



REPUBLIC OF KENYA



**South Nyanza Sugar Company v Ogada (Miscellaneous Civil Application
112 of 2021) [2023] KEHC 26932 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION 112 OF 2021**

RPV WENDOH, J

DECEMBER 18, 2023

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPEAL OUT OF TIME
AGAINST AN ORDER OF A SUBORDINATE COURT TO THE HIGH COURT**

BETWEEN

SOUTH NYANZA SUGAR COMPANY APPLICANT

AND

TABITHA A OGADA RESPONDENT

RULING

1. This ruling is in respect to the Notice of Motion dated 23/9/2021 (the application) filed by South Nyanza Sugar Company Limited (the applicant). The applicant seeks the following orders: -
 1. Spent;
 2. Spent;
 3. The court be pleased to extend time to the applicant within which to prefer an appeal against the judgement and decree of the subordinate court dated and delivered on 3/6/2021 in Migori CMCC No. 2511 of 2015, in terms of the annexed draft memorandum of appeal;
 4. The court be pleased to order stay of execution of the judgement and decree of the subordinate court dated and delivered on 3/6/2021 in Migori CMCC No. 2511 of 2015 pending the hearing and determination of the intended appeal, on such leave being granted and on such appeal being filed on terms the court shall direct;
 5. Costs of this application be in the intended appeal.
2. The application is supported by the grounds on the face of the application and the supporting affidavit of Maurice Omondi Ngayo, the Legal Officer of the applicant. He deponed that on 3/6/2021, the



subordinate court entered judgement for the respondent for Kshs. 130.15/= plus costs of the suit and interest from the date of filing suit; that he was notified of the judgment but the Board of Directors of the applicant, were not in the office during the period when the ruling was delivered and thus the decision to appeal was not made in time; that the lower court entered judgement for the respondent for reliefs which were not due to her; that the applicant stands to suffer substantial loss in the event the stay order is not granted and should execution proceed; that the application has been made without delay and the intended appeal is arguable and not frivolous.

3. The application was opposed. The respondent, Tabitha A. Ogada filed a replying affidavit dated 25/4/2022. It was deponed that the application is frivolous and an abuse of the court process; that the claim against the applicant was for refund of Kshs. 130/= which was irregularly deducted as Presumptive Income Tax from her proceeds of sugar cane by the applicant; that the same was illegal and ought to be refunded to her.
4. The respondent further deposed that the applicant does not have any good and sound grounds for appeal; that the inordinate delay of 90 days of not filing the appeal in time has not been satisfactorily explained; that applicant to file the appeal out of time is an afterthought, meant to frustrate her from getting her dues. The respondent urged this court to dismiss the application with costs.
5. The applicant filed its submissions dated 19/7/2022 evenly. The applicant argued that the application stands unopposed and it should be allowed as prayed. The submissions by the applicant have been overtaken by events since the respondent also filed her response.
6. I have considered the application, the grounds relied thereon, the replying affidavit and the applicant's submissions.
7. An appeal from the subordinate court 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."

8. 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.
9. Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#) provides for stay pending appeal. The Rules provide that a party should satisfy the following principles before grant of stay pending appeal: the applicant shall suffer substantial loss if stay is not granted, the application has been filed without unreasonable delay, the applicant is willing to furnish security for due performance of the decree and the applicant has an arguable appeal.
10. The Court of Appeal in [Edith Gichungu Koine vs Stephen Njagi Thoithi](#) (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 not 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.”

11. 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 vs 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.”

12. The Supreme Court emphasized the need to explain the delay in applications of filing appeals out of time in *County Executive of Kisumu* (2017) 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.”

13. The applicant stated that the impugned judgement was delivered on 3/6/2021. The appeal ought to have been filed on or before 3/7/2021. The instant application was filed on 23/9/2021. This is a period of approximately three months from the lapse of the 30 days period.

14. The applicant’s reason for the delay is that the applicant’s Board of Directors were not present to issue instructions on filing of an appeal. the term of the previous Board of Directors ended on 30/6/2021 and another Board was not instituted until 30/8/2021 when the applicant instructed its Counsel to file an appeal. It is common knowledge that at times instructing clients especially corporates take time to issue instructions. The Legal Officer of the applicant deposed that they issued instructions to their Counsel on 30/8/2021 to institute this appeal. Counsel filed the instant appeal on 23/9/2021 twenty-three (23) days after receipt of instructions. 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.

15. On the substantial loss, the decretal amount that the applicant is seeking to challenge is Kshs. 130.15/=. This is a miserly amount which the respondent can be able to refund in the event the appeal is successful. I do not see the substantial loss to be suffered by the applicant.

16. On security for the due performance of the decree, having found that the applicant shall not suffer any substantial loss, there will be no need to furnish security for the due performance of the decree.

17. Whether the applicant has an arguable appeal: I have considered the memorandum of appeal (MON-1). The applicant is faulting the trial Magistrate for reserving the suit for judgement on the date when it was coming up for hearing of a notice to show cause on why the suit should not be dismissed for want of prosecution without according it a hearing. The applicant also faulted the trial Magistrate in failing to hold that the suit by the respondent was statute barred among other grounds of appeal. This in my view is arguable. The respondent will not suffer any prejudice if the appeal proceeds to hearing.

18. In the end, I make the following orders: -



- a. There applicant shall pay the respondent the decretal sum of Kshs. 130.15/= within three (3) days hereof pending the hearing and determination of this appeal;
- b. The applicant to file and serve the draft Memorandum of Appeal within 7 days hereof after payment of the requisite court fees;
- c. The applicant to file and serve the record of appeal within 45 days hereof;
- d. Mention before the Deputy Registrar on 26/2/2024 to confirm compliance.
- e. Costs of this application do abide the outcome of the appeal.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 18TH DAY OF DECEMBER, 2023

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

Mr. Odero for the Applicant

No appearance for the Respondent

Emma & Phelix Court Assistant

