



West Kenya Sugar Company Limited v Khachina (Miscellaneous Civil Case 05 of 2023) [2023] KEHC 21015 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21015 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL CASE 05 OF 2023
SC CHIRCHIR, J
JULY 28, 2023**

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED APPLICANT

AND

JACKSON ASEKA KHACHINA RESPONDENT

RULING

1. That Applicant's Notice of Motion dated February 3, 2023 seeks for leave to file an Appeal out of time.
2. It also seeks for leave to deposit the decretal sum of kshs 300,000 or any part thereof in court, pending the hearing and determination of the intended Appeal. The Application is supported by the Affidavit of Eunice Adhiambo Owour sworn on behalf of the Applicant.

The Applicant's Case

3. It is the Applicant case that the delay in filing the Appeal was occasioned by an Advocate, who abruptly left the firm representing the Applicant herein without notice, and any proper hand-over.
4. That those were mistakes of an Advocate, and which mistakes should not be visited on a client. It is further stated that the delay is not inordinate and that the Appeal is arguable.
5. The Applicant has further told the court that they were unable to get any stay at the trial court by the trial court and hence the Applicant stands the risk of execution proceedings

The Respondent's case

6. The Application is opposed through the Affidavit of Jackson Aseka Khachina, the Respondent.



7. It is the Respondent case that judgment was delivered upon prior notification to the parties. That the Applicant had obtained an order of stay in the lower court which order lapsed due to the Applicant's failure to attend court.
8. That the issue of the Advocate leaving the firm has been over played as the case has always been handled by an Advocate based in Kakamega and the same advocate is still working within the same law firm That the present Application is merely on afterthought
9. It is further stated that the delay is inordinate and inexcusable.
10. The Application was heard by way of oral submissions.

Appellant's Submission.

11. It is the Appellant's submission that a delay of 2 months and 2 days is not inordinate; that courts have previously held a departure of an advocate from a firm without prior Notice as sufficient cause.
12. It is further submitted that the Appeal is arguable, evidenced by the draft memorandum. That the Applicant should not be chased away from the seat of justice on account of failures of an advocate.
13. The Applicant further submits that the proceedings in the lower court has no bearing in the present Application and that it is only this court that can enlarge time.

Respondent's Submissions

14. Counsel for the respondent has pointed out that the name of the alleged Advocate who purportedly left the law firm is not indicated. That indeed the matter was being handled by an Advocate going by the name Maurice Angara, and the said Advocate is still in the Law firm. That the various Authorities cited by the Applicant to argue for extension represent different scenarios dissimilar to the present one.
15. On whether the appeal is arguable, the respondent argues that the arguability is not a factor for consideration in an application for enlargement of time. The respondent argues that there has been no sufficient cause shown for the delay in filing the Appeal.

Determination

16. The issues in this application are: Firstly, whether this court should enlarge time for filing an appeal, and secondly, whether the Applicant should deposit the decretal sum in court.

Whether time should be enlarged

17. The factors that the court needs to take into account when determining an Application for enlargement of time were set out by the supreme court in the case of *Nicholas Kiptoo Arap Korir Salat vs. IEBC & Others* (2014) eKLR where the court laid down the principles as follows; -
 1. 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
 2. A party who seeks from extension of time has the burden of laying a basis to the satisfaction of the court
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on case by case basis.



4. Whether there is a reasonable reason or the delay the delay should be explained to the satisfaction of the court.
 5. Whether there will be any prejudice suffered by the respondent. If extension is granted.
 6. Whether the application has been brought without undue delay.
 7. Whether in certain petitioner, public interest should be considered
18. In the present case, the reasons given for the delay is that the advocate who was handling the case, left without proper hand-over. The respondent has refuted this by stating that the name of the alleged advocate has not been provided and that the matter was being handled by one Maurice Angara. Advocate, based in Kakamega. In their submissions the Applicant has provided the name as Daniel Ndale. This information was not submitted to court by way of an affidavit however.
 19. The respondent, in their response have attached a similar application filed by the Applicant in the lower court seeking for stay of execution The Affidavit in support of the said Application has been sworn by the same Daniel Ndale Advocate. Curiously in the said affidavit the said Daniel Advocate is equally blaming another advocate for delay, this time unnamed, who also resigned and without proper hand-over.
 20. Further the annexed documents from the lower court has a draft memorandum of Appeal. The draft was done on November 21, 2022. judgment was delivered on 11.2022. Thus, as at the time the draft was being done, the stipulated period of filing Appeal was yet to lapse. It is rather difficult to understand why the Applicant would draw a draft for purpose of getting stay when a proper memorandum could have been easily filed.
 21. The explanation given for the delay not only insufficient but I find the explanation rather insincere, and at worst, borders on deceit. He who comes to equity must do so with clean hands. The Applicant's conduct is not deserving of an equitable relief.
 22. However, in my view the delay of 2 months is inordinate, and no prejudice has been demonstrated to have been visited on the respondent. The application has also been field without undue delay.
 23. On these last three grounds, and only that do I grant the prayer for enlargement of time.

Stay pending Appeal

24. This prayer has not been expressly made but has been camouflaged in a prayer to deposit the decretal sum in court
25. There are a host of past decisions by the superior courts, setting out the conditions which the Applicant must satisfy before the court can grant stay. These are: -
 - i. An arguable Appeal
 - ii. Substantial or that the appeal will be rendered nugatory if the appeal is not granted
 - iii. That the Applicant has given or is willing to give such security as the court may order for the due performance of the decree.
26. I have perused the draft Memorandum and noticed that there are issues that may be arguable
27. However, I am not satisfied that the Applicant has satisfied the court that the appeal if it succeeds will be rendered nugatory. There is no single mention that the respondent is impecunious; there is no



apprehension expressed that the respondent may not be able to pay back the decretal sum. This court has not authority to assume financial standing of the respondent. I am not satisfied therefore that the Applicant is deserving of the orders of stay.

28. Consequently, the prayer for stay is hereby declined.

29. In conclusion I make the following orders:

- a). Leave is hereby granted for the Applicant to file the Appeal out of time, and the memorandum of Appeal is to be filed within the next 14 days from the date of this Ruling.
- c). The prayer for stay of Execution pending Appeal is hereby disallowed.
- d). The costs of this Application are awarded to the Respondent.

Dated. Signed and delivered virtually at Kakamega this 28th day of July, 2023

S. Chirchir

Judge

In the presence of;-

Eric- Court Assistant

No appearance by the parties.

