



**DI v FM (Miscellaneous Application E115 of 2022)
[2023] KEHC 20354 (KLR) (Family) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E115 OF 2022**

**MA ODERO, J
JULY 3, 2023**

BETWEEN

DI APPLICANT

AND

FM RESPONDENT

RULING

1. Before this court is the Notice of Motion application dated June 13, 2022 by which the applicant DI seeks the following orders:-
 1. Spent.
 2. That leave be granted to the Applicant to appeal out of time against the Judgement issued by the Hon. Obura on the January 24, 2022 in Divorce Cause No. 233 of 2018 at the Milimani Commercial Law Courts.
 3. That this honourable court be please to issue any further orders in the interest of justice.
 4. That the costs be in the cause.**
2. The Application was premised upon section 79G and 95 of the *Civil Procedure Act*, 2010, Order 50 Rule 5 of the *Civil Procedure Rules* and was supported by the Affidavit of even date sworn by the Applicant and a supplementary Affidavit sworn on October 31, 2022.
3. The respondent FM opposed the application through the replying affidavit dated July 19, 2022. The Application was canvassed by way of written submissions. The applicant filed the written submissions dated October 31, 2022. Whilst the respondent relied upon his written submissions dated November 28, 2022.



Background

4. The parties herein were involved in Divorce Cause No. 233 of 2018. The applicant filed a Petition against the Respondent for dissolution of their marriage on the ground that the marriage had irretrievably broken down. The respondent filed a cross petition and sought maintenance in the sum of Kshs.80,000 monthly, a declaration that Plot No. 572 on LR No. 8469/5/6 Scheme Kasarani is matrimonial property and an injunctive order restraining the petitioner and or his agents from dealing in any way with the suit property as well as an order compelling the petitioner to share the matrimonial property with the respondent taking three (3) apartments while the petitioner retains two (2) apartments.
5. Vide a judgement delivered on January 24, 2020, Hon. A.M. Obura Senior Principal Magistrate allowed the petition for divorce and issued the following orders:-
 - a) A Decree nisi is hereby issued. It shall be made absolute upon the expiry of thirty (30) days from the date hereof.
 - b) The Petitioner shall pay the Respondent maintenance of Kshs.10,000 for the next (3) months from February 5, 2020 for the next (3) months only.
 - c) The suit property known as Plot No. 572 on LR No. 8469/5/6 Scheme Kasarani is matrimonial property and shall be shared between the parties as prayed in the cross-petition.
 - d) The petitioner is hereby restrained from in any way whatsoever from dealing with the said matrimonial property, alienating or selling it pending distribution as hereby ordered.
 - e) Each party to bear their own costs.
6. Being aggrieved by the decision of the trial court, the Applicant filed the present application.

Analysis and Determination

7. I have considered the application before this court, the affidavits on record as well as the written submissions filed by both parties. The issue that arises is whether the application has merit.
8. Under section 79G of the *Civil procedure Act*, an appeal from the subordinate court to the High court must be filed within thirty (30) days from the date of the decree or order appealed against.
9. The legislature intended that appeals against judgements and rulings should be brought within the prescribed time, and therefore any request for an extension of time to appeal has to be founded on sufficient reasons. The principles to be considered by the court while exercising its discretion to enlarge time to appeal are:-
 - (a) the explanation, if any, for the delay in filing the appeal on time;
 - (b) the nature of the case;
 - (c) the conduct of the applicant, before and during the application;
 - (d) the prejudice to be suffered by the respondent; and
 - (e) whether or not the respondent can be adequately compensated in costs for the prejudice.
10. In *D.I.M v F.W.M.* [2018] eKLR, while it was acknowledged that the discretion of the court to extend time to appeal was unfettered, it was observed that, save for extreme situations where the applicant is guilty of failure to exercise due diligence in appealing within the prescribed time, he should be given



opportunity to exhaust the legal redress that the Constitution and the law provide without undue hindrance.

11. The judgement in this matter was delivered on January 24, 2020 whilst the application for extension of time was brought on June 13, 2022, almost two and a half (2 ½) years later. The applicant submitted that the delay was occasioned by delay in obtaining certified copies of typed proceedings and judgement. He stated that he was apprehensive that the matrimonial property would be divided as directed by the court without lodging an appeal but the same has proved futile.
12. The respondent on the other hand has argued that there is no requirement that certified proceedings and judgement before filing an appeal.
13. I do agree with the respondent that there is no requirement that an appellant must obtain copies of proceedings before filing a memorandum of appeal. There has been inordinate delay to file the present application and the reasons given by the applicant are neither plausible nor believable. The decision to file an appeal is clearly an afterthought.
14. No cogent reasons have been advanced to persuade this court to exercise discretion in favour of the applicant. I find no merit in the application dated June 13, 2022. The same is dismissed in its entirety. Cost are awarded to the Respondent.

DATED IN NAIROBI THIS 3RD DAY OF JULY, 2023.

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MAUREEN A. ODERO

JUDGE

