

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 31 OF 2014

F SAPPLICANT

VERSUS

H TRESPONDENT

RULING

In her application dated 30th September, 2014, the Applicant is seeking two orders namely:

- i) Temporary stay of execution of the decree in Malindi CMCC Children's Case No. 53 of 2010
- ii) Extension of time to file an appeal.

The application is supported by the applicant's affidavit sworn on the same date. Mr. Otara, counsel for the Applicant submitted that the subordinate court in its judgment of 17th April, 2014 ordered that the custody of the child be given to the Respondent. The delay in filing an appeal was due to the fact that there was a divorce cause before the High Court and the issue of custody of the child was to be determined by the High Court. The High Court made its decision and did not deliberate on the issue of custody holding that the subordinate court had dealt with it. Counsel contends that the delay is not deliberate.

Mr. Otara further contends that the appeal has high chances of success. The learned magistrate did not consider the best interest of the child. The Applicant was allowed access to the child but that has been curtailed. The appeal touches on the fundamental rights of the minor and leave to appeal ought to be granted. The Respondent will suffer no prejudice and the Applicant is ready to comply with any conditions imposed by the court.

On his part, Mr. Omwancha, Counsel for the Respondent opposed the application. Counsel relied on his grounds of opposition and submitted that the delay of over five (5) months has not been properly explained. When the Lower Court delivered its judgment the Applicant and her counsel were present. No application for temporary stay was made. There is no evidence that the Applicant has applied for the proceedings. The appeal could have been filed even without typed proceedings. The High Court delivered its judgment in Divorce Cause No. 6 of 2013 on 29th September, 2014 and the application was filed just before the judgment was delivered. The Applicant has access to the child.

The main issues for determination are whether the court should allow the Applicant to file her appeal out of time and whether the Lower Court's judgment should be stayed. With regard to the first issue, it is acknowledged by the Applicant that the decision being appealed against was delivered on 17th April, 2014. According to the Applicant, the Respondent who had petitioned for the divorce had included the issue of custody of the child in the Petition. The Applicant expected the High Court to deal with the issue again. On his part, counsel for the Respondent maintains that the application was filed before the judgment in the divorce case was delivered. In essence therefore, the Applicant could not have known whether the High Court was not going to deal with the issue of custody when she filed her application. Counsel further contends that no evidence has been exhibited to show that a request for proceedings has been made. Although Counsel for the Applicant submitted that the request for the proceedings was made

in the Lower Court file, I have had the advantage of perusing the file (Children Case NO. 53 of 2010) but no such letter requesting for the proceedings is in the file. In any case, nothing would have been easier than to annex a copy of such a letter in the Supporting Affidavit.

The dispute herein involves the custody of the child. The Applicant being the mother feels that she should be the one staying with the child. She would wish to challenge the decision of the trial court before the High Court. I do find that although there was delay in seeking leave to appeal, the delay is not extremely inordinate. The explanation given, although not very strong, still suffices to convince the court to exercise its discretion in favour of the Applicant. It is not the intention of the court to block out a litigant who intends to pursue her right before it. I will allow the request to file the appeal out of time.

On the issue of stay of execution of the orders of the trial court, its not disputed that the judgment was delivered on 17th April, 2014. The effect is that the child has been in the custody of the Respondent for over six (6) months now. To have the taken back to the Applicant pending the hearing of the appeal would lead to creating confusion on the child. The Applicant should prosecute her appeal and if she is successful, she will then have the custody of the child. Before that is done, the best way forward would be to allow the child to remain with the Respondent.

In the end, the application dated 30th September, 2014 partly succeeds. The prayer for leave to appeal out of time is granted. Leave is hereby granted to the Applicant to file appeal out of time. The Applicant to file her memorandum of appeal within fourteen (14) days hereof. The prayer for stay of execution of the Lower Court judgment is hereby disallowed. The child shall remain in the custody of the Respondent. There shall be no orders as to costs.

Delivered and signed at Malindi this **11th** day of **November, 2014** in the presence of

S. Chitembwe

JUDGE