



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISC. CIVIL APPL. NO. E018 OF 2021

KKW.....APPLICANT

-VERSUS-

SWM.....RESPONDENT

RULING

1. The applicant KKW and the respondent SWM are the biological parents of AW. They have an ongoing cause in the Children Court at Nairobi where there have been various applications by either side regarding the custody, maintenance and education of the child. The Children Court delivered a ruling on 22nd November 2019 that is the subject of the present motion dated 29th January 2021. The motion sought the following orders:-

“(1) THAT this application be certified urgent and service thereof be dispensed with and it be heard *ex parte* in the first instance.

(2) THAT this Honourable Court be pleased to stay the proceedings scheduled for the 24th February 2021 in Children’s Case No. 1006 of 2012 before Hon. Trial Magistrate Hon. Mbatia pending the hearing and the determination of this appeal.

(3) THAT leave be granted to the applicant to appeal out of time against the ruling in Children’s Case No. 2006 of 2012 Kevin Kinyanjui Waweru –v- Sheila Wairimu Mwarangu at the Children’s Court at Nairobi on the 22nd day of November 2019 by Honourable Mbatia.

(4) THAT this Honourable Court do issue any further orders it deems fit in the interest of justice.

(5) THAT the costs be in the cause.”

2. Prayer 2 appears to have been spent. The substantive prayer, therefore, is the one seeking leave to appeal the ruling out of time.

3. The ruling sought to be appealed against had the following orders: -

“1) The interim orders on custody and access are extended.

2) The plaintiff is ordered to provide education and related expenses by paying the school fees equivalent for both children at [Particulars withheld] Academy from 26th March 2015 – to date. The defendant shall pay the difference required at the minor’s present school(s) until the parties agree on a different school where the plaintiff shall provide education and related expenses absolutely.

3) The plaintiff shall also provide food for the minors at Kshs.250/= per child per day. This amounts to Ksh.500/= per day and Kshs.15,000/= per month. This amount shall be remitted to the Defendant by the 5th of every month. I have provided a daily rate for ease of computation, subtraction of the dates the plaintiff had access to the minors. This amount shall be back dated to April 2015.

4) Last but not least, the defendant shall provide medical care, home clothes, shelter and all utilities.

5) Having quantified the minor’s needs an apportioned parental responsibility, the Defendant is now at liberty to file an application for Execution and take out a Notice to Show Cause for hearing on 16.1.2020.”

4. The applicant’s complaint was that the court did not consider his financial ability before making the orders, and that the respondent had moved the child to [Particulars withheld] Secondary School whose fees was well beyond what he could afford to pay. Lastly, that the respondent had been allowed to unilaterally make decision about the child’s school which was one of the reasons he was not able to afford to pay.

5. On the question why he did not appeal within the 30 days of the ruling, he stated that he did not have sufficient funds to appeal. Secondly, he called for certified copy of proceedings from the trial court which did not come until February 2020, and immediately after that the country was attacked by Covid-19 pandemic that led to a lockdown. He said he had a good appeal with high chances of success.

6. The respondent opposed the application, saying that since the orders in question the applicant had not paid anything towards the ordered amount. This had forced her to take out a notice to show cause why action should not be taken against him for non-payment. She stated that the applicant was a man of means who had rental income from his apartment in Manchester in UK and had businesses. She stated that the allegation that she had enrolled the child at [Particulars withheld] School was untrue as the child was at [Particulars withheld] School (the same school the child was at the time of the ruling in question). She stated that the application was an afterthought, the applicant having failed to scuttle the notice to show cause before the trial court. Lastly, her case was that the child’s best interests would be compromised if the application were to be allowed.

7. In the supplementary affidavit, the applicant agreed that child was at [Particulars withheld] school, but added that the transfer of the child to the school from [Particulars withheld] Academy was unilateral. I note from the proceedings in the trial court that the transfer of the child to [Particulars withheld] School was sanctioned by the court. Regarding his finances, he stated as follows: -

“24 The respondent is not privy to the contents of my private financial status and can thus not speak into their existence or non-existence.”

He did not categorically deny that he has an apartment in the UK and that he has businesses. I further consider that throughout the proceedings in the trial court, and even before this court, the applicant was represented. The claim that he could not afford to appeal was therefore doubtful.

8. **Sections 79G of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules** allow for extension of time to appeal where an applicant did not appeal within the 30 days. The legislature intended that appeals against judgments and rulings should be brought within the prescribed time, and therefore extension of time to appeal has to be founded on sufficient reasons (**Velji Shahmad –v- Shamji Bros and Popatlal Karman & Co. [1957] EA 438**). 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.

The decisions in **Itute Ngui & Another –v- Isumail Mwakavi Mwendwa, Civil application No. NAI 166 of 1997** and **Berber Alibhai Mawji –v- Sultan Hasham Lalji & 2 Others [1990-1994] E.A. 337**, among others, provide useful guide.

9. In **D.I.M. –v- F.W.M. [2018]**, 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.

10. The application for extension of time was brought over one year following the ruling in question. The explanation that he could not bring the appeal on time because he had no money has been discounted. He was represented. Even without proceedings it was possible to file the appeal, and seek to amend the same upon receipt. In any case, he received the proceedings three months after the ruling. He says there was lockdown owing to Covid-19. That is true, but courts continued to function virtually. Indeed, the present application was filed virtually, and is being heard virtually. The respondent stated, and it was not disputed, that in between the ruling and the present application the parties have continued to litigate before the trial court.

11. The applicant stated that he wanted to appeal because the respondent had unilaterally transferred the child to [Particulars withheld] School. That turned out not to be true, as the child is still at [Particulars withheld] School. Lastly, it was stated by the respondent, and not disputed, that since the orders in the ruling the applicant has not paid a cent towards the maintenance and education of the child. That is not very good for a person who is seeking the exercise of the court’s discretion in his favour. That failure to pay cannot be in the best interests of the child under **section 4(2) (3) of the Children Act and Article 53(2) of the Constitution**.

12. In all, I find that the delay of over one year to file the application for extension of time to appeal was inordinate, and the explanation for

the delay has neither been truthful nor plausible.

13. Consequently, I dismiss the application with costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JULY 2021.

A.O. MUCHELULE

JUDGE