



**South Nyanza Sugar Company Limited v Angila (Miscellaneous Civil Application
206 of 2023) [2023] KEHC 25624 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25624 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION 206 OF 2023
RPV WENDOH, J
NOVEMBER 23, 2023**

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED APPLICANT

AND

JARED ONYANGO ANGILA RESPONDENT

RULING

1. This ruling is in respect to the Notice of Motion dated 2/6/2023 (the application) filed by South Nyanza Sugar Company Limited (the applicant). The applicant seeks the following orders: -
 1. Spent;
 2. Spent;
 3. The applicant deposit the principal award in Rongo CMCC No. 345 of 2018 - *Jared Onyango Angila v South Nyanza Sugar Company Limited* in court, or in a joint interest earning account, within thirty (30) days of the court making an order requiring deposit of security, as condition for granting interim order of stay of execution of the decree of the lower court, pending the hearing and determination of this application;
 4. That the applicant be granted leave to appeal to this court, out of time, from the judgement and decree of the subordinate court dated and delivered on 11/4/2023 in Rongo CMCC No. 345 of 2018 - *Jared Onyango Angila v South Nyanza Sugar Company Limited* in terms of the applicant's annexed draft memorandum of appeal by fixed extension of time to appeal;
 5. That there be a stay of execution of the judgement and decree of the subordinate court in Rongo CMCC No. 345 of 2018 - *Jared Onyango Angila v South Nyanza Sugar Company Limited* dated and delivered on 11/4/2023 pending the hearing and determination of the applicant's intended appeal to this court on conditions the court seems just and affordable;



6. The security availed by the applicant in compliance with the court's order made pursuant to prayer 3 hereinabove, as a condition for the grant of prayer 2 hereinabove, be ordered to remain in place as a condition for grant of prayer 5 hereinabove, consequent to granting leave to appeal to this court out of time, in terms of prayer 4 hereinabove, pending the hearing and determination of this appeal, or until further orders of the court;
 7. Costs of this application be in the intended appeal.
2. The grounds upon which the application is based, are found in the body of the application and the supporting affidavit of Maurice Omondi Ng'ayo the applicant's Legal Service Manager. Counsel deponed that on 11/4/2023, judgement was delivered in the Rongo subordinate court against the applicant for Kshs. 365,040/= with interest from the date of filing suit and cost of the suit; that the applicant being dissatisfied with the judgement and decree of the subordinate court, wrote a letter dated 20/4/2023 to its Counsel instructing them to lodge an appeal; that the letter was inadvertently mixed up in the dispatch and transmission process that it reached the applicant's Counsel's office on 2/6/2023.
 3. It was further deposed that the applicant's intended appeal is arguable as proposed in the draft grounds of appeal; that the intended appeal was statutorily barred on 12/5/2023; that the subordinate court's award was unjust and contrary to the evidence that was on record; that the instant motion has been filed without delay as soon as the applicant's Counsel received the letter instructing them to file an appeal on 2/6/2023; that sufficient cause has been shown why leave sought ought to be granted.
 4. The applicant deposed that the decretal debt in the lower court stands at Kshs. 620,568/= besides the costs; that execution proceedings are imminent as the respondent is intent on causing the execution to issue against the applicant; that there is need to preserve the substratum of the intended appeal; that the applicant stands to suffer substantial loss if the decree is executed and the appeal is successful; that the applicant is willing to provide security for the due satisfaction of the decree within 30 days of any order. The applicant urged this court to allow the application as prayed.
 5. The application was opposed. The respondent filed grounds of objection on 23/6/2023 as follows:-
 1. No reasonable grounds have been adduced or stated capable of excusing the inordinate delay in failing to file the intended appeal on time and also file the application.
 2. The proposed or preferred grounds of appeal have no prospect of success.
 3. The application is but a ploy to deny the respondent the fruits of judgement in the subordinate court and is meant to further drag proceedings for unnecessarily long intentionally so as to exhaust the respondent.
 4. No prejudice will be occasioned to the application should it pay the decretal sum this being but a mere money decree.
 6. Directions were taken that the application be canvassed by way of written submissions.
 7. The applicant filed its written submissions dated 11/10/2023. It was submitted that sufficient cause has to be shown by the person seeking the exercise of the court's discretion to extending time. The applicant relied on the case of *County Executive of Kisumu v County Government of Kisumu & 8 Others* (2017) eKLR where the Supreme Court re - stated the principles on extension of time that it had set out in *Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 Others* (2014) eKLR and the findings in the case of *Yeri v Registrar of Titles Mombasa & 2 Others; Gao Yu International Limited & 4 Others (Interested Parties)* ELC Petition No. 11 of 2013.



