



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 80 OF 2017

SOUTH NYANZA SUGAR CO. LTD.....APPLICANT/APPELLANT

-VERSUS-

EZEKIEL ODUK.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. R. Odenyo, Senior Principal

Magistrate in Migori Chief Magistrate's Civil Suit No. 54 of 2015 delivered on 26/07/2017)

RULING

1. The Applicant herein, **South Nyanza Sugar Company Limited**, filed a Notice of Motion on 21/05/2019 which application is evenly dated and sought for the following orders: -

1. spent

2. spent

3. The Appellant be granted leave of the Court to file and effect Notice of Change of Advocates, it having previously been represented by other advocates who have since declined to proceed with the appeal as instructed and signaled by the Notice of Appeal already filed, and have generally withdrawn from representing the Appellant, in terms of the Notice of Change of Advocates filed herewith, and on such leave being Ms. Okongo Wandago & Company Advocates be deemed as representing the Appellant in this appeal and in allied proceedings.

4. There be a stay of execution of the judgment and decree of this court in his appeal dated and delivered on 12th March 2019 pending the hearing and determination of the Appellant's appeal, from the judgment and decree of this Court in this appeal, to the Court of Appeal.

5. The costs of this application be provided for.

2. The body of the application also contain the grounds upon which the application is premised. The application is supported by the affidavit of **Maurice Omondi Ng'ayo**, an Advocate of the High Court of Kenya and the Applicant's Legal Services Manager, sworn on 21/05/2019. The Affidavit details the background of the application.

3. The Respondent herein opposed the application by filing a Replying Affidavit which he swore on 27/05/2019.

4. Directions were taken and the application was heard by way of oral submissions. Both parties were represented. The brief background of the application is that the Respondent filed **Migori Chief Magistrates Court Civil Suit No. 54 of 2015** against the Applicant seeking the enforcement of a contract he entered into with the Applicant towards growing sugar on the Respondent's farm sometimes in 1994. The suit was heard and judgment rendered on 26/07/2017. Dissatisfied with the decision, the Applicant filed this appeal which was determined by a judgment delivered on 12/03/2019. The Applicant then lodged a Notice of Appeal and filed the application subject of this ruling.

5. Relying on the application, the Applicant contend that the Applicant has satisfied the requirements of **Order 42 Rule 6(2)** of the **Civil Procedure Rules** and submits that the application was filed without any unreasonable delay and the delay, if any, is sufficiently explained. It also submits that the sums payable under the judgment of this Court is in excess of Kshs. 31 Million and it is apprehensive of recovery in the high likelihood of the success of the appeal before the Court of Appeal. It further contends that despite expressing its apprehension the Respondent did not file an Affidavit of Means to the effect that the Applicant shall not be prejudiced in the event of recovery of the judgment

sums. It cited the High Court decisions in **County Government of Migori & Another vs. Migori County Transport Sacco (2018) eKLR** and **James Wandagwa & Another vs. Agnes Naliaka Cheseto (2012) eKLR** in support of the submission. On security the Applicant submits that it is the Court to look at the circumstances of the case and order an appropriate security thereof as a party ought not to fetter the discretion of the Court by proposing the security it is willing to avail. The Applicant also informed the Court that the Auctioneer fees attendant upon the attachment were settled vide **Migori High Court Misc. Civil Application No. 35 of 2019** at Kshs. 920,000/=.

6. Opposing the application, the Respondent who appeared in person submits that the delay was not sufficiently explained as no good reasons were given and that appeal is a way of buying time since the Counsel who initially represented the Applicant declined to take up the appeal in avoidance of further delay. The Respondent further submits that the nature of the contemplated appeal is unknown and the Court is called upon to stay execution of the decree on grounds not before Court. Being a money decree, the Respondent submits that stay does not normally issue since no loss has even been demonstrated and the operations of the Applicant cannot be ground in favour of the application. The Respondent called upon this Court to see how the Applicant is not intent on satisfying the decree and has instead resorted to ways to frustrate the realization of the fruits of the judgment. First, the Applicant has hidden all its items capable of attachment thereby resulting into an *execution in situ* and secondly, the Applicant has paid off the Auctioneer upfront (and way before the conclusion of the execution) as a way of forestalling any further execution.

7. The Respondent further submits that since the Applicant has resorted to pay off the Auctioneer then he ought to be paid as well. On the Affidavit of Means, the Respondent contends that he has a valid judgment and it is upon the Applicant to demonstrate the alleged inability to repay as the burden of proof does not shift to the Respondent. It is also argued that the Applicant is in the process of being privatized and the Respondent is not part of the process hence he stands to be prejudiced. Lastly, the Respondent submits that the application ought to be dismissed and that in the event the stay is allowed then it ought to be conditional to payment of one-half of the sums to himself.

