



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**FAMILY MISC CIVIL APPLICATION NO. 6 OF 2021**

SNM.....APPLICANT

**-VERSUS-**

SUB COUNTY CHILDREN'S OFFICER.....1<sup>ST</sup> RESPONDENT

PNN.....2<sup>ND</sup> RESPONDENT

**RULING**

1. The application before Court is a Notice of Motion dated 22<sup>nd</sup> February, 2021 brought under the provisions of Section 1A, 1B, 3A, 75G & 95 of the Civil Procedure Act and all other enabling provisions of the law. The applicant seeks the following orders from this Court-

**1) Spent.**

**2) That the applicant herein be granted leave to file an appeal out of time from the judgment and decree of the Hon. L. K Sindani delivered at Tononoka Children's Court on 16<sup>th</sup> November, 2020.**

**3) That the annexed substantive Memorandum of appeal be deemed as duly filed on 21<sup>st</sup> December, 2020.**

**4) That the costs of this application be provided for.**

2. The application is anchored on the grounds set out on the face of it and supported by an affidavit sworn on 22<sup>nd</sup> February, 2021 and a further affidavit sworn on 12<sup>th</sup> March, 2021 both by SNM (*the applicant herein*).

3. The applicant stated that she is the minor's maternal grandmother and the 2<sup>nd</sup> respondent is the minor's biological father. She also stated that the minor had been in her custody before the trial Court gave the 2<sup>nd</sup> respondent custody in November, 2020.

4. That being dissatisfied with the decision of Hon. L.K Sindani issued at Tononoka Guardianship Case No. 23 of 2020 on the 16<sup>th</sup> November, 2020, she instructed her Advocates on record to lodge an appeal against the said decision. She averred that soon after her Advocates on record obtained the judgment and typed proceedings from the trial Court, they lodged an appeal dated 10<sup>th</sup> December, 2020 and filed on 21<sup>st</sup> December, 2020.

5. The applicant further averred that when her Advocates sought to lodge the appeal on 11<sup>th</sup> December, 2020, the E-filing system was unavailable and the problem persisted for the next one week or so, thus preventing them from lodging the said appeal in good time.

6. The applicant deposed that her appeal has high chances of success hence it is only just and fair that the same be admitted, heard and determined on merit. She stated that no prejudice will be occasioned upon the respondents if the orders sought are granted.

7. The respondent filed a replying affidavit sworn by himself on 9<sup>th</sup> March, 2021 in opposition to the said notice of motion. He averred that he is the biological father and the only surviving parent to the minor who was born on 6<sup>th</sup> May, 2017. He stated that Guardian Case No. 23 of 2020 by the applicant seeking to be the minor's guardian was instituted without his knowledge and that he only came to know about it when he was contacted by Changamwe Sub county children officer inquiring whether he had given the applicant consent to apply for guardianship

8. The respondent further averred that he challenged the guardianship application and on 16<sup>th</sup> November, 2020, the Court delivered a

judgment granting him actual custody of the minor. He deposed that the applicant's appeal was ready for filing by 10<sup>th</sup> December, 2020 and the system upgrade was done on 11<sup>th</sup> December, 2020 at 6.00pm to Sunday 13<sup>th</sup> December, 2020 at around 11.59pm.

9. The respondent stated that the applicant had two clear days to file the appeal before the system started experiencing challenges after the upgrade on 14<sup>th</sup> December, 2020. He further stated that the Kenya Judiciary through a public notice dated 16<sup>th</sup> December, 2020 provided an alternative e-mail address for Certificate of Urgency and time bound pleadings to be forwarded for processing hence filing of urgent documents was ongoing despite the challenges the system was experiencing.

10. He stated that the appeal is intended to waste the Court's time since the applicant is a busy body who does not have the best interest of the minor at heart. The respondent averred further that the appeal lacks merit as the primary suit was filed without disclosure of important and useful material facts thus denying the Court an opportunity to make a fair and just decision.

11. The respondent deposed that if the applicant is granted leave to appeal, he and the minor shall suffer loss since the minor has already adapted to his family environment and is happy and enjoying his father's love, care, control, attention and affection hence the proceedings of the appeal will negate the gains so far achieved in father-child relationship and it will have detrimental effects on the minor's well-being especially health, growth and overall performance.

