



CMM v MN (Civil Application E074 of 2021) [2021] KECA 67 (KLR) (8 October 2021) (Ruling)

Neutral citation: [2021] KECA 67 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E074 OF 2021
JW LESSIT, JA
OCTOBER 8, 2021**

BETWEEN

CMM APPLICANT

AND

MN RESPONDENT

(Application for extension of time to file Notice of Appeal out of time from an order of the High Court of Kenya at Eldoret (S.M. Githinji) dated 30/04/20. In H. C. DIVORCE CASE NO. 3 OF 2019)

RULING

1. This Motion before me is made under Rule 4 of the Court of Appeal Rules and it seeks for an extension of time to lodge a notice of appeal against the decision of the Superior court made on 30th April 2020 in Eldoret High Court Divorce Case No. 3 of 2019. The application is dated 7th May, 2021 and filed electronically on 11th June, 2021.

The Applicant seeks for orders:

1. That service of this application be dispensed with in the first instance.
2. That the proposed Appellant be granted leave to appeal out of time and time allowed for lodging and serving notice of appeal be extended to enable proposed Appellant to lodge and serve proper notice of appeal against the Ruling and order of the Honourable Justice S. M. Githinji (Mr.) in Eldoret High Court Divorce Case No. 3 of 2019 read and delivered on 30.04.2020. MN vs. CMM.
3. That the Notice of Appeal dated 6.04.2021, lodged on 7.04.2021 in the superior court and served on 30.04.2021 be validated upon the grant of extension of time and it be deemed to have been duly served.



4. That the costs of this application do abide the outcome of the intended appeal.
- 2 The guidelines for the exercise of discretion under rule 4 are now clear and well settled. Waki, JA, as he then was, stated in the case of *Kagai Watakia vs. Ngatia Kareko*, Civil Application No. Nai. 77 of 2005 as follows:

“The discretion under rule 4 is unfettered and there is no limit to the number of factors that the court will consider.”
3. I agree with him. The court has unfettered discretion whether to extend time or not. However, that discretion has to be exercised judiciously. The principles set out in *Leo Sila Mutiso Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997 are a good guide. The court stated:

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”
- 4 The application was filed on the 11th June, 2021. It should have been filed on or before 14th May 2021. It was thus 28 days late.
- 5 I have considered the reasons advanced by the Applicant explaining the reasons for the delay in lodging the notice of appeal. He avers that the ruling sought to be appealed against was delivered during the COVID-19 pandemic when access to court was scaled down. He avers that neither he nor his counsel received information as to the date of delivery. He avers that the ruling was delivered virtually. He avers that his advocate on record had not given his email address to court and therefore no notice was served upon them. That by the time they learned of the ruling the period for filing the notice of appeal had lapsed.
- 6 Both the Respondent and Applicant were served with notice of hearing of this application on 1st July 2021, in which direction was given to them to file written submissions within 3 days of the notice. None of them filed any submissions.
- 7 I have taken into account all the relevant factors in an application of this nature, and I am of the view that the application has merit. The delay involved in this case was not inordinate and reasons advanced for the delay are reasonable.
- 8 Accordingly, and for the reasons outlined, I allow this application, and order that the Applicant shall file and serve upon the Respondent the notice of appeal and memorandum of appeal within 14 days from the date of this ruling.
- 9 Costs shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true



copy of the original.

DEPUTY REGISTRAR

