



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**FAMILY DIVISION**

**MISCELLANEOUS APPLICATION NO. 53 OF 2020**

**FMK.....APPLICANT**

**VERSUS**

**LKM & FMM (suing through their mother/next friend)**

**ANM.....RESPONDENT**

**RULING**

1. The Applicant, Francis Munyao Kinyumu brought an application dated 5.5.2020 seeking enlargement of time within which to file his memorandum of appeal, and leave to file the same out of time.

2. The Application averred that he was aggrieved by part of the judgment in Children's Case No. 612 of 2017 delivered on 4.3.2020. His memorandum of appeal was prepared and forwarded to Court for assessment on 2.4.2020 but the same elicited no response from the registry. Leave of Court to file his appeal is now required as the 30 days within which leave is to be filed elapsed. In his affidavit sworn on 5.5.21, Henia Ruara, the Applicant's advocate averred that he followed up the appeal through the mobile telephone number provided and by his email of 6.4.21, but no response has ever been received. Copies of the memorandum of appeal, notice of change of advocates and the email were exhibited, to support the claim.

3. In her replying affidavit sworn on 17.9.2020, the Respondent opposed the Application. She averred that in the judgment, the Court granted orders regarding the custody and maintenance of two minor children, LKM and FMM born on 15.7.11 and 2.10.13 respectively. Since the judgment, the Applicant has never bothered to visit the minors. The Respondent further averred that in spite of being a man of means, the Applicant has failed to provide for the children leaving the Respondent to struggle on her own. The Respondent further stated that the Applicant has not given sufficient reasons as to why he did not follow up with the registry on the filed memorandum of appeal since 2.4.2020. She further stated that the Applicant's application does not raise triable issues and is just an afterthought, and that the extension of time to the Applicant will not be in the interest of justice. According to the Respondent, the minors will continue to suffer if the orders sought are granted.

4. The statutory period for filing an appeal in this Court from a subordinate Court is 30 days. This is stipulated in Section 79G of the Civil Procedure Act which provides:

**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.**

5. Where a party intending to an appeal gets caught up and is unable to file the same within the stipulated time, such party may seek to have an appeal admitted out of time by invoking the proviso to Section 79G. The party must however satisfy the Court that he has good and sufficient reason for not filing the appeal on time.

6. In the present case, the reasons proffered for the delay are that the memorandum of appeal was prepared and forwarded to the registry for assessment but that in spite of following up the matter, there has been no response from the registry. The statutory 30 days for filing appeal elapsed as he waited. The Applicant contended that failure to file the memorandum of appeal on time was not his fault and that he moved with speed to file the present Application for extension of time and that no prejudice will be suffered if the orders sought are granted.

7. An order for extension of the time to file an appeal is discretionary. Such discretion must however be exercised judicially. The factors to be considered in an application such as the present one were set out by the Court of Appeal in Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR as follows:

**“For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable.**

8. And in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, the Supreme Court listed the following as the under-lying principles that a Court should consider in exercise of its discretion in an application for extension of time:

- 1. Extension of time is not a right of a 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 on 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 respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.**

9. The appeal ought to have been filed by 4.4.2020 as the impugned orders were made on 4.3.2020. The Application was filed on 5.5.2020. It would appear that the Applicant exceeded the stipulated period for filing the appeal by about 4 weeks. Such delay cannot be said to be inordinate and is excusable. The explanation given by the Applicant for the delay is in my view reasonable. My further view is that allowing the Application will not occasion any prejudice to the Respondent or the children herein.

10. In light of the foregoing, my finding is that the Application dated 5.5.20 is merited and I make the following orders:

- i. Leave to file appeal out of time is hereby granted.
- ii. The memorandum and record of appeal shall be filed and served within 21 days from today’s date.
- iii. In default the leave so granted shall automatically lapse.
- iv. The Respondent shall have costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 2<sup>ND</sup> DAY OF JULY, 2021**

**M. THANDE**

**JUDGE**

**In the presence of: -**

.....**for the Appellant**

.....**for the Respondent**

.....**Court Assistant**