

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

Misc Cause No. 45 Of 2013

ROSE KIBUI GATANYU.....APPELLANT

VERSUS

KELLY KARANJA MURITU.....RESPONDENT

RULING

The Motion dated 27th May 2013 and filed in court on 28th May 2013 seeks leave to file appeal out of time. The decision sought to be appealed from was made on 27th November 2012 in Nairobi Children's Court Children Case **No. 524 of 2009** by the Hon. C.A. Ocharo, Principal Magistrate.

Under **Section 80** of the Children Act, Cap 141 Laws of Kenya, an appeal lies from a decision of the Children's Court in any civil proceedings to the High Court. From the papers filed in the matter the proceedings in question were civil in nature. The appeals from civil proceedings in the Children's Court are governed by the Civil Procedure Act which, according to the preamble to the said Act, makes provisions for procedure in civil courts.

The order complained of is appealable from by virtue of **Section 80** of the Children Act as read together with **Section 75(1)(h)** of the Civil Procedure Act. By virtue of **Section 79G** of the Civil Procedure Act, every appeal from a subordinate court to the High Court shall be filed within thirty (30) from the date of the decree or order appealed from, excluding such time as may be certified by the court as having been requisite from the preparation and delivery to the appellant of a copy of the order. There is a proviso to **Section 79G** to the effect that an appeal may be admitted out of time if the court is satisfied that there are ground and sufficient case for the delay.

The order complained of was made by the court on 27th November 2013. The appeal against the order ought to have been filed 30 days thereafter. That would take us to the first week of December 2012. It was not filed by then, and it was not until 28th May 2013 that the applicant came to court to obtain leave to file the same out of time.

The applicant alleges that an appeal had been filed on time by his previous lawyers, but then it was withdrawn on 3rd April 2013. She has not attached a copy of the Memorandum filed then and alleges that the same is lost. It is alleged to have been filed in **HCCA No. 30 of 2012**. It is not indicated when the said alleged appeal had been filed.

In reply to the application, the respondent filed grounds of opposition. He in principle states that there has been inordinate delay in the bringing of the application.

Both sides have filed with submissions to support the averments in made in their papers filed in court. I agree with the respondent. There has been inordinate delay in the filing of the application. The order complained of was made on 27th November 2012, 30 days elapsed sometime in the last week of December 2012. The application before me was filed in court on 28th May 2013, five months down the line. It is alleged that there was an appeal filed, but withdrawn. No proof has been provided. It is alleged that the Memorandum of Appeal got lost. It is not stated which copy lost, twwhether it was what was in the possession of advocates or that in the court file.

I am not satisfied that the applicant is entitled to exercise of discretion in her favour. I decline to extend time for the filing of the appeal. The Motion is dismissed. There will be no order to costs.

SIGNED DATED and DELIVERED in open court this **11th** day of **October, 2013.**

W.M. MUSYOKA

JUDGE