



REPUBLIC OF KENYA



**Kimutai v Kuria & another (Environment & Land Miscellaneous Case E719 of 2022) [2023] KEHC 1903 (KLR) (Civ) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1903 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
ENVIRONMENT & LAND MISCELLANEOUS CASE E719 OF 2022**

**AA VISRAM, J**

**MARCH 8, 2023**

**BETWEEN**

**HILLARY KOIN KIMUTAI ..... APPELLANT**

**AND**

**DAVID KURIA ..... 1<sup>ST</sup> DEFENDANT**

**SAMUEL MWANGI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling relates to the applicant’s Notice of Motion dated November 16, 2022 seeking the following orders;-
  - i. Spent
  - ii. That this Honourable court be pleased to grant the applicant leave to appellant/ applicant to file an appeal out of time.
  - iii. That the annexed Memorandum of Appeal be deemed as duly filed.
  - iv. That the costs of the application be in the cause.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of Hillary Koin Kimutai, the applicant herein, sworn on November 16, 2022.
3. The applicant submitted that he was seeking orders for leave to appeal out of time against the ruling of Hon LB Koech (Mrs) delivered on August 25, 2022 in Chief Magistrate’s Milimani Civil Suit No 2866 of 2016.



4. The applicant deponed that a ruling had been delivered in his absence stating that he had failed to collect summons within the period of 30 days as provided by the [Civil Procedure Rules](#). Accordingly, he only found out that his suit had been dismissed after the ruling had been delivered.
5. The applicant deponed that the reason for his delay in filing the appeal was because the said ruling was originally scheduled for delivery on July 7, 2022, but was then delivered on August 25, 2022, without notice to him. His advocates only learned of the ruling when perusing the court file at the registry, at which point the time for filing the appeal had already lapsed.
6. The applicant deponed that his appeal has merit, and that he should be allowed to file the intended appeal out of time because he had made the application without delay.
7. The respondent filed a Replying Affidavit sworn by Mr. David Kuria on December 23, 2022. He deponed that the applicant was misleading the court. The truth of the matter, was that the said ruling had been rescheduled from July 7, 2022 to August 25, 2022 with notice to the parties.
8. Counsel submitted that 10 years had passed since the accident, the subject matter of the suit in the lower court, and that the delay was excessive. He submitted that the suit in the lower court had also been filed outside the statutory period of limitation; and without leave of the court.

#### **Analysis and determination;**

9. 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. Section 79G of the [Civil Procedure Act](#) provides that:

‘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.’

10. 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. In *Mugo & Others Vs Wanjiru & Anor* [1970] EA 482 the court stated as follows:-

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularized before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

11. I have perused the file and noted that the applicant has attached a draft Memorandum of Appeal to the present application. The same has not been regularized.
12. 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 which could be suffered by the Respondent if the extension is granted;
  - v) The importance of compliance with time limits to the particular litigation or issue; and
  - vi) The effect if any on the administration of justice or public interest if any is involved.
13. Having considered the above factors, I note that the ruling was delivered on August 25, 2022 while the present application was filed on November 16, 2022, two (2) months after the lapse of time within which it ought to have appealed.
14. I also note that there is no evidence to show that the appellant had notice of the rescheduled ruling date. The exhibits referred to in the respondent's deposition were not attached. Nor am I able to substantiate the respondent's submission relating to protracted delay in the lower court as those matters were not in the record before me or part of his deposition.
15. Based on the reasons stated above, I am inclined to allow the applicant leave to file his intended appeal noting that two (2) months is not inordinate.
16. I decline to award the applicant the costs of this application as the appeal had not been regularized at the time of making this application.
17. The orders of this court are as follows:
- a. Leave is granted to the applicant to file an appeal out of time against the judgment of Hon LB Koech (Mrs) delivered on August 25, 2022 in Chief Magistrate's court at Milimani in Civil Suit No 2866 of 2016.
  - b. The applicant shall file and serve his Memorandum of Appeal within 14 days hereof.
  - c. The applicant shall bear the costs of the application.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 8<sup>TH</sup> DAY OF MARCH 2023**

**ALEEM VISRAM**

**JUDGE**

In the presence of;

..... for the Appellant

..... for the Respondent