12. On 9<sup>th</sup> March, 2021 directions were taken that the application dated 22<sup>nd</sup> February, 2021 be heard on 22<sup>nd</sup> March, 2021. The matter proceeded on 22<sup>nd</sup> March, 2021 with the applicant's counsel making oral submissions.

### **Analysis and Determination.**

13. I have considered the application herein, affidavits in support, response thereto, and oral submissions by counsel for the applicant. The main issue for determination therefore is whether the application herein has any merit.

14. Section 75G of the Civil Procedure Act provides as follows:

***“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.”***

15. In the case of **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR**, the Court of Appeal in dealing with a similar application observed as follows;

***“...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.”***

16. In **Abdul Azizi Ngoma vs. Mungai Mathayo [1976] Kenya LR 61, 62**, the Court of Appeal held:

***“We would like to state once again that this court's discretion to extend time under rule 4 only comes into existence after ‘sufficient reason’ for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”***

17. Judgment before the trial Court was delivered on 16<sup>th</sup> November, 2020. The memorandum of appeal was filed on 21<sup>st</sup> December, 2020 while the instant application was filed on 22<sup>nd</sup> February, 2021. Pursuant to the provisions of Section 79G of the Civil Procedure Act, the applicant was required by law to have filed the memorandum of appeal on or before 16<sup>th</sup> December, 2020. The applicant in her affidavit deposed that the memorandum of appeal was ready by 10<sup>th</sup> December, 2020. That when they tried having it filed on 11<sup>th</sup> December, 2020, they encountered challenges with the e-filing system which persisted for a week or so thus making them unable to have the said memorandum of appeal filed within the thirty-period provided for by law.

18. The 2<sup>nd</sup> respondent on the other hand avers that the e-filing system underwent a system upgrade from 11<sup>th</sup> December, 2020 at 6.00pm to Sunday 13<sup>th</sup> December, 2020 at 11.59 pm. That for that reason, the applicant had two clear days to file the appeal before the system started experiencing challenges. He further stated that an alternative email address was provided to enable processing of certificate of urgency and time bound pleadings.

19. Looking at the memorandum of appeal, it is dated, 10<sup>th</sup> December, 2020 and filed on 21<sup>st</sup> December, 2020. Evidently, there is delay which is admitted by the applicant. The delay as it can clearly be revealed was for four days and the same was occasioned partly by challenges with the e-filing system that was affecting the entire Country, not just Mombasa Law Courts. Whereas I agree with the respondent that an alternative e-mail address was provided by the Judiciary, this Court is not in a position to determine whether or not the applicant attempted to make use of it since the applicant did not comment on it in her affidavits neither did the applicant's Counsel submit on the same.

20. Accordingly, and for the reasons cited hereinabove, this court does not find the delay inordinate to deny the applicant her Constitutional right and an opportunity to ventilate her grievances by way of an appeal to this Court. It is my conviction that the reasons advanced by the applicant are sufficient to warrant this Court to exercise its discretion in favor of the prayers sought.

21. Regarding the question whether the intended appeal has high chances of success, at this stage. I do not want to delve on the merit of the same in detail. However, an outward look at the memorandum of appeal dated 10<sup>th</sup> December, 2020 reveals that the said intended appeal is not frivolous. The applicant will have an opportunity to satisfy the court on the merits of her appeal and the Respondents will have a chance to respond on the merits or demerits of the appeal once filed and subjected to a hearing. This Court also finds that no prejudice shall be visited upon the respondent in the event the applicant is granted leave to appeal out of time. In any event, the respondent has not demonstrated any prejudice that he will suffer should the prayers sought be granted.

22. It is therefore this Court's holding that where a party is aggrieved and wishes to pursue an appeal, it would not only be fair but also in the interest of justice to exercise discretion in his/her favor, most especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way as is the case herein. Discretion of the court must always be exercised judiciously. The appellant has already filed a memorandum of appeal which raises arguable grounds of appeal. My view is that she should be given an opportunity to pursue the appeal by giving her an extension of time within which to file the appeal.

23. For the above stated reasons, it is my finding that the application herein is merited and the same is allowed. Costs shall abide the outcome of the appeal. The memorandum appeal filed herein is deemed as duly filed. The applicant to serve the same together with a record of appeal upon the respondent within 21 days and thereafter fix the matter for hearing.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 7<sup>TH</sup> DAY OF MAY, 2021**

**HON. JUSTICE J.N. ONYIEGO**

**JUDGE**