



MEM v RMM (Civil Application E447 of 2024) [2025] KECA 814 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 814 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E447 OF 2024
LA ACHODE, JA
MAY 9, 2025**

BETWEEN

MEM APPLICANT

AND

RMM RESPONDENT

(Being an application seeking extension to file an appeal out of time arising from the judgment of the High Court in Nairobi (Riechi J) delivered on 6th June, 2024 in High Court Civil Appeal No. E049 of 2023)

RULING

1. By a Notice of Motion dated 5th August, 2024, filed under rule 4 of the Court of Appeal Rules 2022, Martin Elisha Musambai, the applicant seeks orders for enlargement of the time within which to file his Notice of Appeal, as well as the Memorandum of Appeal. Upon granting this prayer, the draft Memorandum of Appeal be deemed as duly filed and served on time and the Notice of Appeal dated 5th August, 2024 be deemed as properly filed and the costs of the application be provided for.
2. The grounds of the application as set out on the face thereof are that the appeal arising from the Children’s court was scheduled for judgment in the High court on 9th May, 2024 and was deferred to 29th May, 2024 because it was not ready.

The judgment was not delivered on the subsequent date, whereupon the court indicated that it would be delivered on notice. On 26th June, 2024, the advocate on record learnt that there was a judgment on record, but it was not until 31st July, 2024, and with a lot of follow up from the advocate that the judgment dated 6th June, 2024 was availed to the applicant.
3. The applicant was aggrieved by the judgment and as such, seeks to file the Notice of Appeal and Memorandum of Appeal out of time. It is argued that the delay in lodging the Notice of Appeal was



caused as a result of lack of proper communication from the court as to when the judgment was to be delivered, and the failure to lodge the appeal was not intentional.

4. The applicant states that the appeal has a high probability of success and he is desirous of defending the minors' interests. That unless the orders sought herewith are granted the minors will be prejudiced. Further that this application has been made without unreasonable or inordinate delay and no prejudice will be suffered by the respondent if the orders sought are granted.
5. The application is supported by the affidavit sworn by Isoe Kwamboka, learned counsel for the applicant, restating the facts set out above.
6. The respondent filed a replying affidavit dated 1st October, 2024 in opposition to the application and deposed that despite the appeal being dismissed, the applicant is yet to comply with the orders of the lower court. That should this Court choose to allow the application, it should order the applicant to comply. Her averments will be analysed under the pertinent issues.
7. The applicant filed submissions dated 4th October, 2024 through the firm of Isoe and Associates Advocates, LLP. Counsel urged in reliance of *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR that in exercising discretion under rule 4, the Court is guided by the following principles: the length of the delay, the reason(s) for the delay, the degree of prejudice to the respondent if the application is granted, whether the intended appeal is arguable and lastly, the importance of the subject of the appeal. In counsel's view, the applicant has met all these conditions. Further that the discretionary power under Rule 4 must be exercised judicially.
8. In rebuttal, the firm of Morris Mbulo and Associates Advocates filed undated submissions for the respondent. Relying on the case of *Njoroge vs Kimani (Civil Application Nai E049 of 2022)* [2022] KECA it was urged that an application for extension of time must show good and substantial reasons for the delay, and a prima facie good cause why the intended appeal should be heard.
9. On whether the intended appeal is arguable the respondent relied on the decision of the Constitutional Court of South Africa in *Paulsen and Another vs Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5, where it was stated that the intended appeal must be arguable on a point of law. That it should entail some degree of merit in the argument although the argument need not, of necessity, be convincing at this stage. It must however, have a measure of plausibility.
10. This being an application for extension of time, the jurisdiction of this Court is invoked under rule 4 which clothes the Court with the mandate to exercise the discretion to extend time otherwise limited by these rules, or a decision of the Court, or Superior Court. The rule provides that:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
11. The principles applicable in considering the exercise of discretion in an application for extension of time were delineated by the Supreme Court in *Nicholas Kiptoo ArapKorir Salat vs IEBC & 7 others*, Supreme Court of Kenya Application No. 16 of 2014 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 an 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-to-case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petition, public interest should be a consideration for extending time.”
12. I have considered the grounds of the application and the submissions in light of the principles stated in Nicholas Kiptoo.
 13. With regard to whether the length of the delay was inordinate or excusable, it was submitted for the appellant that his counsel only became aware of the judgment on 26th June 2024. The judgment was thereafter availed to them on 31st July, 2024 after several unsuccessful attempts by counsel to obtain it from the court registry. It was urged that the period of delay which is slightly over one month is not inordinate in those circumstances.
 14. The delay was attributed to the fact that the judgment was not delivered as expected on the initial date of 9th May 2024, or on the subsequent date of 24th May, 2024 by the court. The court postponed the delivery of the judgment, eventually indicating that the judgment would be delivered on notice. However, the judgment was filed in the court record without notifying the parties. That the applicant’s advocate made diligent effort to follow up with the registry until 31st July, 2024, when the judgment was availed and these were circumstances beyond the applicant’s control.
 15. Therefore, it was urged that the length and reason for the delay had been satisfactorily explained as required by the holding of the Supreme Court in County Executive of Kisumu vs County Government of Kisumu & 8 others [2017] eKLR.
 16. In response the respondent deposed that this application is not for allowing. Her reasons were that the applicant did not explain what steps he took to obtain the judgment, after he became aware of it on 26th June 2024, other than the unsubstantiated claims that he made phone calls to the registry. The respondent averred that in fact, it was she who was eager for the judgment to be delivered, due to the highly detrimental stay orders granted by the superior court against the judgment of the lower court.
 17. The rules do not stipulate the number of days that may be considered as inordinate delay. Each case is to be determined on its own facts, as held in Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR in which the Court of Appeal stated that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”



