



REPUBLIC OF KENYA



KENYA LAW
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**South Nyanza Sugar Company Limited v Onditi (Miscellaneous Civil Application
208 of 2023) [2023] KEHC 25622 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25622 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION 208 OF 2023
RPV WENDOH, J
NOVEMBER 23, 2023**

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED APPLICANT

AND

LUCY ACHIENG ONDITI 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 do deposit the principal award in Rongo CMCC No. 110 of 2018 - Lucy Achieng Onditi 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 the 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. 110 of 2018 - Lucy Achieng Onditi 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. 110 of 2018 - Lucy Achieng Onditi 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 just and affordable conditions the court desires;



6. The security availed by the applicant in compliance with the court's order made pursuant to prayer 3 hereinabove, as 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. 2,171,520 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 to file an appeal on 2/6/2023; that sufficient cause has been shown why leave sought out to be granted.
4. The applicant deposed that the decretal debt in the lower court stands at Kshs. 3,791,908/= 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 13/7/2023 as follows:-
 1. No reasonable grounds have been adduced or stated capable of excusing the inordinate delay in failing not only to file the intended to 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 decree this being but a mere money decree.
6. Directions were taken that the application be canvassed by way of written submissions. The respondent chose to rely on his grounds of opposition.
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 extend time; that in *County Executive of Kisumu v County Government of Kisumu & 8 Others* (2017) eKLR the Supreme Court re - stated the principles on extension of time that it 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. I have considered the application, the grounds relied thereon, the grounds of objection and the applicant's written submissions.
10. 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.”

11. 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.
12. 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.”

13. 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.”

14. 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.”



15. 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.
16. 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 view, 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.
17. On the degree of prejudice that may be suffered by the respondent, the respondent has not explained what prejudice she 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.
18. On 12/6/2023, this court granted interim orders on stay of 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 demonstrates a keenness by the applicant to prosecute the appeal.
19. 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. 110 of 2018 - Lucy Achieng Onditi 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.

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.

