



No. 36

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 120 OF 2012**

**IN THE MATTER OF: AN APPLICATION BY ASHWAG MBARAK TO FILE APPEAL OUT TIME**

**AND**

**IN THE MATTER OF: CHILDREN'S MAGISTRATE CASE NUMBER 49 OF 2012, AT MOMBASA AM VERSUS T A Z**

**A M ..... APPLICANT/RESPONDENT**

**VERSUS**

**T A Z ..... RESPONDENT/APPLICANT**

**RULING**

0. On the 27<sup>th</sup> March 2012, the court granted leave to file an appeal out of time when it was demonstrated that the appellant was prevented by the delay in the supply of the certified copies of proceedings and judgment by the trial court delivered on the 13<sup>th</sup> January 2012 in the Mombasa Children Court Case No. 49 of 2011.
0. In granting the extension of time to file an appeal, the court considered the welfare of the child in accordance with the constitutional provisions that the welfare of a child is of paramount consideration in all proceedings. The trial court granted the custody of the female child aged 7 years at the time of the judgment to the respondent father against the general principle that children of tender age should be given to the mother.
0. By an application dated 16<sup>th</sup> July 2012 but filed in court on 15<sup>th</sup> February 2013, the respondent has sought the setting aside of the order of leave to file appeal out of time on the ground that the application for leave was granted ex parte without affording the respondent an opportunity to be heard, and counsel for the respondent has cited Article 50 of the Constitution in support thereof.
0. In opposing the application for setting aside counsel for the appellant has observed that the application was filed over one year after the order for leave to file the appeal was granted and indeed after an appeal Mombasa High Court Civil Appeal No. 63 of 2012 had been filed and admitted to hearing on 17<sup>th</sup> May 2012. Counsel emphasized the principle of the best interests of the child under section 88 of the Children Act and considered that the respondent would suffer no prejudice by admission of the appeal.
0. Article 53 (2) of the Constitution requires that the court gives the best interest of the child

- paramount consideration in any matter concerning the child, while Article 50 (1) of the Constitution guarantees fair hearing of disputes that may be resolved by application of law.
0. In balancing the parties' interests in the matter under the respective constitutional provisions, and granting the necessary paramountcy to the obvious best interests of the child to a permanent home and final order as regards her custody, I consider that the justice of the case requires review of the court order of 27<sup>th</sup> March 2012 to enable the respondent to be heard on the issue of extension of the time to file an appeal and, in the interests of an expeditious disposal of the dispute, that the application for extension of time be heard *inter partes* on priority basis.
  0. Accordingly, the respondent's notice of motion dated 16<sup>th</sup> July 2012 and filed on 15<sup>th</sup> February 2013 is granted but on account of its matrimonial nature, there will be no orders as to costs of the application.
  0. The application for leave to file appeal out of time dated 27<sup>th</sup> March 2012 shall be heard *inter partes* before the court differently constituted on a date to be fixed at the Registry on priority basis.

**Dated, signed and delivered on the 5<sup>th</sup> May, 2014.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Mgupu for the Applicant

Miss. Akei for the Respondent

Miss Linda - Court Assistant