



Mwambanga & another v Mwambisi (Miscellaneous Civil Application E031 of 2025) [2025] KEHC 18747 (KLR) (19 December 2025) (Ruling)

Neutral citation: [2025] KEHC 18747 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS CIVIL APPLICATION E031 OF 2025
AN ONGERI, J
DECEMBER 19, 2025**

BETWEEN

PASCAL MWAMBANGA 1ST INTENDED APPELLANT

CLARA MWAMBANGA 2ND INTENDED APPELLANT

AND

DANCUN GILBERT MWAMBISI INTENDED RESPONDENT

RULING

1. The application coming for consideration in this Ruling is the one dated 24th July 2025 brought under Section 1, 1B, 3A, 75 and 95 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 50 Rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of the law seeking the following orders:-
 - i. The application be certified urgent and be heard on priority basis.
 - ii. The Honourable Court be pleased to grant leave to the Applicants to file an appeal against the judgement of the Honourable Court delivered on 9th December 2024 in Voi Children Case No. E033 of 2023, out of time.
 - iii. The annexed draft Memorandum of Appeal be deemed as duly filed.
2. The application is based on the following grounds:-
 - i. The Applicants are the grandparents of the minors who had custody of the minor since 21st December 2020 while the Respondent is the father to the minor.
 - ii. The trial court on 9th December 2024 delivered a judgment in favour of the Respondent granting him custody and legal parentage of the minor.
 - iii. In the said judgment, the Applicants were granted limited access to the minor only during school holidays on terms that were to be agreed by the parties.



- iv. Upon delivery of the said judgement, the minor was reluctant and had made her intentions clear that she was not going to be under the custody of the Respondent herein and was emotionally drained and disturbed.
 - v. Considering the effect of the judgment had on the minor, the parties herein tried to have a discussion on the way forward and as such they, the Respondent included had to promise the minor that she will be allowed to visit the Applicants during mid-term breaks and during school holidays and further, that the Applicants would be visiting her at school since she is in boarding school. This decision was reached for the minor's well-being and interests as she had lived with the Applicants for so long.
 - vi. That while trying to have the minor agree to settle and live with the Respondent and see how she would be fairing, the thirty (30) days period allowed for lodging an appeal lapsed.
 - vii. After the above stated agreement between the parties, the Applicants have on several occasions visited the school purposely to check on how the minor is fairing but they have been denied access by the school administration and indicated that they have instructions from the Respondent not to allow them in to see the minor.
 - viii. Additionally, on several occasions during mid-term breaks and school holidays, the Applicants have requested the Respondent to allow the minor visit them but the Respondent has always denied and/or refused their request.
 - ix. The time within which the Applicants were to file an appeal has since lapsed.
 - x. That unless the orders sought are granted, the Applicants and the minor will continue to suffer psychologically and emotionally since the Respondent has already executed part of the judgment and the intended appeal will be rendered nugatory.
 - xi. That this intended appeal shall be made purely for the benefit of the minor and not for any personal gains whatsoever.
 - xii. That the intended appeal raises substantial and prima facie issues relating to and concerning the welfare of the minor which is at stake through the enforcement of the judgment of the trial court which is converse to the best interests of the minor as well as her wishes.
 - xiii. That no prejudice will be suffered by the Respondent as he will still be granted an opportunity to be heard on the appeal on merits.
 - xiv. That it will be proper, just and in the greater interests of justice that this application be allowed.
3. The application is supported by the affidavit of CLARA MWAMBANGA sworn on 24th July 2025 in which she deposed as follows:-
- i. That I am the 2nd Intended Appellant/Applicant herein hence competent to swear this affidavit.
 - ii. That I have been authorized by the 1st Intended Appellant/Applicant to swear this affidavit for and on his behalf.
 - iii. That the trial court on 9th December 2024 delivered a judgment allowing the Respondent's suit and partially allowing our counterclaim.
 - iv. That in the said judgement, we were granted limited access to the minor only during school holidays on terms that were to be agreed between us and the Respondent.