8. In a brief rejoinder the Applicant urges this Court to allow the application as the Notice of Appeal is deemed as an appeal in law and that whenever an Applicant raises the issue of apprehension of inability to repay the sums then the burden shifts to the Respondent to prove his/her/its ability to repay. It is further submitted that the settlement of the Auctioneer fees and costs is not a ground to decline a stay of execution. And on the privatization of the Applicant it is submitted that the process is in full public purview and all claims shall be taken into account accordingly.

9. Counsel for the Applicant also applied that the outcome of the application to apply in **Civil Appeal No. 81 of 2017** save that the Auctioneer in that appeal was instead paid Kshs. 460,000/= as fees courtesy of **Migori High Court Misc. Civil Application No. 34 of 2019**.

10. I have carefully considered the application and the submissions as well as the judicial decisions before me. **Order 42 Rule 6(2)** of the **Civil Procedure Rules** gives the conditions precedent to granting a stay of execution order. The conditions are that the Applicant must demonstrate that it will suffer substantial loss unless the order is made, the application is made without any unreasonable delay and the Applicant offers security for the due performance of the decree.

11. On the aspect of **substantial loss**, the Applicant relied on two grounds. The first one being that the Applicant is a public entity and is currently servicing a lot of judgments arising from several suits filed against it and secondly that the Respondent's means and material possessions are unknown save for the decree herein and as such the Applicant is apprehensive that in the event the appeal succeeds then it will not be able to recover the sums from the Respondent.

12. The Respondent rightly submits that the fact that the Applicant is reeling under several court judgments cannot be a good reason to demonstrate any loss or at all. The simple reason thereto is that the judgments are a result of lawful court processes and must be satisfied thereby they cannot be alleged to occasion any loss to the Applicant.

13. Arising from the contention by the Applicant that it is apprehensive that any money paid to the Respondent may not be recovered in the event the appeal before the Court of Appeal succeeds given that the Respondent's means and material possessions are unknown save for the decree herein, the Respondent did not file any rejoinder as the Replying Affidavit is silent on the assertion.

14. It is well settled in law that whoever alleges must prove. Therefore, an Applicant who alleges that it may not be able to recover the sums from a Respondent in the event the appeal is successful must likewise prove such. The Applicant must adduce evidence on the preponderance of probability in support of the assertion. An assertion that the Applicant is not aware of the financial position of the Respondent will largely suffice. In the event the Applicant adduces such evidence or the record contains such evidence then the evidential burden of proof shifts to the Respondent. In such a case the Respondent will be required to respond to the Applicant's position to the contrary. One of the ways a Respondent may put forth such a response is by filing an Affidavit of Means. (See Court of Appeal in **ICDC vs. Daber Enterprises Ltd Civil Application No. Nai 223 of 1999** as referred to in **Tabro Transporters Limited vs. Absalom Dova Lumbasi (2012) eKLR**, **Ocean View Beach Hotel Ltd vs. Salim Sultan Moloo & 5 Others (2012) eKLR** among others).

15. Adding its voice to the issue of the shifting of the evidentiary burden of proof the Court of Appeal in **Nai Civil Application No. 238 of 2005 National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Another** (unreported) expressed itself thus: -

...This Court has said before and it would bear repeating that while the legal duty is on the Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by a Respondent or lack of them. Once an Applicant expresses a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.....

16. The Applicant deponed that it was not aware of any of the Respondent's means and material possessions although there is no dispute that the Respondent is an Advocate of the High Court of Kenya and also a farmer. The decretal sum runs past Kshs. 31 Million and in the absence of a rejoinder by the Respondent on his ability to repay the sums in the event the appeal succeeds, the Applicant's apprehension solidifies. The sum of Kshs. 31 Million is colossal by any standard and not many people or even corporates are able to settle such amount of money

with ease. In this case the Applicant having deponed that it was not aware of the liquidity of the Respondent and in view of the sums involved the evidential burden shifted to the Respondent. This is a perfect case where the Respondent was to demonstrate his ability to repay the sums by may be filing an Affidavit of Means. By failing to demonstrate his contrary ability the Respondent did not discharge the evidential burden of proof on his part. I therefore find that the Applicant demonstrated the likelihood of substantial loss unless the order sought is granted.

17. On the issue of **delay**, I note that the judgment was rendered in March 2019 and the application filed in May 2019. The intervening period of around 60 days is sufficiently explained being the period the Applicant took to pursue the release of the file from the former Advocates and to instruct the current one.

