



**Kenya Adhesive Products Limited v East African Packaging Industries Limited
(Civil Appeal E101 of 2022) [2023] KEHC 22259 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 22259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E101 OF 2022
F WANGARI, J
MAY 25, 2023**

BETWEEN

KENYA ADHESIVE PRODUCTS LIMITED APPELLANT

AND

EAST AFRICAN PACKAGING INDUSTRIES LIMITED RESPONDENT

RULING

1. The Applicant vide an application dated 25th July, 2022 and filed on 26th July, 2022 sought for the following orders: -
 - a. That the appeal filed by the Appellant be heard despite the same having been filed out of time;
 - b. That the costs of this application be provided for.
2. The application is opposed. The Respondent through its counsel swore an affidavit dated 26th September, 2022 and filed in court on 27th September, 2022. In its response, the Respondent submitted that the application lacks merit and an abuse of the court hence ought to be dismissed. The Respondent cited the cases of *Wanjiru Mwangi & Another* [2015] eKLR and *APA Insurance Co. Limited v Michael Kinyanjui Muturi* [2016] eKLR in opposing the application.
3. Directions were taken that the application be disposed off by way of written submissions. The Applicant complied by filing its submissions dated 27th February, 2023 on even date. There are no submissions on record for the Respondent and I shall deem that they were never filed.

Analysis and Determination

4. I have considered the application, the response, the Applicant's submissions as well as the law and in my view, the following are the issues for determination: -
 - a. Whether the application is meritorious;



- b. What is the order as to costs?
5. On the first issue, the application basically seeks for an order that the court regularizes an appeal filed out of time. It does not seek leave to file an appeal out of time. Section 79G of the [Civil Procedure Act](#) is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. It provides 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.”
6. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. I have perused the file and indeed the Applicant filed a memorandum of appeal dated 19th July, 2022 on the same day.
7. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in [Thuita Mwangi V Kenya Airways Ltd](#) [2003] eKLR. They include the following: -
- i. The period of delay;
 - ii. The reason for the delay;
 - iii. The arguability of the appeal;
 - iv. The degree of prejudice that will be suffered by the Respondent if the extension is granted;
 - v. The importance of compliance with time limits to the particular litigation or issue;
 - vi. The effect if any on the administration of justice or public interest if any involved.
8. On the period of delay, I note that the judgement which the Applicant seeks to appeal was delivered on 16th June, 2022. The memorandum of appeal was filed on 19th July, 2022 meaning that it was filed three (3) days out of time. This in my view is not an inordinate delay. On the reason for the delay, the Applicant submits that it is acting in person and due to limited understanding of legal procedures and timelines, it could not file the appeal within time. The director’s advanced age has also been cited as the reason. Though the reasons advanced may not be plausible enough, am satisfied that the reason for delay has been sufficiently explained.
9. On arguability of the appeal, I note that in law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court’s interrogation on the one hand and the courts invitation to the opposite party to respond thereto. I have perused the memorandum of appeal and indeed the grounds therein are arguable and I am thus satisfied that the appeal lodged is one that meets the test of arguability.



10. On the degree of prejudice, I note that the Respondent in its response stated that it had gone through a legal process to obtain a regular and proper judgement thus it would be unfair to denied it the fruits of its lawfully obtained judgement without any viable reason being fronted by the Applicant. I do not have the benefit of the judgement and as such, I am not in a position to tell what type of judgement was delivered. It would have done for the Respondent to annex the judgement it obtained and without such, I cannot discern the prejudice to be suffered by the Respondent at this juncture. Be that as it may, any prejudice to be suffered can be alleviated through award of costs.
11. The upshot of the foregoing is that I am inclined to allow the application to regularize the appeal already filed as I am satisfied that the Applicant has successfully navigated the barricades for grant of the orders sought. I thus exercise my discretion in favour of the Applicant. On the issue of costs, the same follows the event. This is what section 27 of the *Civil Procedure Act* decrees. However, this court has discretion to either award or not award any costs. Though the Applicant is successful, it would be onerous to require the Respondent to bear the costs of the application and I thus exercise my discretion to direct that the costs shall be in the cause.
12. Flowing from the foregoing, I proceed to make the following orders: -
 - a. The application dated 25th July, 2022 is merited and is thereby allowed;
 - b. The memorandum of appeal dated 19th July, 2022 and filed on the same date is deemed to have been properly filed.
 - c. The Applicant to compile, file and serve a Record of Appeal within forty-five (45) days from the date hereof;
 - d. Failure to comply with (c) above, the application dated 25th July, 2022 shall be deemed dismissed with costs;
 - e. The costs to be in the cause.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 25TH DAY OF MAY, 2023.

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F. WANGARI

JUDGE

In the presence of:

N/A by the Appellant

N/A by the Respondent

Guyo, Court Assistant

