

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO.100 OF 2013

P. W. K.....APPLICANT

VERSUS

L.K.K.....RESPONDENT

RULING

1. The applicant and the respondent got married on 3rd December 1988 at [particulars withheld] Church along Thika Road and were blessed with two children who are now adults. On 14th December 2005 the respondent petitioned the subordinate court for the dissolution of the marriage on grounds of desertion and cruelty. He also sought the custody, care and control of the two issues of the marriage. The applicant filed an answer to the petition on 7th February 2006. She denied all the allegations by the respondent. On 12th March 2013 the petition was heard. Only the respondent testified as the applicant was absent. A judgment was rendered on 2nd August 2013 allowing the petition and dissolving the marriage. A decree *nisi* was issued subsequently.
2. On 16th October 2013 the applicant filed the present application under **section 79G** of the **Civil Procedure Act** and **Order 51 rules 1-3 and 10** of the **Civil procedure Rules** for extension of time to file an appeal to challenge the judgment. Her case was that owing to problems that she had with her previous advocates she was not informed of the hearing date and the judgment date. She stated that she became aware of the judgement on 4th September 2013, and that was when she instructed her present advocates to seek the extension of time as the time for filing of appeal had passed. She stays in the U.S.A. to the knowledge of the respondent and both counsel.
3. On 13th March 2014 the respondent filed grounds of opposition stating that the application was an abuse of the process of the court, was vexatious, was brought late, an appeal did not lie, the matter had been overtaken by events etc. On 10th July 2014 the respondent filed a replying affidavit to say that following the dissolution of the marriage, he obtained decree *nisi* on the same date and decree absolute on 6th March 2014 and that on 8th April 2014 he married one G M N under the **Marriage Act (Cap 150)** (now repealed). He stated that the application has therefore been overtaken by events.
4. Under **section 79G** of the **Civil Procedure Act** an appeal to the High Court shall be filed within 30 days from the date of decree or order appealed against, 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. Further, **Order 50 rule 6** of the **Civil Procedure Rules** empowers the Court to enlarge time upon such terms (if any) as the justice of the case may require.
5. Some of the facts that a court takes into a consideration in an application for extension of time are the length of the delay, the reasons for the delay, the possible chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted (**Kenya Tea Development Authority -v- Microfilm Equipment Ltd & Another, Civil**

Application No. 221 of 1991 at Nairobi). In Nicholas Kiptoo Arap Korir Salat –v- IEBC & KLR, the Supreme Court stated that:-

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence one has to lay a basis that he was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”

6. The factual basis of the application was not challenged. The applicant resides in the U.S.A. and the petition was being heard in Kenya. She was represented and was relying on her advocates to inform her of the hearing date, and so on. She was not informed of the hearing date. She was not informed of the judgment date. When she learnt of the judgment she moved with speed to instruct the present advocates who filed the present application. I find that she has shown sufficient cause to be allowed extension of time to file an appeal to challenge the judgment. The delay has been explained, and was, in any case, not inordinate.
7. The respondent is saying that the application has been overtaken by events because he has since remarried. That issue will be canvassed during the appeal. The court will consider the legality of the new marriage given that it happened when it was known that the present application was pending.
8. In conclusion, I allow the application with costs. Time is extended by 30 days to allow the applicant file the intended appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 12TH day of April 2016.

A.O. MUCHELULE

JUDGE