18. I have considered the period of delay to establish whether it has been satisfactorily explained. I note that there is no evidence that notice of the delivery of the impugned judgment was given to the parties before the applicant's counsel learnt that it was in the court file on 26th June 2024. Thereafter it was only availed to counsel on 31st July 2024. The instant application is dated 5th August, 2024 five days later. The circumstances were not of the applicant's making. In my finding the delay was not inordinate and the reason for the delay was reasonable.
19. The next issue is whether the intended appeal is arguable. The applicant averred that the appeal has a high probability of success and he is desirous of defending the minors' interests. That unless the orders sought herewith are granted the minors will be prejudiced. It was submitted in reliance of *Vishwa stone suppliers Ltd vs RSR Stone [2006] eKLR* that the intended appeal raises serious and arguable issues as demonstrated in the annexed Memorandum of Appeal. These include the question whether the learned judge erred in upholding the decision from the Children's court. That the appeal is not frivolous.
20. The respondent on the other hand averred that the assertion that the appeal has a high probability of success is inconsequential, as her advocate strongly advised that it is not arguable. That the applicant seeks to maintain the current status quo where the minors remain separated from one another and from either parent. That he also seeks to halt the maintenance, counselling and access orders issued by the lower court and upheld by the superior court and this is inconsistent with the law. Thus the appeal is not arguable.
21. On the Possibility of the intended appeal to succeed, the Court expressed itself in *Machira t/a Machira & Company Advocates v Mwangi & Anor [2002]* thus:

“The Court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word “realistic” makes it clear that fanciful prospect or an unrealistic argument is not sufficient. When leave is refused, the Court gives short reasons which are primarily intended to inform the applicant why leave is refused. The Court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the Court is not satisfied that the appeal has no prospects of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law requires clarifying. There must, however, almost always be a ground of appeal which merits serious consideration”.
22. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. See - *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. See - *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
23. The issues raised in the Memorandum of Appeal concern children and are not idle. They deserve consideration on appeal. I say no more on this lest I should embarrass the bench that will be seized of the appeal
24. On whether granting the orders sought would occasion prejudice, the applicant urged that the respondent will not suffer any substantial prejudice if the orders are granted and that allowing the application will accord him an opportunity to ventilate his appeal on merit. That the intended appeal



concerns the welfare and best interest of children and deserves utmost consideration which should not be defeated on technical grounds.

25. The respondent countered that the subject minors have been separated from each other and from either parent since December, 2022, and the applicant seeks to make this painful separation permanent through the appeal. The respondent urged the Court to dismiss the application with costs, to restore the principles espoused in Articles 153 and 159 of *the Constitution*
26. I have weighed the right of the applicant to pursue the intended appeal, which is pegged on the need to do justice to the parties and boost the confidence of the public in the justice system, against the respondent's right to have finality and conclusiveness to litigation, so that she can enjoy the fruits of a judgement that was rendered in her favour.
27. I have weighed the importance of the subject matter. That is that the intended appeal concerns the welfare and best interest of children. The prejudice to be considered is in relation to the children who are the subject of the suit and not the two protagonists. It is of paramount importance that the children's fate be decided with conclusiveness.
28. In the end, I find that the delay is not inordinate, the reason for the delay has been sufficiently explained and the intended appeal is arguable. Consequently, the Notice of Motion dated August 5, 2024 succeeds and I order as follows:
 - i. The Notice of Motion dated August 5, 2024 is hereby allowed.
 - ii. The Notice of Appeal and Memorandum of Appeal annexed to the application be and is hereby deemed as duly filed and served.
 - iii. The applicant shall bear the cost of this application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2025

L. ACHODE

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. JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

