



REPUBLIC OF KENYA



KENYA LAW
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**TM v ZKM (Miscellaneous Application E016 of 2023)
[2023] KEHC 20688 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E016 OF 2023**

**G MUTAI, J
JULY 7, 2023**

BETWEEN

TM APPLICANT

AND

ZKM RESPONDENT

(Being an application for leave to appeal out of time the judgment and orders of Hon V Yator delivered on November 30, 2022 in Tononoka MCCHCC No E407 of 2021.)

RULING

Introduction

1. Vide a Notice of Motion application dated May 3, 2023 the Applicant sought the following orders: -
 1. Spent;
 2. Spent;
 3. That pending the interpartes hearing of this application and suit, there be stay of proceeding in Tononoka MCCHCC No E407 of 2021;
 4. That pending the interpartes hearing of this application, the honourable court be pleased to issue the following orders that:-
 - a. The applicant be granted unlimited access rights to interact with the minor during half school holidays, half public holidays and alternative weekends without supervision;
 - b. The applicant be granted unlimited visitation rights to the minor from morning to evening without supervision.



5. That this honourable Court be pleased to allow the Applicant to appeal the judgment and orders of Hon V Yator delivered on November 30, 2022 in Tononoka MCCHCC No E407 of 2021 out of time;
 6. That upon granting of prayer 5 (above) the Draft Memorandum of Appeal attached be deemed as duly filed upon payment of the requisite fees;
 7. That costs of this application be provided for.
2. The Applicant avers that he was unaware of the delivery of the judgment and that he was surprised when he was served with the decree dated February 2, 2023 by the Respondent's advocate on February 3, 2023. The Applicant argued that he was denied custody of the child based on the Respondent's false, malicious and misleading allegations regarding his sexual orientation

“coupled with allegations that the Applicant molested/sodomised his own son and thus he was a threat to the minor himself”.

He is aggrieved by the access he was granted. In his view the supervised access he was granted is undignified, open to abuse, and not to the best interest of the minor. He blames the 3-month delay between the time he got to know of the delivery of the judgment and the date of the filing of the application for leave on lack of funds. The Court is thus asked to allow the application.

3. The application is opposed. The Respondent filed a Replying Affidavit sworn on May 19, 2023. The Respondent contended that the Applicant is gay. She opposed the prayer for unlimited access. She averred that the application was made after 6 months, a period which she reckoned was inordinate and hadn't been explained. She thus deposed that the application before Court was an afterthought intended to obstruct justice and an abuse of the Court process which should be dismissed with costs.
4. When the matter came before me on May 22, 2023 I directed the parties to file Written Submissions. I will refer to the submissions of each party below.
5. The Applicant submitted that the Court below fixed the cause for judgment on November 30, 2022. He argued that he never received the judgment via email on the said date. As soon as he received the judgment he complied with the directions of the Court and filed the instant application despite his financial difficulties. The Applicant avers that it would be in the best interest of the child to allow the application. Lastly, he states that he has an arguable appeal. In support of his application I was referred to the the case of *MFI Document Solutions Ltd versus Paretto Printing Works Limited* [2021]eKLR.
6. The Respondent, on the other submitted that the Applicant was given reasonable access by the Subordinate Court. The appeal was filed 6 months after the delivery of the judgment. The delay has not been adequately explained, it was averred. The Respondent relied on the Court of Appeal case No 130 of 2018; *The County Government of Mombasa versus Kooba Kenya Ltd* for the proposition that where delay is not explained extension of time to file an appeal would be refused. Reliance was also placed on *Wachira Karani versus Bildad Wachira* [2016] eKLR where the Court of Appeal defined “sufficient cause in the following terms

“however what constitutes “sufficient cause” to prevent a defendant from appearing in Court, and what would be “fit conditions” for the Court to impose when granting such an order, necessarily depend on the circumstances of each case.”
7. I have looked at the application and the affidavit in response. I have also considered the rival submissions of the parties.



8. The Applicant did not annex a copy of the judgment. What has been provided is a decree. The decree indicates that the judgment was delivered on November 30, 2022. The decree on the other hand was issued on February 2, 2023 at 14:32:43. The Applicant avers that the judgment wasn't availed to him by email as directed by the Court. The Respondent on the other hand deposed that she received the judgement by email. Who should be believed?
9. The decree is clear that the judgment was delivered on November 30, 2022. I have no reason to doubt the date indicated in the said document. I also note that upon being made aware of the judgment (assuming that he wasn't already aware) the Applicant took 3 months to file the instant application. Although the Applicant alleges that he lacked money to pay the Court fees he was able to settle the outstanding maintenance sums. I am therefore not convinced that the delay in this respect was explained.
10. I would have dismissed the application. Given the gravity of the allegations made against the Applicant, in particular that he sodomised the child the subject of the proceedings before the subordinate court, and his denial of those charges, I am inclined to exercise my discretion in his favour so that he may get another opportunity of clearing himself, if all he didn't do what has been alleged. In my view giving the Applicant an opportunity to appeal the decision of the court below will be in the best interest of the child.
11. In my view justice will be served by affording the Applicant an opportunity to ventilate his case. *Markson Karani Muchunku versus Joseph Ngari Gituku* [2021] eKLR. Gitari, J stated as follows: -
- “The applicant seeks the exercise of discretion by this court to reinstate the appeal. It is trite that the court’s discretion must be exercised fairly and judiciously. It is a principle of natural justice that a party should be given an opportunity to be heard. Article 50 of the *Constitution* provides that,
- “every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body”
- It follows that every person ought not to be shut out from accessing the court or normally what is referred to as having his day in court. The right of a party to enjoy the fruits of judgment must be weighed against the right of a party to access court and to have his dispute heard and determined by a court or tribunal with competent jurisdiction. The emerging jurisprudence is that courts should lean on doing substantive justice by determining disputes on merits other than on procedural technicalities Article 159(2) (d) of the *Constitution* provides that
- “Justice shall be administered without undue regard to procedural technicalities.”
- This is buttressed by Section 1A & 1B of the *Civil Procedure Act* which provides for the overriding objectives of the *Act* which is to facilitate the just, expeditious proportionate and affordable resolution of civil disputes governed by the *Act*.”
12. In the circumstances I order as follows: -
1. Prayer No 3 of the Notice of Motion dated May 3, 2023 is disallowed;



2. Prayer No 4 is similarly disallowed. Given the allegations made against the Applicant it will not be in the best interest of the child to allow the said orders until the appeal is heard and determined;
3. Prayer No 5 is allowed in the interest of justice;
4. Prayer No 6 is denied. The Applicant should file an appeal in the usual manner, not in this miscellaneous cause;
5. The Respondent is awarded costs of KES 20,000.00;
6. This file to be closed.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS AT MOMBASA THE 7TH DAY OF JULY, 2023 VIA MICROSOFT TEAMS

GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Kihira for the Applicant

Ms. Okumu for the Respondent

