



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC CIVIL CASE NO. 192 OF 2019

CN.....APPLICANT

VERSUS

GWK.....RESPONDENT

RULING

1. The Applicant herein is aggrieved by the judgment delivered on 17th October 2018 in **Thika Children Case No.213 of 2017** and expresses his desire to appeal against the decision, which effectively ordered him to pay for the maintenance and upkeep of **LWW** (a minor). Through his application filed on 24th May 2019, the Applicant seeks leave to appeal out of time. By his grounds and affidavit in support of the application, the Applicant asserts that the case in the court below was heard before **B.J. Bartoo R.M.** who set judgment for 17th October 2018 but she was transferred from the Thika court; that he and his counsel had no notification or confirmation in the circumstances that the judgment would be delivered on the material date and that they only learned of its delivery when he was served with notice of show requiring him to attend court on 27th May 2019.

2. It would seem from the parties' depositions and the copy of judgment of the court annexed as annexure "CN" to the Applicants affidavit that the judgment was prepared by a different magistrate subsequent to hearing and upon the transfer of the trial magistrate from Thika Law Courts.

3. The Respondent takes serious objection to the application through her affidavit in reply and the so-called notice of preliminary objection which repeats some of the factual matters in the affidavit. The Respondent views the application as an attempt to "sabotage the process of justice", citing the delay of 7 months in bringing the application and the failure by the Applicant and his counsel to attend court for the judgment. In her view the Applicant only rushed to court upon realizing that the execution process had commenced against him.

4. The parties resolved to rely on then respective filing when the application came up for hearing.

5. The court has considered the application and respective affidavits. Section 79G of the Civil Procedure Act provides that:

"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."

6. The successful applicant must demonstrate **"good and sufficient cause for not filing the appeal in time."** In **Thuita Mwangi v Kenya Airways [2003]eKLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."

7. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor.

8. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles

applicable in an application for leave to appeal out of time. The Court state inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

- 1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**
- 7.”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR.**

9. There is no dispute that the parties had been heard before the trial court and judgment set for 17th October 2018. That however the trial magistrate was transferred before that date from her station. The Applicant claims that his advocate upon making inquiries was informed that the file had not yet been forwarded for delivery of the judgment. It appears that another magistrate **Kyanya – Nyamori R M**, of the same station took over the matter and proceeded to prepare judgment, evidently on the basis of proceedings taken by his predecessor.

10. There is no material to support the Applicants assertions that his counsel had been otherwise advised. No written communication to the court is furnished by him. Nor explanation why he and his advocate did not follow up with further inquiries only springing into action when execution commenced. Nevertheless, it is possible in the circumstances where a trial magistrate is on transfer that parties are unsure or unaware whether dates given by them for delivery of decisions would still be kept. There is no evidence that parties were informed that **Kyanya – Nyamori, RM** had become seized of the matter and would proceed to deliver judgment on the basis of the proceedings taken before his predecessor. Even so, the Applicant did not himself make any inquiries with the court for seven months since the date of the judgment.

11. In the circumstances of the case the delay appears long but not quite inordinate. The explanation given by the Applicant is not a perfect one, but is in the circumstances of this case somewhat reasonable. Certainly, the Applicant moved with alacrity upon being served with the notice to show cause. I note that the matter involves the upkeep of a minor, who could be prejudiced by further delay. On the other hand, the grounds disclosed in the Draft Memorandum of appeal (**annexure CN3**) cannot be said to be hopeless. In the circumstances, mindful of the best interest of the minor herein, and in the interest of justice, the court allows the application subject to the following conditions:

- a) the Applicant to file his memorandum of appeal in 14 days
- b) the Applicant to file the record of appeal within 90 days of today’s date and prosecute the appeal to conclusion within 9 months of filing the record of appeal.
- c) The order allowing appeal out of time will lapse automatically in the event of default in respect of conditions spelt out in (b) above, and the appeal filed deemed as dismissed for want of prosecution.

Costs are awarded to the Respondent in any event.

DELIVERED AND SIGNED AT KIAMBU THIS 13TH DAY OF FEBRUARY 2020

.....

C. MEOLI

JUDGE

In the presence of:

Mr. Njehu holding brief for Mr. Macharia for Applicant

Respondent in person

Court Assistant – Nancy/Ndege

