

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 3 OF 2013

MUMIAS SUGAR COMPANY LTD. APPELLANT

V E R S U S

HENRY KHATOLWA AMUKOYA RESPONDENT

R U L I N G

In its application dated 16.1.2013 the appellant/applicant is seeking an order of stay of execution of the decree in Butere SRMCC No.7 of 2010 pending the determination of the appeal. The appellant also seeks leave to file an appeal out of time. Counsel for the appellant submitted that the instructing legal officer from the appellant company was not in office and the instructions to file the appeal were given on the 9.1.2013. On the 15.1.2013 the respondent proclaimed against the appellant's property and there is the danger that the respondent will execute against the appellant. No prejudice will be suffered by the respondent.

Mr. Namatsi counsel for the respondent submitted that the application was brought to court after a long delay. Judgment was delivered on the 15.11.2012 and the application was filed almost two months after the delivery of the judgment. Counsel maintains that the application does not satisfy the conditions necessary for the granting of stay of execution orders. The applicant has not shown that it will suffer substantive loss.

The record shows that the judgment which is being challenged was delivered on the 15.11.2012. The current application was filed on the 10.1.2013 and a similar was filed on the 16.1.2013. The reason as to why the application was filed a bit late is that the legal officer who was dealing with the matter was not in his office. Counsel for the respondent contends that in a similar matter the appellant filed an appeal within ten days upon delivery of a judgment. From the records herein it is established that the dispute arises from a road traffic accident involving the respondent and motor vehicle registration number KBH 570 M owned by the appellant. It is also established that Eshikhoni Auctioneers have already proclaimed and the amount indicated in the warrant of attachment is KShs.449,100/=. Each case has to be decided according to its own circumstances. It is clear that the appellant in a case presumably involving the same accident managed to file its appeal within time. It is therefore established that the none filing of the appeal within time was not intentional on the part of the appellant. The judgment having been delivered in November 2012 and the application having been filed within two months I do find that given the circumstances of this case the application was filed without inordinate delay. I do agree with the submissions by the applicant's counsel that no prejudice will befall the respondent. I do appreciate the fact that the respondent is entitled to enjoy the fruits of his judgment. However, the applicant's right to pursue an appeal overrides the respondent's right to enjoy the respondent's right to enjoy the fruits of his judgment once it is established that the respondent will suffer no prejudice. The appellant company is still running and will be able to settle any amount that will be awarded to the respondent in the event that the results of the appeal are in his favour.

In the end I do find that the applicant's request for leave to file appeal out of time and for stay of execution is merited and the same is granted as prayed. There is no need to order the deposit of the decretal sum in court or in a joint account of both counsels as I am satisfied that the appellant will be able to satisfy the decretal amount in the event that its appeal is dismissed. Costs shall follow the outcome of the appeal.

Delivered, dated and signed at Kakamega this 26th day of June 2013

SAID J. CHITEMBWE

J U D G E