



**China Jianxi International (K) Limited v Overall Security  
Services (Miscellaneous Civil Application E810 of 2021)  
[2023] KEHC 3963 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3963 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E810 OF 2021**

**A MSHILA, J  
APRIL 28, 2023**

**BETWEEN**

**CHINA JIANXI INTERNATIONAL (K) LIMITED ..... APPLICANT**

**AND**

**OVERALL SECURITY SERVICES ..... RESPONDENT**

**RULING**

**BACKGROUND**

1. The notice of motion dated October 29, 2021 was brought pursuant to order 51 rule 1, order 42 rule 6 of the Civil Procedure Rules as well as section 3A & 1A of the Civil Procedure Act for the following orders;
  - a. Leave be granted to Appellant to file an appeal out of time.
  - b. The court to extend time for filing the Appeal.
  - c. The Draft Appeal herewith attached be considered duly filed upon payment of requisite court fees.
  - d. The costs of this Application be provided for.
  - e. Such further and / or other Orders be made as the court may deem fit and expedient.
2. The Application was supported by the sworn Affidavit of Mark Oyugi who stated that the Appellant was previously represented by another advocate who failed to provide details on the date of judgment and on records of the pleadings as well as other documents of the subordinate court wherefore it took the Appellant time to secure the records and the judgment.



3. The Appellant only got hold of the subordinate court records on October 28, 2021 and immediately set in motion the process herein. No party will be prejudiced if this Application is allowed.
4. Further, there is a deposit of one million six hundred thousand in the subordinate court that can be used as security in this Appeal.

### **Applicant's Case**

5. It was the Applicant's case that it has raised both matters of law and of fact in its annexed Memorandum of Appeal which raises triable issues that should be heard and determined by the court.
6. The Applicant submitted that the Application was timely and without inordinate delay as it was brought only five days after the lapse of the 30 days statutory period.

### **Respondent's Case**

7. The Respondent argued that the Application as drawn is misleading, defective, frivolous as the same is an abuse of the court process as the application before the court is filed by an advocate without the leave of the court.
8. The Application dated October 29, 2021 was heard and determined by the Hon. Chief Magistrate S.A Opande and the ruling was delivered on May 17, 2022. The Applicant's Application was replied vide the Replying Affidavit sworn on July 14, 2022. As per the Order of the Court the firm of Nyauke & Company was allowed to come on record on May 17, 2022 hence by filing the Application dated October 29, 2021 the firm of Nyauke did not have authority or leave to come on record, hence the Application is an abuse of the court process. The Applicant should have appealed against the Orders instead of the present Application.
9. The Applicant filed a similar application with the one filed in lower court, the said application was heard and determined, yet the Applicant is again bringing an application of the same nature in this court.
10. From the fore going the Judgment debtor continues to buy time and deny the decree holder from enjoying the fruits of the judgment considering that this is a matter which was determined hence continues filing unnecessary applications to continue delaying the matter.
11. The Judgment Debtor/ Applicant's intended appeal to be filed has no basis and has no chances of survival hence an abuse of the court, more so the Applicant has not applied for typed proceedings and judgment for this appeal and/or annexed any receipt to prove the same
12. The Applicant has also not attached the any receipts to confirm whether they have paid for the Decree, hence in the absence of any attachment of receipt, it is clear that the Applicant is not serious with this matter, hence the Application is an afterthought and the court cannot entertain the same as justice delayed is justice.

### **Issues For Determination**

13. Having considered the Application and the written submissions the court frames the following issue for determination;
  - a. Whether the Applicant should be granted leave to file appeal out of time.



## Analysis

14. Section 79G of the *Civil Procedure Act* allows the court to enlarge time to file an appeal. 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.”

15. The principles 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 if Respondent the extension is granted;
16. The Applicant annexed the Memorandum of Appeal dated October 29, 2021 which states that the judgment of the Trial Court was delivered on 24<sup>th</sup> September 2021. However, it is notable that the Applicant did not attach a copy of the impugned judgment and therefore the said date cannot be ascertained.
17. The reason for delay given by the Applicant was that the Appellant was previously represented by another advocate who failed to provide details on the date of judgment and on records of the pleadings as well as other documents of the subordinate court wherefore it took the Appellant time to secure the records and the judgment. The Applicant averred that it got hold of the subordinate court records on October 28, 2021.
18. The Applicant filed the matter before this Court on October 29, 2021 that the length of the delay of thirty-five (35) days was not inordinate. Considering the circumstances of the case and the reasons given by the Applicant for the delay occasioned by the change of advocates, this court finds that there is a reasonable and satisfactory explanation given for the delay.
19. On the arguability of the Appeal, it is imperative for the court to make a determination after considering the Trial Court’s judgment against the Memorandum of Appeal. Without the said judgment the court’s hands are tied.

## Findings And Determination

20. For the forgoing reasons this court makes the following findings and determinations.
- (i) This court finds the application to be devoid of merit and it is hereby struck out with costs to the Respondent.

Orders Accordingly.



**DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF  
APRIL, 2023.**

**HON. A. MSHILA**

**JUDGE**

**In the presence of;**

No appearance by parties

**Sarah-----Court Assistant**

