



**China Zhongxing Construction Company Limited v Longovane (Civil Miscellaneous Application E462 of 2021) [2024] KEHC 1671 (KLR) (Civ) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1671 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**CIVIL MISCELLANEOUS APPLICATION E462 OF 2021**  
**AN ONGERI, J**  
**FEBRUARY 23, 2024**

**BETWEEN**

**CHINA ZHONGXING CONSTRUCTION COMPANY LIMITED .. APPLICANT**

**AND**

**JONATHAN ONYNAGO LONGOVANE ..... RESPONDENT**

**RULING**

1. The application coming for consideration in this ruling is the one dated 31/8/2021 brought under rule 51(1) and 1A Sections 1A, 1B, 3A and 95 of the *Civil Procedure Act* and all enabling provisions of law seeking the following prayers;
  - i. That the applicant be granted leave to lodge appeal out of time against the whole judgment of the Hon. D. Ocharo delivered on 30<sup>th</sup> November, 2020 at the Chief Magistrate's Court at Milimani by Hon. E. Kagoni.
  - ii. That the cost of this application be met in the cause.
2. It is supported by the affidavit of Apollo Kariuki sworn on 31/8/2021 in which it is stated that he is working with the applicant as its safety officer duly authorized to swear this affidavit and therefore, competent to swear this affidavit.
3. That their advocates on record wrote to them on 4<sup>th</sup> December, 2020 informing them of the judgment delivered by the court on 30<sup>th</sup> November 2020.
4. That they instructed the advocates on record to file an appeal against the judgment.



5. That we have been advised by our advocates which advise we verily believe to be true that they had problem filing the appeal because of the e-filing system has not provided fully for appeals going from lower court to the High Court.
6. That they tried to follow up on the matter with IT officials such that they now need to seek leave to file the appeal out of time.
7. That the Memorandum of Appeal annexed to this application shows that you got a good chance of success.
8. The respondent filed a replying affidavit opposing the application in which he deposed that the applicant does not want the respondent to enjoy the fruits of his judgment which was legally acquired.
9. Further, that the applicant has not demonstrated that the intended appeal has high chances of success.
10. That this application and appeal are abuse of the court process and ought to be dismissed.
11. That if the court is inclined to grant the orders sought then the applicants should be ordered to deposit the entire decretal sum in joint account of both parties.
12. That the respondent will be prejudiced if the orders sought are granted.
13. That the applicant has not demonstrated that they will suffer substantial loss if the orders sought are not granted.
14. That the application ought to be dismissed because it is a waste of the court's time and it is aimed at delaying justice.
15. Finally, that in the alternative if the court is inclined to grant orders sought, then the court should order the applicants to pay costs.
16. The parties filed written submissions as follows;
17. On the part of the Applicant, counsel began by reiterating the reasons advanced in the Applicant's affidavit material to assert that delay in filing the appeal was beyond the Applicant's control thus necessitating the instant motion. Concerning arguability of the appeal, counsel contended that the intended appeal has a high chance of success given the grounds enumerated in the memorandum of appeal meanwhile the Applicant is willing to abide with any conditions imposed by the court including depositing the decretal sum in a joint account.
18. Further agitating the aforesaid, it was submitted that paying the decretal sum to the Respondent would create problems by way of recovery should the appeal succeed. In conclusion, counsel called to aid the decision in *Zarika Adoyo Obondo v Tai Shunjun & Another* [2020] eKLR in urging the court to allow the motion as prayed.
19. The Respondent on his part condensed his submissions into (3) cogent issues for the court's consideration. As concerns success of the intended appeal, counsel submitted that the appeal has a very low chance of success as the award by the trial court was reasonable given that the Respondent proved his case on a balance of probabilities. On delay, it was posited that the Applicant is guilty of the same given that the impugned judgment was delivered on 30.11.2020 whereas it took the Applicant more than three (3) years to prosecute the instant motion as such the delay herein is inexcusable.
20. In support of the foregoing counsel relied on the decision in *Nicholas Mutuku Mwasuna v Patricia Mueni Kilonzo* [2022] eKLR. Lastly, addressing the question of substantial loss, it was argued that the Respondent is a person of means capable of refunding the decretal sum should the intended appeal



succeed whereas if the court is inclined to allow the Applicant's motion it ought to order provision of security to be deposited in a joint account. In summation and in the alternative to the foregoing counsel urged the court to dismiss the motion for want of merit.

21. The sole issue for determination is whether the applicant should be granted leave to appeal out of time.
22. I find that the judgment was delivered virtually at a time when courts were transitioning from physical to virtual hearings.
23. I find that the delay in filing the application has been explained.
24. I find that the respondent will not suffer prejudice that cannot be compensated by an award of costs.
25. I allow the application dated 31/8/2021 on the following grounds;
  - i. That the appeal be filed within 30 days of this date.
  - ii. That the entire decretal sum be deposited in a joint interest earning account held by counsels for both parties within 30 days of this date.
  - iii. That the appeal be fully prosecuted within 90 days of this date.
  - iv. That the applicants pays the cost of this application.
  - v. That failure to fully prosecute the appeal within 90 days the same to stand automatically dismissed with costs to the respondent and the decretal sum to be released to the respondent without reverting back to court for an order of release.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

.....for the Applicant

.....for the Respondent