- v. That upon delivery of the said judgement, the minor was reluctant and was rebuffing the directions to be under the custody of the Respondent herein and was emotionally drained.
 - vi. That considering the effect the judgment had on the minor, we together with the Respondent herein tried to have a discussion on the way forward and had to promise the minor that she will be allowed to visit us during mid-term break and during school holidays and further that we would be visiting her at school since she is in boarding school. This decision was reached for the minor's well-being and interests as she had lived with us for so long since 21st September 2020 and did not want to live with the Respondent.
 - vii. That while trying to have the minor agree to settle and live with the Respondent and see how she would be fairing, the thirty (30) days period allowed for lodging an appeal lapsed.
 - viii. That after the above stated agreement between the parties, we have on several occasions visited the school purposely to check on how the minor is fairing but we have been denied access by the school administration who indicated that they have instructions from the Respondent not to allow us in the school to see the minor.
 - ix. That also on several occasions during mid-term breaks and school holidays, we have requested the Respondent to allow the minor visit us but the Respondent has always denied and or refused to hear our request.
 - x. That we also wanted the minor to stay with the Respondent who is her father so that she would make an informed decision for her best interests upon a real experience of both sides.
 - xi. That since the Respondent took away the minor, we have never seen nor heard from her and we are psychologically and mentally tortured and our wish is to check on her well-being.
 - xii. That it was due to the above stated factors that the stated period of thirty (30) days within which were to file the appeal lapsed.
 - xiii. That the delay was not deliberate as we were trying other mechanisms for the minor's best interests.
 - xiv. That the intended appeal raises substantial issues for determination with high chances of success.
 - xv. That unless the orders sought are granted, we as well as the minor will continue to suffer psychologically and emotionally since the Respondent has already executed part of the judgement and thus the intended appeal will be rendered nugatory.
 - xvi. That it will be proper and just and in the interest of justice that this application be allowed.
 - xvii. That the Respondent will not suffer any prejudice if our application is allowed.
 - xviii. That I am apprehensive that if leave to file the appeal out of time is not granted, we will not be able to challenge the judgement as by law required having been dissatisfied with it.
 - xix. That I make this affidavit in support of the application to seek leave to file appeal out of time.
4. The Respondent filed a Replying Affidavit which I have duly considered and which is reiterated in his written submissions.



5. The parties filed written submissions as follows; The applicants submitted that they seek leave to file an appeal out of time against a judgment delivered on 9th December 2024, which granted custody of their grandchild to the respondent, the child's father.
6. They acknowledge a delay of approximately six months in filing this application, attributing it to good-faith efforts to prioritize the minor's emotional well-being following the distressing judgment.
7. During this period, the parties engaged in negotiations, evidenced by a written agreement, to find an amicable visitation arrangement that would serve the child's best interests.
8. These attempts ultimately broke down when the respondent failed to adhere to the agreed terms, prompting the applicants to seek appellate review.
9. The application is grounded in the discretionary power of the court to extend time, as provided under Order 50, Rule 6 of the Civil Procedure Rules.
10. Guided by the principles established in *Nicholas Kiptoo Korir Arap Salat v IEBC & Others* and *Thuita Mwangi v Kenya Airways Ltd*, the applicants submit that the delay is neither inordinate nor unexplained.
11. They further contend that the intended appeal raises highly arguable grounds, primarily centering on whether the trial court adequately considered the ascertainable wishes of the minor and the child's best welfare, which are paramount under the *Children Act*.
12. The applicants argue that no prejudice will be suffered by the respondent, who retains custody, as granting leave merely allows the appeal to be heard on its merits.
13. They emphasize that the matter concerns the vital interests of a child, and that the administration of justice warrants a flexible approach to procedural timelines to ensure a substantive determination on issues so critically affecting a minor's welfare.
14. The Respondent, the father of the minor child, vigorously opposed the application by the maternal grandparents for an extension of time to appeal the custody judgment.
15. He argues that the Applicants have provided no good or sufficient cause for their excessive delay of over six months, which they poorly explain as being due to post-judgment "discussions."
16. This delay is compounded by their outright defiance of the court's order, as they refused to release the child to her father until compelled by the Children's Office. Such conduct demonstrates bad faith and disrespect for the court, disqualifying them from seeking its equitable discretion.
17. The intended appeal is frivolous and lacks merit, as it seeks only to re-argue factual findings thoroughly considered by the trial court, which were supported by an independent social inquiry report.
18. The law strongly favours custody with the surviving parent, and no exceptional circumstances were proven to override this. Crucially, granting this application would severely prejudice the child's best interests by reintroducing instability and trauma, undermining the finality she needs.
19. The child is now settled in her father's care, and further litigation would only disrupt her welfare.
20. The Respondent therefore prays for the application to be dismissed with costs, affirming the lower court's judgment and safeguarding the child's current stable custody arrangement.
21. The matter for determination before this Court is the application dated 24th July 2025, wherein the Intended Appellants/Applicants (the maternal grandparents) seek leave to file an appeal out of time



against the judgment delivered by the trial court on 9th December 2024 in Voi Children Case No. E033 of 2023.