18. As to **security**, the Applicant contend that it is ready to furnish any security as ordered by the Court as a condition precedent to the grant of the orders sought. On its part the Respondent contend that the Applicant ought to have given the security which in money decrees is usually by depositing the entire decretal sums into Court. Of the two schools of thought put forth by the parties I am in support of the position that the determination of the security is on the part of the Court. However, when an Applicant offers a certain security that goes a long way in aiding the Court to exercise its discretion with ease. Offering security gives a general direction on the Applicant's ability to comply with conditional stay and may curtail further applications for review of conditions attached to a stay of execution order, but as said the buck stops with the Court in determining a suitable form of security.

19. Having considered the aforesaid conditions there is an issue which came up at the hearing worth mentioning. It is the fact that the Applicant paid the Auctioneer fees which accrued as a result of the attachment in this matter. The Respondent deponed that the Applicant is in a sustained trail to frustrate the realization of the fruits of the judgment and it has opted to not only appeal but to also compromise the Court process by satisfying the Auctioneer fees and costs well before the Auctioneer undertook his duty in realization of the judgment.

20. Respectfully, I do not find any merit in the argument that lodging an appeal against a decision is tantamount to delaying the matter unless it is demonstrated that the appeal is frivolous. Otherwise, appeals have constitutional and statutory underpinning and parties are generally at liberty to exercise such rights. On the issue of the Applicant settling the Auctioneer fees and costs beforehand, I must state that the process of execution is in essence initiated by the Court itself by issuing Warrants of Attachment and Sale to an Auctioneer. The Auctioneer therefore takes the position of an agent of the Court with a clear mandate to execute the decree within a specified period.

21. From the outset it may appear to be a normal and harmless transaction between the Auctioneer and the judgment debtor, but it raises several legal questions. For instance, in this case the Applicant has been so categorical that there is no contract between the Respondent and itself and that it is not in any way liable to make good any of the Respondent's demands. That is the position the Applicant has taken in the matter and resulted to the appeal before this Court and the pending appeal before the Court of Appeal. That being so, the Applicant goes ahead to satisfy the fees and the costs of the Auctioneer in circumstances which remain unknown to the instructing Court. What happens if the appeal succeeds and the Applicant is absolved of any liability? Truly, the possibility of other suits arising is real. Is the Applicant silently admitting liability?

22. This is my position on the matter: Ideally, the Auctioneer fees and costs must be recovered alongside the judgment sums. In the event the judgment debtor opts to settle the Auctioneer fees and costs before satisfying the decree then that should not in any way forestall the execution process unless with the intervention of the Court which issued the Warrants. An Auctioneer who receives his/her fees and costs in advance and fails to proceed on with further execution of the decree stands on the way of a Court process and brings his/her conduct into the sharp focus of *inter alia* **Article 10** of the **Constitution**. Indeed, in appropriate instances such an Auctioneer may be in contempt of Court. An Auctioneer must always stand true to the calling to aid in administration of justice by focusing on faster determination of matters referred to him/her in line with *inter alia* **Article 159(2)(b)** of the **Constitution**, the overriding objective in **Sections 1A** and **1B** of the **Civil Procedure Act, Cap. 21** of the Laws of Kenya among other laws.

23. As I come to the end of this ruling I must confirm that the firm of **Okong'o Wandago & Company Advocates** properly took over the conduct of this matter from the firm of **Owiti, Otieno & Ragot Advocates** for the Applicant. I must also confirm that this ruling shall apply in **Civil Appeal No. 81 of 2017**.

24. From the foregone analysis and by striking a balance between the parties without losing focus of the unique circumstances of this matter and with a view to hasten the parties to take steps towards early determination of the intended appeal I must allow the Notice of Motion dated 21/05/2019, but in the following manner: -

(a) There be a stay of execution of the decree herein pending the determination of the intended appeal before the Court of Appeal on condition that the sum of Kshs. 2,500,000/= be deposited in an interest earning joint account in the names of the parties' Advocates within 45 days of this order and in default execution do issue.

(b) For avoidance of doubt, order (a) above shall apply in Civil Appeal No. 81 of 2017.

(c) The firm of Messrs. Okong'o Wandago & Company Advocates is hereby deemed to be properly on record as the Counsels for the Appellant.

25. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 08th day of August 2019.

A. C. MRIMA

JUDGE

Ruling delivered in open court and in the presence of: -

Mr. Marvin Odera, Counsel instructed by the firm of Messrs. Okong'o Wandago & Company Advocates for the Applicant.

Mr. Oduk, Counsel instructed by the firm of Messrs. Oduk & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant