 2024 directed that the Application shall be canvassed by way of written submissions. On record are the Applicant's written submissions dated 21st June, 2024.

Applicants Submissions

6. It was submitted that the delay was not intentional but was occasioned by her previous advocates who failed to file the appeal and became uncooperative. She argued that the intended appeal is arguable and meritorious. She contended that the delay was as a result of mistake on her previous advocates on record and should not be visited on her. That she took steps in prosecution the appeal and has attached a draft memorandum of appeal.
7. It was also submitted that under Section 79G of the *Civil Procedure Act*, the Court has discretion to grant the orders to file appeal out of time provided that a good reason has been given for not filing on time.
8. In support of her arguments, she relied on the case of *Thuita Mwangi v Kenya Airways Ltd* [2003], where the Court of Appeal set down factors which ought to be taken into consideration by Court in a matter seeking orders for extension of time to appeal. The factors are inter alia the period of delay; the reason for the delay; arguability of the appeal, the degree of prejudice to the Respondent if the Application is granted and the effect on administration of justice.
9. The Court had on the 27th September 2023 directed the Application be served upon the respondent and further directions relating to service were issued on the 2nd may 2024 and the Applicant effected service upon the Respondent by a process server who swore an affidavit of service dated the 2nd of May 2024 which was duly filed on the 28th May 2024.
10. The Respondent failed and or refused to enter Appearance and thus the Court has proceeded to determine the Application as an undefended Application.

Analysis and Determination;

11. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate "good and sufficient cause" for not filing the appeal in time. In *Thuita Mwangi v Kenya Airways* [2003] e KLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which is similar to section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

"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 generally the matters which this Court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."

12. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat Vs. IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

"The underlying principles a Court should consider in exercise of such discretion include;



1. Extension of time is not a right of any 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 the discretion to extend time, is a consideration to be made 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.
 7.”
13. It is not disputed that the judgment of the lower Court in Nakuru CMCC No. 41 of 2016 was delivered on 29th July, 2022. It is the Applicants’ case that, her previous advocates failed to file the appeal on time and became uncooperative. That the intended appeal is arguable and meritorious. That the delay was as a result of mistake on her previous advocates on record and should not be visited on her and. That she took steps in prosecution the appeal attaching a draft memorandum of appeal.
14. The Applicant filed the present application on 22nd September 2023 the delay herein is approximately one (1) year one (1) month which in my view is inordinate, considering the Applicant has not provided details relating to the disagreements in filing of the Appeal by the Previous Advocates.
15. Further, while the discretion of the Court is unfettered, a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court’s discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of *Telkom Kenya Limited V. John Ochanda and 996 Others* [2015] eKLR that:
- “In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court’s discretion in curing the pleadings before it. This Court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....
- It is this Court’s position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course.....”



16. Similarly, in *Rufus Muriithi Nyaga v Juliet Wanja Ireri* [2018] eKLR Justice Muchemi held thus:

“When a Court is considering delay, the length of delay is a relevant factor. The applicant was required to act within 21 days but he took a whole one (1) year in slumber. It is not too harsh to refer the applicant as an indolent litigant. The limited time of filing the record was not fixed in vain but to serve the purpose of expeditious disposal of cases. Litigation must come to an end.....

The discretion of the Court to extent time must be exercised judiciously. I find one (1) year delay inexcusable and contrary to the overriding objective in regards to expeditious disposal of cases and in regard to economic use of judicial resource.”

17. In the circumstances this Court finds that the reasons advanced for the delay are insufficient, and the delay in the period taken by the Applicant to move this Court for enlargement of time is inexcusably inordinate.
18. In conclusion, this Court finds that it cannot exercise its discretion in favour of the Applicant and consequently the Miscellaneous Application dated 9th August, 2023 is dismissed for want of merit.
19. Owing to the failure to defend by the Respondent, this Court shall not award costs to the Respondent and orders that parties shall bear their own costs.

It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 4TH DAY OF JULY, 2024.

MOHOCHI S.M

JUDGE

