



In re AMN & MMN (Minors) (Miscellaneous Petition E029 of 2025) [2026] KEHC 2514 (KLR) (2 March 2026) (Ruling)

Neutral citation: [2026] KEHC 2514 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS PETITION E029 OF 2025
DKN MAGARE, J
MARCH 2, 2026**

BETWEEN

DNM APPLICANT

AND

SKN RESPONDENT

RULING

1. This is a Ruling over an application dated 6.10.2025. The applicant sought the following prayers:
 - a. That this Honourable Court be pleased to grant the Applicant leave to lodge an appeal against the Judgment and decree in Nyeri Children’s Case No. E011 of 2022, delivered on 23rd May, 2024, out of time.
 - b. That the costs of this application be provided for.
 1. The applicant relied on the following grounds:
 - a. That she had sought a review of the judgment and, as such, could not appeal. It was averred that judgment was delivered on 23rd May, 2024, granting the Respondent actual custody of the minors and making final custodial, access, and support arrangements.
 - b. The Applicant is dissatisfied with the said judgment and desires to appeal against the same, raising pertinent issues that prop an arguable appeal as demonstrated by the Draft Memorandum of Appeal annexed hereto.
3. She posited that the delay in filing this application is not unreasonable or undue, and the same is not explicable. That this application has been brought without undue or unreasonable delay. The last two sentences are oxymorons, given that they say two diametrically opposed things. The main issue is custody of the minors.



Analysis

4. The issue before me is whether the delay in lodging a Memorandum of Appeal has been satisfactorily explained.
5. The factors to consider in dealing with such an application are: -
 - a. The length of delay
 - b. The reason for delay
 - c. The animus of the applicant
 - d. The prejudice to the Respondent
6. The discretion of the court in that respect is unfettered. However it cannot be arbitrary or capricious. Waki, JA in *Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company* Civil Application No. Nai. 349 of 2005 held that:

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant’s counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

7. The law governing extension of time was settled by the Supreme Court of Kenya decision (*M.K. Ibrahim & S.C. Wanjala SCJJ*) in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014]eKLR where the learned Judges held as follows:-

- “(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- (3) Whether the Court should exercise the discretion to extend time is a consideration to be made on a case-by-case basis.
- (4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.



8. There must be some material before the Court to enable its discretion to be so exercised. In *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR Odunga J observed that:

“In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman vs. Cumarasamy* [1964] 3 All ER 933; *Savill vs. Southend Health Authority* [1995] 1 WLR 1254 at 1259.

9. It follows, therefore, that the Applicant’s explanation for the delay is key in guiding the Court’s exercise of discretion on the issue of leave to appeal out of time.

10. When it comes to the question of children, a court’s heart is supposed to melt and point towards the directives of the best interest of the child. This is the dictate of Article 53 (2) of *the Constitution*, which provides as follows:

(2) A child’s best interests are of paramount importance in every matter concerning the child.

11. The delay is one year and 4 months. It is a long one. However, it is explained that there was a review application in between. The questions of the appeal’s competence, as raised, are not for this court at this time. I am satisfied that although the delay is long, it was explained.

12. The time for filing civil appeals is set out in Section 79 G of the *Civil Procedure Act* as follows: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

13. Given the circumstances of the case, I also have to consider both parties. The Respondent is entitled to the fruits of the judgment. The injustice to the Respondent if the application were to be allowed exceeds the prejudice to the Applicant if the application is disallowed. In *Harris Horn Senior, Harris Horn Junior vs. Vijay Morjaria Nyeri Civil Appeal No. 223 of 2007* when confronted with similar arguments, the Court made observations therein inter alia as follows:

(32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case.”

14. However, the true parties are not the two parties in court. It is the minors who are entitled to their best interests to be guarded jealously. In this context, I find no prejudice to be suffered by the parties. This is thus a proper application to allow.

15. This leaves the issue of costs, which is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion



of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
16. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:
- It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.
17. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Rai & 3 others v Rai & 4 others* [2014] KESC 31 (KLR), as follows:
18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation
 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.
18. This being a children matter and between parties who are co-parenting, an order that each party bears its own costs will suffice.

Determination

19. In the circumstances, I make the following orders: -
- a. The application dated 6.10.2025 is allowed.
 - b. The applicant is to file a memorandum of appeal within 21 days.
 - c. Each party to bear its own costs.
 - d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 2ND DAY OF MARCH, 2026. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.



KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Magua for the Applicant

Ms. Wachira for the Respondent

Court Assistant – Michael

