

IN THE SUPREME COURT OF KENYA

AT NAIROBI

(CORAM: WANJALA & NJOKI, SCJJ)

SUPREME COURT CIVIL APPEAL NO. 1 OF 2013

SHABBIR ALI JUSAB.....APPLICANT

AND

ANAAR OSMAN GAMRAI.....1ST RESPONDENT

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

RULING

1] This is a preliminary objection filed by the 1st respondent and supported by the 2nd respondent seeking the dismissal of an appeal filed in this court on the 20th of November 2012 by the applicant/petitioner challenging the decision of the Court of Appeal in this matter.

2] By an application dated 24th January 2012, the appellant filed an application for leave in the Court of Appeal to appeal to the Supreme Court on the basis that the intended appeal raised weighty issues of general public importance relating to the law of international child abduction.

3] By a ruling dated 9th November 2012, the Court of Appeal granted the Certificate to file an appeal to the Supreme Court

4] Following the certification by the Court of Appeal, the appellant filed a Notice of Appeal before the Supreme Court on 20th November 2012 and a Petition of Appeal on the 5th February 2013 under Rules 9, 33 and 42 of the Supreme Court Rules and the inherent powers of the Court, which are the subject matter of this preliminary objection.

Preliminary Objection

6] The 1st respondent filed a preliminary objection dated 11th March 2013 and filed on the same date on the grounds that;

- a) the same were filed out of time;*
- b) the issues in the notice of appeal were not canvassed in the Superior Court or in the Court of Appeal;*
- c) the matters raised in the petition were not matters of general public importance, and that;*
- d) this Court therefore did not have jurisdiction to entertain the matter*

Submissions by Counsel

9] During the hearing of the Preliminary objection on the 17th of April 2013 learned Counsel for the Ist Respondent urged the court to strike out the notice and record of appeal since they were filed out of time. Counsel argued that the old rules required the Court to give directions on the time taken to file the notice of Appeal and no such directions had been given once the certification was granted.

10] Counsel further contended that at the time certification was granted, the new rules had already come into place and provided that that the Notice of Appeal should file within 14 days from the day of Judgment. Counsel drew the attention of the Court to rule 37 of the Supreme Court Rules 2012 which provide that if a record of appeal is not filed in time, the notice is deemed withdrawn and the court may on its own motion do so or on application of the party.

12] Counsel for the applicant Mr. Kinyanjui in his submissions observed that there is no material prejudice that has been visited upon the applicant. He argued that Article 159 (2) of the Constitution contemplates that substantive justice should be the driving force in deciding the matter and urged the Court to disallow the preliminary objection. He further asserted that although rules of procedure are there to guide the Court and must be followed, the applicant waited for far too long to file their notice of preliminary objection and only did so when the matter came up for mention before the Registrar.

13] Further, Mr. Kinyanjui urged the Court to consider the best interests of the Child pursuant to Article 53 (3) of the Constitution and invite the Court to the provisions of rule 37 of the Supreme Court Rules which give the court discretion to make

appropriate orders as it considers fit with respect to a notice of appeal filed out of time.

Analysis

14] This Court has yet to pronounce itself on what constitutes a matter of general public importance under Article 163(4) (b) of the Constitution of Kenya. The matter at hand is one where the Court has been called upon to determine if the questions raised are of general public importance. Allowing the preliminary objection would deny the Court an opportunity to determine this important question of law and examine the substantive issues raised by this appeal to enable it make a jurisprudential finding on whether issues of child custody are indeed matters of general public importance.

15] The Supreme Court **under** Rule 53 of the Supreme Court Rules has power to extend the time limited by these rules and we hereby exercise this power and deem the Notice of Appeal and Record of Appeal to have been filed within time.

16] The Supreme Court under Rule 55 of the Supreme Court Rules has discretion to issue appropriate orders where the rules of procedure have not been followed. Specifically, Rule 55 states as follows;

55. These Rules and Practice Directions issued there under shall bind all parties in all proceedings before the Court provided that:

(a) where any provision in these Rules or any relevant practice direction is not complied with, the Court may give such directions as may be appropriate, having regard to the gravity of the non-compliance, and generally to the circumstances of the case.

(b) any direction given under this rule may include the dismissal of the petition, reference or application

17] We have also considered the submissions of both Counsel and are of the view that no injustice will be occasioned to the Applicant if the matter is allowed to proceed to its determination under Article 163 (4) (b) of the Constitution.

18] In arriving at this decision, this Court is guided by rules and regulations and urges all parties to follow the same since they guide the court and the parties in obtaining justice. However, the Court is alive to the provisions of Article 159 (2) (d) of the Constitution which requires the Court to administer justice without undue regard to procedural technicalities. Indeed, the Court in the case of ***Raila Odinga vs IEBC and 4 others Petition (No. 5 of 2013)***, pronounced itself on the matter thus;

"The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course"

This is one of the cases where the Court disregards procedural technicalities in favour of substantive justice having regard to all relevant circumstances obtaining in this case.

19] In view of the foregoing, we dismiss the preliminary objection and order that the matter proceed to full hearing for determination of the issues at hand.

21] Accordingly this matter should be set down for hearing of the substantive appeal.

20] Costs in the Cause.

ORDERS ACCORDINGLY

Dated and Delivered at Nairobi this 23rd day of April 2013

**S.C. WANJALA
JUSTICE OF THE SUPREME COURT**

**N.S. NDUNGU
JUSTICE OF THE SUPREME COURT**

**I certify that this is a true
Copy of the original**

**DEPUTY REGISTRAR
SUPREME COURT OF KENYA**