



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 134 OF 2019

HLDO.....APPLICANT

VERSUS

TFDO.....RESPONDENT

(Being an Appeal from the Ruling and Order of the Honourable A.N. Makau (PM) delivered on 28th July, 2019)

RULING

1. It is now trite that extension of time to file an appeal is an equitable remedy which will be granted only to a deserving party (**Nicholas Kiptoo Arap Korir Salat –v- I.E.B.C & Others, S.C. Application No. 16 of 2014**). The applicant must lay sufficient basis before he can be granted the discretion. The delay in filing the appeal on time has to be explained. The application should be brought without undue delay. Lastly, the court should consider the degree of prejudice to the respondent (**Morrison M’Tetu –v- James Ireri Njagi & Grace Wanjiku Kanyiba [2016]eKLR**).

2. The applicant HLDO and the respondent TFDO got married in January 1996 in New York City in the USA. The marriage was blessed with two children. In the course of the marriage the applicant alleged cruelty. In 2017 she left the matrimonial home and went to live with her sister. Because she was not in gainful employment, she went before the Chief Magistrate’s Court at Milimani in **Divorce Cause No. 954 of 2018** to seek the dissolution of the marriage. In the same cause, she applied for maintenance in the sum of 3000 USD per month. This was pending the hearing and determination of the sought divorce. The respondent opposed the application. The trial court heard the application, and on 28th July 2019 delivered a ruling dismissing it.

3. On 6th November 2019 the applicant filed the instant application seeking to be allowed to appeal out of time. Her case was that, following the ruling, she instructed her advocates to appeal. The advocates on 22nd August 2019 wrote to the trial court for a copy of the ruling and proceedings (although the letter only sought a copy of the ruling). On 5th November 2019 they filed a Memorandum of Appeal. By the time the ruling and proceedings had not been supplied. She explained that that the delay to file the appeal on time was occasioned by the lack of ruling and proceedings.

4. The respondent opposed the application through grounds of opposition. His case was that the application was incompetent, having been brought under the wrong provisions of the law; the ruling was such that would only be appealed from with leave; she ought first to have sought leave from the trial court to appeal out of time; the delay in bringing the application to appeal out of time was inordinate, and the reasons given for the delay were not sufficient; the proposed appeal did not raise arguable grounds; and the respondent would be irreparably prejudiced if the application were to be allowed.

5. Under **section 79G** of the **Civil Procedure Act**, applicant was required to appeal the ruling within 30 days. She acknowledged that she was out of time for 68 days.

6. Now that the Memorandum of Appeal was filed before the applicant’s advocates had received a copy of the ruling and proceedings from the lower court, it meant that it was within the applicant’s power to file the appeal without the documents. The documents were not necessary in filing of the appeal. In any case, there was always the right to apply to amend the appeal upon the receipt of the documents. It follows that the explanation that delay to file the appeal on time was because of lack of copy of ruling and proceedings was not plausible.

7. Secondly, time to appeal begun to run on 28th November 2018. Request for ruling and proceedings was not done until the last day (27th August 2019). After the end of the 30 days, nothing was done for over two months. Given these facts, there has been no demonstration that there was a serious intention to appeal the ruling. In any case, the delay in bringing the appeal and application was inordinate in the

circumstances.

8. In the grounds of opposition, it was indicated that there would be no prejudice to the respondent because the pending divorce cause also prays for maintenance. There was no response to this.

9. I have not considered the claim by the respondent that the application was incompetent because it was brought under **Article 163(4)(b)** of the Constitution and **section 7** of the **Appellate Jurisdiction Act**, instead of being brought under the relevant provisions of the **Civil Procedure Act** and **Rules**. This is because I am aware that the relevant provision is **section 79G** of the **Act**. Further, an **Order 50 rule 6** of the **Rules** provides for extension of time, and **Order 50 rule 10** of the **Rules** asks the court to deal with the substance of the application and not pay attention to technicalities.

10. I find the appeal not merited, and dismiss it.

11. Since this is a family dispute, each side shall bear own costs.

DATED AND DELIVERED NAIROBI THIS 17TH DAY OF JUNE 2021.

A.O. MUCHELULE

JUDGE