



REPUBLIC OF KENYA



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Busia Sugar Industry Limited v Chivilili & another (Miscellaneous Civil Suit E077 of 2022) [2023] KEHC 464 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEHC 464 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS CIVIL SUIT E077 OF 2022**

DK KEMEL, J

JANUARY 26, 2023

BETWEEN

BUSIA SUGAR INDUSTRY LIMITED APPLICANT

AND

ALEX JUMA CHIVILILI 1ST RESPONDENT

ESHIKONI AUCTIONEERS 2ND RESPONDENT

(An application for extension of time to file an appeal against the orders issued on June 17, 2022 and June 21, 2022 in Bungoma CMCC No 399 of 2019.)

RULING

1. The applicant has filed a notice of motion brought under certificate of urgency dated October 6, 2022 under the provisions of section 1A, 3A, 79G of the [Civil Procedure Act](#), order 22 rule 22, order 42 rule 6(1) and order 50 rule 6 of the [Civil Procedure Rules](#) seeking the following prayers;
 - a. The honourable court be pleased to enlarge the time within which the applicant may lodge their intended appeal against the orders issued on June 17, 2022 and June 21, 2022 in Bungoma CMCC No 399 of 2019.
 - b. Orders of stay of execution be issued pending the hearing and determination of the intended appeal.
 - c. Costs of the application be provided for.
2. The application is supported by the affidavit of JN Ngigi, counsel appearing for the applicant in which he depones that the ruling on the auctioneer's bill of costs was delivered on June 17, 2022 without their notice and on sending a representative to the registry to procure a copy thereof, the file was not



available until July 12, 2022. That by that time, the time allowed for lodging a reference against the bill had lapsed due to unavailability of the file.

3. Upon obtaining a copy of the ruling, he preferred an application for extension of time to file his reference before he learnt that the court lacked jurisdiction forcing him to withdraw the application further aggravating the delay. He admits that the mistake was his and should not be visited on the applicant. That their appeal is arguable with a high chance of success.
4. The application was strenuously opposed. The auctioneer filed his replying affidavit sworn on October 12, 2022 wherein he deponed inter alia; that upon the ruling being rendered, he wrote to the applicant's counsel on the ruling and asking for settlement of the bill; that two days to the lapse of the stay window granted, the applicant instituted an application for stay which has been formally withdrawn from court rendering the instant application sub judice; that the length of six months before filing the application is inordinate and inexcusable and the applicant is thus not entitled to the orders sought.
5. The parties subsequently filed and exchanged written submissions in disposal of the application. Both parties duly complied.
6. The applicant submits that in determining an application for enlargement of time, parameters under section 95 of the *Civil Procedure Act* and case law that ought to be satisfied are thus; period of delay, reasons for the delay, arguability of the appeal, prejudice to be suffered by respondent, importance of compliance with timelines and the effect on the administration of justice.
7. On the period of delay, it is argued that rule 55 of the *Auctioneers Rules 1997* permits seven days to file a reference and in the instant case, the period of filing such reference lapsed on 24th and June 28, 2022 respectively. The applicant was late by three months and some days.
8. On the reasons for the delay, counsel contends that the delay was caused by the fact that he had no notice of the delivery of the ruling, the unavailability of the file at the registry and the act of filing the application for stay at the subordinate court. He supports his position with the holding of Madan, J in *Belinda Muras & 6 others v Amos Wainaina* (1978) eKLR.
9. On the arguability of the appeal, counsel contends that it has plausible grounds with high chance of success. On the degree of prejudice to be suffered by the respondent, it is submitted that the court ought to balance the rights of the applicant to appeal against the respondent's loss. That there is no demonstrated prejudice the respondent shall suffer.
10. On the importance of complying with timelines, it is submitted that in as much as the applicant is out of time, section 95 of the *Civil Procedure Act* allows extension of such time and buttresses this position with the case of *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* (2018) eKLR. Lastly, on the effect of administration of justice, it is argued that allowing the application would be a fair administration of justice.
11. On the prayer for stay of execution of decree, counsel submits that the legal underpinning on the subject is order 42 rule 6 of the *Civil Procedure Rules* and that an applicant needs to satisfy the conditions therein. On the element of substantial loss, it is submitted that the respondent has already extracted the certificate of costs and may attach the applicant's assets in execution and may subsequently be sold off before the determination of the appeal. Counsel cites *Kinyunjuri Muguta v Wotuku Muguta* (2018) eKLR.
12. On the issue of security, counsel submits that the applicant is willing to provide security as the court may deem fit and lastly, on the delay, he contends that the delay was due to the fact that the ruling was



delivered without notice, the unavailability of the file at the registry and his mistake of filing the initial application in the subordinate court.

