



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPLI 170 OF 2009 (114/2009)

A.O.GAPPLICANT

AND

1. S.A.J1ST RESPONDENT

2. THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

(Application for extension of time to file and serve the notice of appeal and record of appeal from the judgment of the High Court of Kenya at Nairobi (Rawal, J) dated 18th March

in

H.C. MISC. APPL. No. 15 OF 2009)

RULING

A.O.G, the applicant herein, seeks under **rule 4** of the Rules of the Court extension of time within which to file and serve notice of appeal and record of appeal.

The judgment the subject matter of the intended appeal was given on 18th March 2009 and by that judgment the learned Judge, Rawal, J made seven orders of which the applicant was aggrieved the most pertinent one being that the applicant, a citizen of Kenya and her child of 4 years be returned to the United Kingdom within 72 hours from the date of the decision. It is common ground that the learned Judge’s decision was based on an ex-parte order of the High Court of Justice of England, and by which that court ordered that the applicant shall cause the return of the child forthwith to the United Kingdom and shall not remove him from the jurisdiction of that court without permission.

The applicant’s notice of appeal filed pursuant to the said judgment was struck out by this Court on 12th June, 2009 in Civil Application No. 99 of 2009 on the ground that it was defective in law.

Whatever events or omissions which may have taken place between 18th March, 2009 and 12th June 2009 must have been dealt with by this Court in the application which resulted in the earlier notice of

appeal being struck out. In any case nothing material turned on it in this motion. Despite this I have considered the events thereon and I am satisfied that the applicant has all the time since 18th March 2009 been desirous of exercising her right of appeal and has never relented in her pursuit. However, the events which call for explanation in this application are those which occurred after the earlier notice of appeal was struck out.

The applicant mounted this application on the same day that the respondent's application was granted thereby striking out the notice of appeal. There is therefore no delay involved in bringing this application by the applicant who is exercising her undoubted right of appeal. As there is no culpable conduct on her part she should not be barred to exhaust the legal channels available to her.

The subject matter of the intended appeal is of great public interest. The laws of two countries will call for interpretation, and possibly the mechanisms of resolving any conflict in their application will have to be determined. A child of 4 years is in the centre of dispute and further the applicant, a Kenya citizen, is ordered to leave the country. There are, indeed, serious issues to be raised and contested in the appeal. I think therefore that unnecessary obstacles by way of flimsy technicalities should not be brought in to obscure the interests of justice. Definitely, the intended appeal is arguable. It is certainly not frivolous.

The 1st respondent through his counsel Mr. Kinyanjui, though visibly contemptuous of and sometimes openly very rude to me, has vigorously opposed the application. He did not think that the applicant ought to be allowed to file the intended appeal. But, the reasons he has advanced in the replying affidavit and in the oral submissions before me relate more or less to the merits of the intended appeal which he thinks is frivolous and cannot succeed. He is fully in support of the decision of the superior court.

It is trite that under **rule 4** my discretion is unfettered but must be exercised on sound basis or as is normally put, judicially. As there is no delay involved in the prosecution of the intended appeal, the application should not be refused considering the legal issues involved in the intended appeal.

Again, I am satisfied that the 1st respondent will not suffer any prejudice if I grant the application. On the contrary, the applicant and the infant will suffer great prejudice if the right to appeal is denied them.

In reaching this decision I have taken into account the fact that Mr. Menge, the Principal State Counsel, on behalf of the Attorney General and Ms W.G. Wambugu counsel for the interested party concede the application.

The counsel for all the parties have supplied me with a lot of authorities upon which they support their submissions. I have considered all of them and I am very grateful to counsel. However most of those authorities are simply repetitious of the established principles and add no new jurisprudence

I grant the application as prayed. The applicant is granted leave to file and serve the notice of appeal and the record of appeal out of time. The notice of appeal shall be filed and served within 7 days hereof and the record of appeal shall be filed and served within 30 days also of this ruling. The costs of this application shall be in the intended appeal.

Dated and delivered at Nairobi this 23rd day of July, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR