



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**MISC. CIVIL APPLICATION NO. 61 OF 2015**

**T K, a minor suing through**

**C C.....APPLICANT**

**VERSUS**

**G K L.....RESPONDENT**

**RULING**

1. The applicant prays for extension of time to lodge an appeal. The intended appeal is against the judgment and decree of the lower court delivered on 29<sup>th</sup> October 2013 in Eldoret Chief Magistrates Court Children’s Case 203 of 2013.
2. The applicant had presented the suit praying for custody of the minor on grounds of his age and health; and, for maintenance. The respondent denied the claim *in toto*. The lower court found “glaring inconsistencies” and paucity of evidence to support the claim. It dismissed the suit.
3. The applicant filed the present notice of motion on 17<sup>th</sup> July 2015. The gravamen of the motion is that the intended appeal is arguable and has “overwhelming chances of success”. In particular the applicant avers that it was erroneous to grant the respondent custody of a minor of tender years; and, that the minor has been denied motherly care and attention.
4. The applicant blames her legal counsel for misadvising her to seek review of the impugned judgment instead of filing an appeal. The motion for review was dismissed by the lower court. She says her lawyer told her she would file an appeal. The applicant was surprised to learn later that no such appeal was lodged. She avers that failure to file the appeal within the prescribed time was inadvertent. Those matters are set out in the supporting affidavit of the applicant sworn on 17<sup>th</sup> July 2015.
5. The motion is contested. There is a replying affidavit sworn by the respondent on 17<sup>th</sup> November 2015. The pith of the deposition is that there has been substantial and unexplained delay. The respondent contends that there is no documentary evidence showing the applicant instructed her lawyer to lodge an appeal. The respondent avers that the applicant acted in person in the lower court and only sought the services of an advocate after the judgment. The respondent denies that the minor is prejudiced by the orders of custody.
6. On 17<sup>th</sup> November 2015, I heard brief submissions from the parties. I have considered the application, depositions and the rival submissions.
7. The legal parameters in a matter of this nature are well settled. This court has wide and unfettered discretion. The discretion must however be exercised judiciously. Some of the factors to be considered include the length of delay, the reasons for the delay, the nature of the intended appeal and whether the respondent will suffer prejudice if the court extends the time. See generally, *Leo Sila Mutiso v Rose Mwangi*, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported).

8. The Court must also pay heed to the overriding objective to do justice to the parties. See Article 159 of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act. See also Harit Sheth T/a Harit Sheth Advocate v Shamas Charania, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.
9. There is no dispute that the impugned judgment was delivered on 29<sup>th</sup> October 2013. That is *one year and nine months* before presentation of this motion. The dispute was between the biological parents of the minor. The applicant, who is the mother, lost the suit for custody and maintenance. From the records of the lower court, she does not seem to have been represented. The respondent states that the applicant only sought the services of an advocate after the judgment. There is no evidence of correspondence or details showing instructions to her lawyer to file an appeal. But even if I give the benefit of doubt, the delay is too lengthy. I am alive that the dispute relates to *custody* of a minor. I would have expected the applicant to be concerned about the appeal or to pursue the matter with a little more vigour. As it is, the reasons proffered for the delay are not plausible. There is no concrete evidence in the supporting affidavit to support the allegation that “the minor continues to suffer” in the hands of his *father*. I note the minor is *male*.
10. I have reached the inescapable conclusion that there has been *inordinate* and *unreasonable* delay in seeking leave to appeal out of time. The delay is not well explained. As a general rule, when delay is established, unless it is well explained, it is deemed to be inexcusable. See Ivita v Kyumbu [1984] KLR 441.
11. Granted those circumstances, I am unable to exercise my discretion under section 79G of the Civil Procedure Act in favour of the applicant. See also Leo Sila Mutiso v Rose Mwangi, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported). I find that the entire motion is an *afterthought*.
12. The upshot is that the applicant’s notice of motion dated 17<sup>th</sup> July 2015 is completely devoid of merit. It is dismissed. In the interests of justice, I will make no order on costs.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 4<sup>th</sup> day of February 2016

**GEORGE KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:**

Ms. C. C (applicant) in person.

No appearance for the respondent.

Mr. J. Kemboi, Court clerk.