



**MS Advocates LLP v China Wu Yi (Kenya) Co. Ltd (Civil Application E461 of 2023) [2024] KECA 1403 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1403 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E461 OF 2023  
K M'INOTI, JA  
OCTOBER 11, 2024**

**BETWEEN**

**MS ADVOCATES LLP ..... APPLICANT**

**AND**

**CHINA WU YI (KENYA) CO. LTD ..... RESPONDENT**

*(Application for extension of time to appeal from the ruling and order of the High Court of Kenya at Nairobi (Chepkwony, J.) dated 12th May 2023 in HC Misc. C. No. E623 of 2021)*

**RULING**

1. The motion on notice before the Court is dated 14<sup>th</sup> September 2023 and is taken out by the applicant, MS Law LLP. The applicant seeks extension of time to appeal from the ruling of the High Court of Kenya at Nairobi, (Chepkwony J.) dated 12<sup>th</sup> May 2023 in which the learned judge dismissed the applicant's reference on taxation.
2. The brief antecedents of the application are as follows. On 28<sup>th</sup> February 2022 Hon. E. M. Nyakundi, Deputy Registrar, High Court, sitting as taxing officer, delivered a ruling regarding the applicant's Advocate and Client Bill of Costs. The respondent, China Wu Yi (Kenya) Co. Ltd was aggrieved by the manner in which some of the items in the Bill of Costs were taxed and applied to the High Court to set aside the decision of the taxing officer and to order re-taxation of all the items in the Bill of Costs.
3. By a ruling dated 12<sup>th</sup> May 2023, the High Court found that there was in existent an agreement on fees between the advocate and client and therefore the applicant's fees ought to have been based on that agreement. Accordingly, the learned judge found that the Deputy Registrar had no jurisdiction to tax the Bill of Costs, and allowed the application but directed each party to bear its own costs.
4. The applicant was aggrieved and filed a notice of appeal on 31<sup>st</sup> August 2023, which is slightly more than three months from the date of delivery of the impugned ruling.



5. In the application for extension of time, Ms. Neddie Eve Akello, a partner in the applicant, has deposed that the applicant was not notified of the date of delivery of the ruling and further that as at the date the ruling was delivered, she was out of the country. She adds that the ruling was scheduled to be delivered on 19<sup>th</sup> January 2023 but the same was deferred to be delivered on notice. Subsequently the learned judge was transferred from Nairobi but the parties were still assured that the ruling would be delivered on notice.
6. The applicant further avers that it was not until 24<sup>th</sup> August 2023 that the court informed her that the ruling had been delivered on 12<sup>th</sup> May 2023, and availed a copy of the ruling to her, by which time the 14 days prescribed by rule 77(2) of the [Court of Appeal Rules](#) for filing a notice of appeal had long expired.
7. In written submission dated 16<sup>th</sup> October 2023, the applicant submits that there are good reasons why they were unable to file the notice of appeal timeously; that they filed the notice without delay upon learning of the delivery of the ruling; that the intended appeal is not frivolous and that they stand to suffer more prejudice than the respondent if time is not extended to appeal.
8. From the record, on 11<sup>th</sup> October 2023 the Court directed the parties to file and exchange submissions within 30 days. By the hearing notice dated 4<sup>th</sup> September 2024, the parties were again reminded to file submissions before the hearing date on 23<sup>rd</sup> September 2024. The respondent filed only a notice of appointment of advocates on 9<sup>th</sup> April 2024. Their submissions, if any, are not on record. I shall accordingly treat this application as unopposed.
9. Before I address the merits of the application, it is important to point out that that by dint of rule 11(3) of the [Advocates Remuneration Order](#), the applicant has no automatic right of appeal to this Court from the decision of the High Court in objection proceedings on taxation. The provision provides as follows:
 

“ 11 Any person aggrieved by the decision of the judge upon any objection referred  
 (3) to such judge under subsection  
 (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.”
10. There is nothing on record to indicate that the applicant has obtained leave to appeal to this Court as required by rule 11(3) of the [Advocates Remuneration Order](#). In the application before me, the applicant has applied for extension of time to appeal, suggesting that they have an automatic right of appeal, which is not the case.
11. In the interest of doing substantive justice by virtue of Article 159 (2) (d) of the [Constitution](#) , I will treat the application before me as one for extension of time to enable the applicant apply for leave to appeal to this Court.
12. Turning to the merits of the application, extension of time is not a right of a party but a discretionary remedy granted to a party who is able to satisfy the Court that they were prevented by good reason from taking action within the prescribed time. (See [Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 others](#) [2014] eKLR).
13. Also, being an equitable remedy, a party who is seeking extension of time and the exercise of discretion in his favour must be candid and forthright with the Court. A party who convinces the Court that he lacks candour is not entitled to such a remedy.



14. The factors that guide the court in determine whether or not to extend time are well settled. In *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi*, CA No. Nai. 255 of 1997, this Court stated the factors as follows:

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay:

secondly, the reason for the delay: thirdly, (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.

(See also *Fakir Mohamed v. Joseph Mugambi & 2 Others*, CA No. Nai. 332 of 2004)

15. The delay involved in this appeal is slightly over three months, which ordinarily would be inordinate. However, the applicant has explained that the ruling was scheduled to be delivered on notice and they were not notified of the date of delivery of the ruling and did not get to know of the delivery of the ruling until 24<sup>th</sup> August 2023. The Notice of Appeal was filed on 31<sup>st</sup> August and this application on 14<sup>th</sup> September 2024, less than a month after the applicant was notified that the ruling had been delivered.

16. As I indicated earlier, the respondent has not filed a replying affidavit or submissions. I do not have anything on record to controvert the applicant’s averments. I do not think the intended appeal is frivolous and neither can I say, in the absence of a response from the respondent, that the respondent stands to suffer greater prejudice than the applicant.

17. Having found that the applicant has candidly and honestly explained the delay, I allow the notice of motion dated 14<sup>th</sup> September 2023 and direct the applicant to apply for leave to appeal to this Court within Fourteen (14) days from the date of this ruling. Costs will abide the outcome of the intended appeal. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024.**

**K. M’INOTI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

