



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

MISC. APPLICATION NO. 29 OF 2017

JOSEPH NJUGUNA NJOROGE.....APPLICANT

versus

ALICE NJOKI KARIUKI..... RESPONDENT

RULING

1. By way of this Notice of Motion dated 20.9.17 brought under certificate of urgency the Applicant seeks *inter alia* the following orders:-

2. THAT, this Honourable Court be pleased to enlarge the time within which to file an appeal against the orders Hon. Sindani – SRM made on 17th day of July 2017 from Children’s Cause No. 233 of 2007.

3. THAT, the orders made on 7th day of July 2017 be stayed pending hearing and determination of the Application or intended Appeal/and further orders of the Court.

4. THAT, Honourable Court be pleased to grant orders or reliefs it deems fit and necessary to grant to meet the ends of justice.

2. The Application was supported by the affidavit of the applicant Joseph Njuguna Njoroge sworn on 12.9.17. The Respondent opposed the Application by way of her replying affidavit sworn on 3.10.17. Parties were directed to file their written submissions and timelines were given. The Respondent filed her submissions in good time but the Applicant filed his on the date the ruling was reserved. In the interest of justice, the Court has consider the submissions by both parties.

3. The time 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.

4. 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.

5. In the present case, the Applicant’s reason for not filing the intended appeal on time is that the orders were made on 17.7.17 at the height of the 2017 general election and his counsel was actively involved in the same upcountry. Upon his return, the time for filing the Appeal had already elapsed. The Applicant contends that the delay is not inordinate.

6. 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.

7. The record shows that the orders were made on 11.7.17 while the Application was filed on 25.2.18. It would appear that the Applicants exceeded the stipulated period for filing the appeal by about 6 weeks. The delay cannot therefore be said to be inordinate.

8. On the question of stay the Court is mindful of the fact that this is a children’s matter. The Court is enjoined by Article 53(2) of the Constitution of Kenya 2010 to make orders that guarantee, secure and protect the best interests of the child. The Article provides as follows:

A child’s best interests are of paramount importance in every matter concerning the child.

9. Further, the Section 4(2) of the Children Act requires that in all actions concerning children undertaken by this Court the best interests of the child shall be a primary consideration:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

10. The order of 11.7.17 is for payment of maintenance and arrears of maintenance for the parties’ children. Should a stay be granted the children stand the risk of not having their needs met. It is therefore my finding that stay would militate against the best interest of the subject children.

11. Having considered all factors herein, I decline the prayer for stay of the orders of 11.7.17. I however allow the prayer for leave to file appeal out of time. The intended appeal shall be filed within the next 14 days, failing which the leave granted shall lapse. The Respondent shall have costs.

DATED, SIGNED and DELIVERED in MOMBASA this 7th day of September 2018.

M. THANDE

JUDGE

In the presence of: -

.....**for the Applicant**

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

.....**Court Assistant**