



**Auma v South Nyanza Sugar Co Ltd (Civil Appeal E061 of 2024)
[2024] KEHC 5832 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E061 OF 2024
RE ABURILI, J
MAY 23, 2024**

BETWEEN

DISHON H OTIENTO AUMA APPELLANT

AND

SOUTH NYANZA SUGAR CO. LTD RESPONDENT

(Being an appeal from Judgment of the Senior Principal Magistrate's Court at Winam by Hon. R. M. Oanda, SPM, in Winam SPMCC No. 501 of 2004 delivered on 8th December, 2023)

RULING

1. This appeal was filed on 27th March 2024 and on the same day, the Appellant filed his application dated 25th March 2024 under certificate of urgency, seeking orders of stay of proceedings in Winam SPMCC No. 501 of 2004 pending hearing and determination of the application and stay of execution of decree in the said court pending hearing and determination of this appeal.
2. The Applicant also seeks for enlargement of time within which this appeal which was filed out of time should have been filed and an order that the appeal as filed be deemed to be duly filed.
3. The order which is being challenged is that which was made in the Ruling of 8th December 2023 by the trial court in execution proceedings of Notice to Show Cause why the Appellant cannot be arrested in execution of decree.
4. Under Order 43(k) of the Civil Procedure Rules, Orders in execution are appealable as a matter of right specifically, orders made pursuant to Order 22 Rule 25, 57, 61(3) and 73 of the Civil Procedure Rules 2010.
5. In the supporting affidavit which mirror the grounds the Appellant gives the history of the dispute spanning now 20 years which dispute was escalated to the High Court on appeal and back to the lower court.



6. According to the Applicant, he cleared the decretal sum of Kshs.40,000 out of Kshs.47,000 and that the claim was compromised. That he was shocked to learn that he is being asked to pay over Kshs.200,000 which sums are costs assessed in the High Court on Appeal yet the Respondent is in the process of executing a High Court decree in the lower court, wherein costs of the suit in the lower court have never been assessed.
7. He deposes of how the Ruling which is impugned was delivered in his absence and that although he was present in court virtually on the date when the Ruling on Notice to Show Cause was to be delivered, the Ruling was never delivered only for him to be given other dates only for him to learn that the Ruling was delivered and that the Respondent was in the process of having the Appellant arrested in execution of a decree of the High Court through the proceedings before the Magistrate's Court.
8. The Appellant annexed copy of application for execution of decree by way of Notice to Show Cause showing a total of Kshs.274,195.80 inclusive of Kshs.47,168 out of which he claims he paid Kshs.40,000 and that interest from 19th October 2004 was also included as well as Kshs.114,683 covering High Court matters HC Misc. Application No. 113 of 2019 and HCC No. 114 of 2019 and HCCA No. 75 of 2005.
9. He annexed also copies of Advocate/Client Bill of Costs and receipt for Kshs.40,000 paid on 17th November 2004.
10. The Appellant urged this court to grant the orders sought.
11. The Respondent opposed the application deposing that the delay was inordinate, of 3 months, that the Appellant was in court on the day when the Ruling on Notice to Show Cause was to be delivered then he vanished before the file was called out, that the decree was never compromised by the payment of Kshs.40,000; that the Appellant's deposition are imaginations.
12. On stay, it was submitted that the Appellant had not met the conditions for stay of execution pending appeal as stipulated in Order 42(6) (2) of the Civil Procedure Rules and that should this court stay execution, then the Appellant should be ordered to deposit security for costs, as the court should look into account the interests of both parties and do justice.
13. The parties' advocates argued the application orally on 8th May 2024 reiterating the grounds and the depositions as filed.

Determination

14. I have considered the twin application for enlargement of time to file the appeal out of time and deem the appeal as duly filed and stay of execution of the Ruling of 8th December 2023 made by the lower court pending the hearing and determination of this appeal.
15. On the first limb of enlargement of time, I observe that the Ruling of 8th December 2023 is appealable as a matter of right as stipulated in order 43 (k) of the Civil Procedure Rules, being and appeal in matters execution of decree (Order 22 Rule 25 of the Civil Procedure Rules).
16. Such appeal ought to have been filed within 30 days of the date of the Ruling and not 7 days as stated by the Applicant's counsel who was mixing up the issues of the Deputy Registrar in the High Court and lower court matters.
17. It is true that the impugned Ruling was rendered on 8th December 2023 and this appeal was filed on 27th March 2024. The appeal was to be filed on or before 27th January 2024 hence it was filed 2 months late.



18. However, under Order 50 Rule 4 of the *Civil Procedure Rules*, the period between 21st December 2023 and 13th January 2024, time stopped running. Order 50 Rule 4 of the *Civil Procedure Rules* provides as follows –

[Order 50, Rule 4.] When time does not run.

4. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.

19. For avoidance of doubt, Order 50 rule 4 makes it clear that the rule applies specifically to computing time under the *Civil Procedure Rules*, or in accordance with an order of the court. Nothing in the rule shows that it was intended to be applied to the time limits fixed by the *Limitation of Actions Act* or other statute.
20. It follows that the delay in filing the appeal is about one month, and not three months.
21. Section 79G of the *Civil Procedure Act* stipulates the period for filing of from orders/decrees of the subordinate court to the High Court which is 30 days from date of Order/Decree.
22. Where there is such delay in filing the appeal, the proviso thereof comes in hand to given the court power to enlarge such period.
23. Order 50 Rule 6 of the *Civil Procedure Rules* permits the court to enlarge the period within which any act ought to have been done, even if such period has already lapsed.
24. The power to enlarge time for filing an appeal is discretionary, which discretion has to be exercised judiciously. There are principles which have been established by the supreme court on the considerations that the court must have in enlarging time. See case of *Nicholas Kiptoo Arap Salat vs IEBC & 7 others* [2014]eKLR.
25. In this case, there is delay. That delay is explained to court on oath. It is not inordinate delay. The Appellant was acting prose in the Notice to Show Cause proceedings and he has deposed of how he kept going to court and inquiring on the Ruling until the Respondent's counsel started calling him and threatening him with arrest is then he realized that the Ruling had been delivered on the date when he was in court, virtually but his call dropped and he was given another date and another until January 2024.
26. The Respondent contends otherwise, deposing that the Ruling was rendered in the Applicant's absence on 8th December 2023 albeit he had been in court but that he vanished after he was told that it was to be delivered at noon.
27. I have examined the two rival positions and I am inclined to believe the Applicant because no Judgment debtor can deliberately ran away from knowing his fate in a matter where he had fully participated by filing submissions showing cause why execution should not issue.
28. The submissions he filed are very detailed and dated 10th November 2023 drawn by the Applicant in person, even citing authorities and contending that he had settled the decree and that any other claims where extinguished by the *limitation of Actions Act*.



29. That being the case, despite the delay, that delay in my view is not inordinate and it was explained to the satisfaction of this court.
30. I find that it is in the interest of justice to accord the Applicant the opportunity to ventilate his grievances considering the fact that from the Notice to Show Cause and decree being executed, there is truth in the deposition that the Respondent was combining so many other decrees and bills for execution, including decrees and or bills in the High Court matters.
31. I find the prayer for enlargement of time merited. It is hereby allowed as prayed.
32. On the second limb of the application seeking stay of execution of the orders of 8/12/2023 and decree pending appeal herein, without delving too deep into the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, I observe that the Applicant has deposed and it is not disputed that he paid Kshs.40,000 which was in 2004 and that in the drawn decree, that amount is included, plus decrees of the High Court on appeal costs, all being mixed up into a decree of the lower court which has no jurisdiction to execute the decree of the High Court.
33. In my humble view, the Applicant has demonstrated that he is likely to suffer substantial loss if he is compelled to settle a decree which is doubtful and which, according to him is stale, barred by the statute of limitations.
34. On the question of delay, I have already pronounced myself that the delay in filing this appeal and application was not inordinate and that it was explained to the satisfaction of this court. Further, that despite the delay, justice can still be done.
35. On security for the due performance of decree, having considered the deposition by the Applicant which border on Limitation of Actions Act which, if established by this court to be the case, and the fact that apart from Kshs.7,000 the rest of the decretal sum is High Court decreed costs as the costs of the matter in the lower court have never been assessed, I find that this is a case where the court will not order for deposit of security for due performance of decree as that would prejudice the Applicant and in addition, this court would be sanctioning execution of High Court decree by the lower court which borders on vesting the lower court with jurisdiction that it is devoid of.
36. For the above reasons, I find that the prayer for stay of execution is merited.
37. In the end, I make the following orders:
 1. The Appellant is granted leave to file his appeal against the Ruling of 8th December 2023 in Winam SPMCC No. 501 of 2004 out of time.
 2. The appeal herein as filed is hereby deemed to be duly filed and served upon the Respondent within time.
 3. There shall be stay of execution of decree and Ruling of 8th December 2023 in Winam SPMCC No. 501 of 2004 pending the hearing and determination of this appeal.
 4. As the trial court file is already available, I hereby admit the appeal to hearing and direct as follows:-
 - i. The Appellant to file and serve a complete record of appeal together with written submissions within 14 days of today upon which the Respondent shall have 10 days of service to file and serve written submissions.
 - ii. Mention on 20th June 2024 to fix a Judgment date.



38. I order that each party shall bear their own costs of the application.

39. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2024

R. E. ABURILI

JUDGE

