



South Nyanza Sugar Company Limited v Achach (Miscellaneous Civil Application 113 of 2021) [2022] KEHC 14509 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14509 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION 113 OF 2021
RPV WENDOH, J
OCTOBER 27, 2022**

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED APPLICANT

AND

DANIEL DACHE ACHACH RESPONDENT

RULING

- 1 South Nyanza Sugar Company Limited the applicant, filed an application dated September 23, 2021 on October 5, 2021. The applicant is seeking the following orders:-
 - i. Spent.
 - ii. Spent.
 - iii. That this 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 June 8, 2021 in Migori CMCC No 1999 of 2015 in terms of the annexed draft memorandum of appeal.
 - iv. That this court be pleased to order a stay of execution of the judgement and decree of the subordinate court dated and delivered on June 8, 2021 in Migori CMCC No 1999 of 2015 pending the hearing and determination of the intended appeal on such leave being granted and on such appeal being filed on terms as the court shall direct.
 - v. 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 Ng'ayo, the Legal Officer of the applicant. He deponed that on June 8, 2021, the subordinate court entered judgement for the respondent for Kshs 880.96 plus costs of the suit and interest on the sum at court rates from the date of filing suit; that he was informed of the judgment but the Board of Directors of the Company 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 him; 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 filed an undated replying affidavit. The affidavit is sworn by Mr Kerario Marwa Counsel for the respondent. Counsel deponed that the reasons advanced by the applicant for the delay are not supported by any evidence; that this court should take judicial notice that the applicant has managers and other officials in charge of the affairs of the applicant who could offer instructions; that judgement was entered for the plaintiff for Kshs 880.96/= and therefore the applicant will not suffer substantial loss if it pays the decretal sum; that the respondent is able to refund the Kshs 880.96/= in the event that the intended appeal succeeds; that the decretal sums are small and the appeal preferred is an abuse of the court process.
 - 4 The applicant filed its submissions dated July 19, 2022 evenly. In its submissions, 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 his response.
 - 5 The application is one seeking stay pending appeal and leave to appeal out of time.
 - 6 Order 42 Rule (6) (1) and (2) of the [Civil Procedure Rules](#) makes provision for stay pending appeal as follows:-
 - 1 No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - 2 No order for stay of execution shall be made under subrule (1) unless-
 - a the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b such security as the court orders for the due performance of such decree or order as may ultimate be binding on him has been given by the applicant.”
 - 7 The four (4) conditions that the applicant should establish for orders of stay of execution to issue are: -
 - i. The applicant will suffer substantial loss if stay is not granted;
 - ii. That the application has been filed without unreasonable delay;
 - iii. The applicant is willing to furnish security for the due performance of the decree;
 - iv. The applicant has an arguable appeal.
 - 8 On the issue of substantial loss, it is the applicant’s case that it will suffer substantial loss. In rebuttal, but the respondent contends that he is able to refund Kshs 880.96/= in the event that the appeal



succeeds. In case of *Silverstein v Chesoni* (2002) 1 KLR 867 cited in *Superior Homes (Kenya) Limited vs Musango Kithome* (2018) eKLR the Court of Appeal held as follows:-

“...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”

- 9 The assurance that the applicant will not suffer substantial loss is the ability of the respondent to refund the decretal sum if the appeal succeeds. In *Superior (Homes) Kenya Limited vs Musango Kithome* (*supra*), the court held:-

“...The law, however appreciates that it may not be possible for the applicant to know the respondent’s financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum.”

- 10 A similar finding was made in *Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua* (2001) eKLR. The appeal challenges the award of the decretal amount which the outcome thereof is not known until the substantive appeal is heard and determined. The applicant has not alleged that the respondent is not a man of means and the respondent through his Counsel has not stated that he is a man of means. The decretal sum being challenged is a sum of Kenya Shillings Eight Hundred and Eighty-Six and Ninety-Six Cents Only (Kshs 886.96/=) which is quite a small amount. I do not see any substantial loss which the applicant is likely to suffer. In any event, there is a proper procedure laid down in the law for a party to recover decretal sums already advanced to a decree holder.

- 11 On whether there was unreasonable delay in bringing this application, Section 79G of the *Civil Procedure Act* provides that appeals from subordinate courts should be filed within thirty (30) days from the date of judgement. The judgement herein was delivered on June 8, 2021, and the appeal ought to have been lodged on or about July 8, 2021. The instant application dated September 23, 2021 was filed on October 5, 2021. This is a period of about three months after the lapse of the statutory period of 30 days. The reason for the delay was that the applicant’s Board of Directors were not present to issue instructions on filing of an appeal. It is common knowledge that instructing clients especially corporates sometimes take time to issue instructions. The Legal Officer of the applicant deposed that they issued instructions to their Counsel on August 30, 2021 to institute an appeal. A delay of three months was unreasonable in my view.

- 12 On security for the due performance of the decree, having found that the applicant will not suffer any substantial loss, if the decretal sum is paid there will be no need to furnish security for the due performance of the decree.

- 13 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 on why it should not be dismissed for want of prosecution without according it a hearing. The applicant also faulted the trial Magistrate for 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.



14 Though there was a delay in filing the application served later but no order for stay, I exercise my discretion and in the end, I make the following orders: -

1. There applicant do pay the respondent the decretal sum of Kshs 880.96/= within three (5) days hereof;
2. Leave is granted to the applicant to file appeal out of time; the applicant to file and serve the draft Memorandum of Appeal within 7 days hereof upon payment of the requisite court fees;
3. The applicant to file and serve the record of appeal within 45 days hereof;
4. The orders herein shall apply to Misc Civil Application E116 of 2021;
5. Mention of all the files in this series before the Deputy Registrar on December 11, 2022 to confirm compliance.
6. Costs of this application do abide the outcome of the appeal.

Dated, Delivered and signed at Migori this 27th day of October, 2022

R WENDOH

JUDGE

Ruling delivered in the presence of:-

Mr Odera for the Applicant

Ms Kijana holding brief Mr Kerario for the Respondent

Nyauke Court Assistant

