

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

MISCELLANEOUS APPLICATION NO. 6 OF 2013

REHEMA AWISSA.....APPLICANT

VERSUS

SHABAN OMAR IBRAHIM.....RESPONDENT

RULING

S S, F S, M S and Z S, minors suing through their mother and next friend Rehema Awissa have applied to this court for leave to appeal out of time. They had sued their father in the Senior Resident Magistrate's Court at Mwingi in Children's Case No. 16 of 2008 seeking maintenance.

The case was heard and judgement delivered on 20th February 2013. The case was dismissed. The applicants were aggrieved by that order and sought to appeal against it. They have now come to this court seeking leave to file a memorandum of appeal out of time. The reason advanced is that the proceedings in the lower court were delayed by the court.

The application was argued ex parte by Mr. Mbaluka, advocate, who submitted that delay in filing the appeal was not deliberate and that filing the appeal out of time will not occasion any prejudice on the respondent. He submitted that the appeal has high chances of success.

The applicant has not attached any letters written to the lower court asking to be supplied with proceedings. She has not demonstrated when the proceedings were finally supplied to her.

I have read the record from the lower court. I have noted that on 26th February 2013, the applicant wrote to the Executive Officer at Mwingi Law Courts asking for proceedings and certified copy of judgement. I have noted from the court file that as late as 18th June 2013 the proceedings had not been forwarded to Garissa High Court. The lower court record was forwarded to this court and received on 5th July 2013.

Matters concerning children are sensitive and ought to be considered with the paramount consideration being the welfare of the children. For this reason, I will and do hereby allow the application. I note that among the prayers sought in the application dated 2nd May 2013 is costs for the appeal and the application. The applicant seeks orders of this court to condemn the respondent to costs for both the application and the appeal. This is not the time to seek costs for the appeal. This ought to be sought during the said appeal. As for costs in respect of this application, I hereby order the applicant to bear these costs. The application was argued ex parte and it is not fair to condemn the respondent to costs of the application.

The memorandum of appeal attached to the application and marked "RA-2" is hereby deemed as duly filed upon payment of requisite fees. I make orders accordingly.

Dated, signed and delivered this 4th February 2014.

S.N.MUTUKU

JUDGE