13. The respondent on his part submitted that an order of stay cannot be granted on taxed costs supporting this with the authorities in *Francis Kabaa v Nancy Wambui* (1996) eKLR.
14. As to whether the applicant has established sufficient cause, it is submitted that the applicant has not annexed a draft chamber summons enumerating their dissatisfaction with the ruling they intend to appeal against. He relies on *Flamingo Towers Ltd Citiscpaes Valuers and Estate and Agents Ltd v Homelands Media Group Ltd* (2021) eKLR and *Nicholas Kiptoo Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR.
15. As to whether the applicant has demonstrated substantial loss, it is submitted that the auctioneer is a man of means who can refund the taxed costs if the appeal is finally successful. Whether the application is merited, it is argued that the applicant has not placed enough material before the court to enable it exercise its discretion. The delay has not been explained satisfactorily and that a mistake of counsel cannot be an excuse. Reliance is placed in *Joseph Erick Owino v Dr Japheth Ogendo Owuor* Civil Suit No 164 of 1997-Kisumu.
16. On the issue of stay of execution, it is further submitted that there is no imminent danger of execution since no warrant of execution has been given and that the applicant has not offered security for the due performance of the decree. In sum total, the respondent prays that the application be dismissed.

Analysis and determination

17. The issues for determination in this application are two-fold; firstly, whether the applicant is entitled to enlargement of time to file its reference and secondly, whether the applicant is entitled to stay of execution of the ruling pending determination of the intended reference.
18. The starting point is that the ruling sought to be appealed against was made pursuant to rule 55 (5) of the *Auctioneers Rules 1997* which provides;

The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.
19. The provision envisages the filing of such reference within seven days of the date of the ruling though in the instant case, the applicant was late by a period of close to four months. The applicant attributes this delay to; the unavailability of the file at the registry for perusal after the delivery of the ruling, the ruling being delivered without notice to them and the fact that he initially filed his application for extension of time in the subordinate court.
20. The factors to be taken into consideration while reviewing the delay were stated in *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR where it was held that: -

the under-lying principles that a Court should consider in exercise of such discretion:

 - a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;



- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
21. I am aware that the power to enlarge time is an exercise of discretion which must be exercised judiciously. In exercising the discretion, the court is asked to balance between the conflicting rights of the applicant to exercise his unassailable right to appeal against the respondent's right to enjoy the sweet fruits of his judgement.
 22. The court also needs to consider the prejudice that will be suffered by the respondent if leave is granted. In the circumstances of this case, the dispute is a taxed bill of costs awardable to the auctioneer. The auctioneer avers that he is a man of means and can easily refund the money if the appeal finally succeeds. I have to balance this against the applicant's apprehension that their goods will be attached and sold off in execution. It is not in doubt that the bill still stands until the appeal is determined and the respondent will eventually be paid.
 23. After reviewing the matter, I am inclined to allow the applicant leave to lodge his reference out of time. Although I note from the application that a chamber summons appeal dated October 6, 2022 has been annexed without a prayer in the motion for the admission of the appeal as duly filed. In the interest of justice, I will allow the chamber summons as duly filed.
 24. Turning to the second issue, the law governing the grant of stay pending appeal is found in order 42 rule 6 of the Civil Procedure Rules which provides the conditions to be established by an applicant seeking stay of execution; substantial loss, the application has been filed without unreasonable delay, and; security for the due performance of any decree.
 25. Odunga J in *Michael Ntouthi Mitheu v Abraham Kivondo Musau* (2021) eKLR observed as follows regarding an application for stay;

..... To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A(2) of the *Civil Procedure Act*.
 26. The applicant avers that its goods will be attached and sold off if the order is not granted. The respondent contends that there is no warrant of attachment already served. Substantial loss was stated in *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR, as:

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.



27. I note that there is no imminent danger of attachment against the applicant as no warrants of attachment have been taken out.

28. On the issue of delay, I have already stated the reasons tendered. In *Ngwambu Ivita v Akton Mutua Kyumbu* HCCC No 340 of 1971 (unreported) the issue of inordinate delay was discussed thus;

So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too ... The defendant must however satisfy the Court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the Court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the Court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the Court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed.

29. In light of the applicant's explanation for the delay, I am inclined to find that the explanation for the delay is implausible. The delay is inordinate. It seems the applicant was woken from slumber after realizing that the respondent was about to proceed with execution. In any case, orders of stay of execution ought not to affect taxed costs and further, the respondent has indicated that he is a man of means and will be in a position to refund the monies in the event of success of the reference.

30. The third limb relates to the provision of security for the due performance of the decree. In the instant application, the applicant has not offered any security but has only indicated that it is willing to offer.

31. For the reason that the applicant has not demonstrated the grounds to warrant the issue of stay orders, coupled with the fact that the respondent, an auctioneer is an officer of the court, he can refund the amount that may be paid to him if the appeal is finally successful.

32. In view of the foregoing observations, the applicant is hereby granted leave to lodge his reference out of time. The chamber summons annexed to the application is hereby deemed as duly filed upon payment of court filing fees and that the applicant is ordered to serve the same within seven (7) days from the date hereof. The order of stay of execution pending the intended appeal and or reference is declined. Costs of the application shall abide the outcome of the reference.

DATED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF JANUARY, 2023

D.KEMEI

JUDGE

In the presence of :

Miss Mwangi for Ngugi for Applicant

Anwar for Respondent/Auctioneer

Kizito Court Assistant