22. I have carefully considered the grounds on the face of the application, the supporting affidavit of Clara Mwambanga, the Replying Affidavit of the Intended Respondent (the father), the rival written submissions, and the overarching principle enshrined in Section 4(2) & (3) of the *Children Act*, 2022 that in all actions concerning children, the best interests of the child shall be a primary consideration.
23. The issues that arise from this application are as follows;
 - i. First, whether the Applicants have satisfactorily explained the delay in lodging their intended appeal.
 - ii. Second, whether the intended appeal raises arguable points with a high chance of success.
 - iii. Third, whether granting the orders sought is ultimately in the best interests of the minor child.
24. The jurisdiction to extend time is discretionary, guided by established principles and exercised judiciously, not capriciously.
25. The Court is guided by the precedents set in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, which outlined factors for consideration, which emphasized that the discretion must be exercised to avoid injustice.
26. More appropriately, in matters concerning children, the procedural focus on timelines must yield to the substantive inquiry into the child's welfare, since "the welfare of the child is paramount and trumps all other considerations."
27. On the first issue, the Applicants attribute the delay of approximately six months to a period of negotiation and attempts at an amicable resolution aimed at securing the minor's emotional transition to her father's custody.
28. They depose that the child was emotionally distressed by the judgment, prompting a collective promise to her regarding visitation terms.
29. This narrative, though contested by the Respondent, provides a plausible, good-faith explanation for the delay.
30. The Court takes judicial notice that in delicate family and custody disputes, parties are often encouraged to explore reconciliation and amicable settlements in the child's interest.
31. The period of attempted adjustment and negotiation, though it resulted in the lapse of the appeal window, cannot be dismissed as mere indolence or defiance.
32. Where the delay is not inordinate and a reasonable explanation is offered, the door to justice should not be slammed shut.
33. On the second issue, regarding the arguability of the intended appeal, the grounds presented focus on whether the trial court sufficiently considered the ascertainable wishes and feelings of the minor child, who had resided with the Applicants since 2020, and whether the access terms granted were truly in her best interests.
34. These are not frivolous points. Section 11(2) of the *Children Act* mandates the court to consider the child's wishes, having regard to their age and understanding.



35. An appellate court may well be called upon to interrogate whether this statutory mandate was fully discharged.
36. Furthermore, the Applicants allege a breakdown of the post-judgment understanding, with the Respondent allegedly denying them any access, including at the child's school.
37. This raises a serious issue regarding the practical implementation of the custody order and its impact on the child's right, under Article 53 of *the Constitution* and Section 10 of the *Children Act*, to maintain personal relations and direct contact with both parents and her grandparents on a regular basis, unless it is contrary to her best interests.
38. The intended appeal therefore presents substantial questions of law and fact, meeting the threshold of arguability.
39. The third and most important issue is the best interests of the minor. The Court's paramount duty is to safeguard the child's welfare, which encompasses her physical, emotional, psychological, and educational well-being.
40. The Respondent's submissions correctly emphasize the legal preference for parental custody and the need for finality to ensure stability.
41. However, the situation presented is not a simple binary choice between finality and litigation. The Applicants, as long-term caregivers, represent a significant and consistent emotional anchor in the child's life.
42. The alleged total severance of contact, if true, is a matter of grave concern that could itself be a source of instability and emotional harm to the child.
43. The best interests of a child are rarely served by the complete excision of a loving and formative relationship with her grandparents, with whom she has lived for a substantial period.
44. The best interests of the child is an all-encompassing umbrella that covers the totality of the child's life.
45. In the present circumstances, to deny the Applicants a forum to be heard on appeal would risk perpetuating a status quo that may be harmful to the child.
46. Conversely, granting leave does not automatically upend the child's current living arrangement; it merely permits a higher court to review the lower court's decision.
47. The Respondent retains custody pendente lite, and no irreparable prejudice is occasioned to him by the mere filing of an appeal.
48. The greater prejudice lies in potentially foreclosing a judicial re-examination of arrangements affecting a child's fundamental right to family.
49. Furthermore, this Court is alive to the potential for this appellate process to serve as a catalyst for a more sustainable resolution.
50. While the primary prayer is for leave to appeal, the history of attempted negotiation between the parties suggests that with proper judicial guidance, a mediated settlement on access and co-parenting could still be achieved, either at the appellate level or through court-annexed mediation.
51. The pursuit of such a settlement is inherently in the child's best interests.
52. Consequently, and guided by the principle that procedural technicalities should not be used to deny substantive justice, especially where the welfare of a child is at stake, the application is allowed.



53. The Applicants are granted leave to file their appeal out of time. The draft Memorandum of Appeal annexed to the application shall be deemed as duly filed and served upon payment of the requisite court fees within seven (7) days from the date hereof.

54. The costs of this application shall be in the cause

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF DECEMBER 2025 VIRTUALLY VIA MT TEAMS AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Mabishi/Millicent

.....for the Intended Appellants/Applicants

.....for the Intended Respondent