8. It was further submitted that the motion has been filed without inordinate delay and if the orders are not granted, the applicant stands to suffer substantial loss.
9. The respondent filed his written submissions on 20/10/2023. The respondent submitted that the instant application is devoid of merit; that of importance is that there has to be sufficient explanation made for the delay as it was underscored by the Court of Appeal in *Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo* (2019) eKLR where the court restated the principles by the Supreme Court in Nicholas Kiptoo Korir Arap Salat (*supra*) on extension of time. The respondent submitted that the applicant has not met the threshold espoused under Section 79G of the *Civil Procedure Act*; that the reason advanced herein is a scapegoat and no sufficient cause as to why leave ought to be granted. The respondent further relied on the findings in *FWNM v SMM* (2019) eKLR where the court explained the meaning of sufficient cause.
10. It was submitted that the applicant acted negligently and made no attempt since 20/4/2023 when the alleged letter of instruction to appeal was written; that it is only after the lapse of the statutory period that the applicant moved to court; that the application herein is an afterthought and an abuse of the court process; that the respondent will suffer prejudice if the judgement in his favour is stayed for no reason; that the intended draft appeal contains mere allegations; that the errors alluded to are not in the judgement and the appeal has no chances of success. The respondent urged that the application and prayers are an unmeritorious and ought to be dismissed.
11. I have considered the application, the grounds relied thereon, the grounds of objection and the submissions by both parties.
12. An appeal from the subordinate should be filed within 30 days from the date of judgement. Section 79G of the *Civil Procedure Act* provides: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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.”
13. Further to the provisions of Section 79G (*supra*), the court may admit an appeal out of time upon application by a party and upon the court being satisfied that the party had good and sufficient cause for not filing the appeal within time.
14. In determining whether leave to appeal out of time should be granted, I am guided by the binding decision of the Court of Appeal in *Edith Gichungu Koine v Stephen Njagi Thoitbi* (2014) eKLR Odek JA rendered himself as thus:-

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”



15. The extension of time is not an automatic right. It is an exercise of the court's discretion which must be exercised judiciously. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Nairobi Appeal 255 of 1997 the court, when considering the exercise of discretion to extend time, had this to say:-

“It is now well 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.”

16. The Supreme Court emphasized the need to explain the delay in applications of filing appeals out of time in *County Executive of Kisumu* (supra) eKLR as follows:-

“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court... It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the Court.”

17. The applicant stated that the impugned judgement was delivered on 11/4/2023. The appeal ought to have been filed on or before 12/5/2023. The instant application was filed on 6/6/2023. This is a period of approximately one month from the lapse of the 30 days period.

18. The applicant's reason for the delay is that there was a mix up in the delivery of the letter instructing its Counsel to file the appeal on time. To support this, the applicant annexed in its supporting affidavit a letter dated 20/4/2023 “MON-2” instructing its Counsel to file an appeal against the judgement of the trial court delivered on 11/4/2023. The letter was received by the applicant's Counsel on 2/6/2023. The applicant deposed that the instructing letter inadvertently got mixed up in the transmission process to its Counsel. The instant application was filed 4 days after the applicant's Counsel allegedly received the instruction letter. In my considered opinion, the delay has been sufficiently explained by the applicant. I also find that there was no inordinate delay in bringing the instant application seeking to file the appeal out of time.

19. On the degree of prejudice that may be suffered by the respondent, the respondent has not explained what prejudice he is likely to suffer if the extension of time is allowed. The applicant has conceded that it is willing to deposit the decretal sum in the court or in a joint interest earning account. This is sufficient to protect the interest of the respondent in the event the appeal is unsuccessful.

20. On 12/6/2023, this court granted interim orders staying execution on condition that the full decretal sum to be deposited in court within 14 days. There is evidence that the applicant complied with this order. The decretal sum was deposited in court on 30/6/2023. This demonstration is a keenness of the application to prosecute the appeal.

21. In the premise, I allow the application dated 12/6/2023 on the following terms:-

1. That there be a stay of execution of the judgement and decree of the subordinate court in Rongo CMCC No. 345 of 2018 - *Jared Onyango Angila v South Nyanza Sugar Company Limited* dated and delivered on 11/4/2023 pending the hearing and determination of the applicant's intended appeal.



2. The Applicant is hereby granted leave to file and serve its Memorandum of Appeal within 7 days hereof upon payment of requisite court fees.
3. The Record of Appeal be filed and served within 60 days.
4. Costs do abide the outcome of the appeal.
5. Mention before the Deputy Registrar on 22/1/2024.
6. File closed.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 23RD DAY OF NOVEMBER, 2023.

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

Mr. Odero for the Applicant.

Ms. Theuri for the Respondent.

Emma & Phelix Court Assistants.

