



**Mungai t/a Iron Timbers Ltd v Kimani & another (Miscellaneous Case E032 of 2023) [2023] KEHC 1563 (KLR) (Civ) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1563 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS CASE E032 OF 2023**

**AA VISRAM, J**

**MARCH 8, 2023**

**BETWEEN**

**ERIC MUNGAI T/A IRON TIMBERS LTD ..... APPLICANT**

**AND**

**JOHN ANTONY KIMANI ..... 1<sup>ST</sup> RESPONDENT**

**ANNE WAIRIMU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. I have considered the grounds in the notice of motion application dated January 23, 2023 together with the supporting affidavit sworn on January 22, 2023, and the submissions of counsel.
2. I have also considered the opposition in the replying affidavit sworn on February 28, 2023 and submissions of counsel.
3. Counsel for the applicant submitted that the appeal was filed out of time because proceedings were not ready. A delay of two months is not inordinate. Further, that the draft memorandum filed shows that the appeal is arguable.
4. Counsel for the respondent stated that the test in section 79G of the Act was not met. The applicant must show good and sufficient cause for not filing. This was not done.
5. On proceedings, he stated that no letter was annexed to show that they had been requested for. *Order* 42 rule 1 states that every appeal to the High Court shall be a memorandum of appeal. All that is needed is that; not even a record.
6. He submitted that no instructions from a client means that the client was not keen on the appeal and that is why the applicant was late.



7. Finally, that the applicant was not deserving and the chances of success of the appeal were nil.

### **Analysis And Determination**

8. 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.’

9. 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 v 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 regularised 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.”

10. 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 *Thuira 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.

11. Based on the above, I do not think that a delay of two months is inordinate and will prejudice the parties.

12. I am satisfied that the application is with merit and succeeds in part. The orders of the court are as follows:



1. Prayer 2 is granted.
2. The applicant shall however bear the costs of this application as it is the party seeking extension of time.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 8TH DAY OF MARCH 2023**

**ALEEM VISRAM**

**JUDGE**

