



REPUBLIC OF KENYA



**Kuru v Attorney General (Civil Appeal E085 of 2022)  
[2023] KEHC 22216 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 22216 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E085 OF 2022**

**F WANGARI, J  
MAY 25, 2023**

**BETWEEN**

**KELVIN KUGURU KURU ..... APPELLANT**

**AND**

**ATTORNEY GENERAL ..... RESPONDENT**

**RULING**

1. The applicant/appellant *vide* an application dated June 10, 2022 and filed on even date sought for the following orders: -
  - a. That the appellant be granted leave to file the memorandum of appeal out of time with regard to the judgement delivered on March 11, 2022 in Mombasa Civil Case No 965 of 2019;
  - b. That the memorandum of appeal and the record of appeal filed herein on June 10, 2022 be deemed as though it was filed on time;
  - c. That the costs to be in cause.
2. Though it is indicated that the application is opposed, I have not had sight of the response.
3. Directions were taken that the application be disposed off by way of written submissions. The applicant complied by filing his submissions dated January 28, 2023. 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 applicant's submissions, authorities cited 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 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 June 10, 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 *Thuaita 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 March 14, 2022. The memorandum of appeal was filed on 10<sup>th</sup> June, 2022 meaning that it was filed almost three (3) months out of time. This in my view is not an inordinate delay. On the reason for the delay, the applicant submits that the employee who was instructed to lodge the appeal went back to school without notifying the employer that it had not executed the instructions on filing the appeal. It would have been imperative that an affidavit by the said employee would have been more appealing. Though the reason 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, as earlier noted, I have not had the benefit of the respondent's response and as 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 dated June 10, 2022. Indeed, the applicant has gone to the extent of compiling and filing a record of appeal. This is commendable as it is evidence of a party who is keen on exercising his right of appeal. 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.
12. 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.
13. Flowing from the foregoing, I proceed to make the following orders: -
  - a. The application dated June 10, 2022 is merited and is thereby allowed;
  - b. The memorandum of appeal dated June 10, 2022 and filed on the same date is deemed to have been properly filed.
  - c. The record of appeal is deemed to have been filed within time.
  - d. The costs to be in the cause.

Orders accordingly

**Dated, signed and delivered at Mombasa, this 25<sup>th</sup> day of May, 2023.**

.....

**F. WANGARI**

**JUDGE**

**In the presence of:**

N/A by the Appellant

N/A by the Respondent

Guyo, Court Assistant

