



REPUBLIC OF KENYA



**Butali Sugar Millers Limited v Andrew & 2 others (Civil Appeal
E007 of 2023) [2023] KEHC 3560 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E007 OF 2023
SC CHIRCHIR, J
APRIL 20, 2023**

BETWEEN

BUTALI SUGAR MILLERS LIMITED APPELLANT

AND

WASULA KWOMA ANDREW 1ST RESPONDENT

ALICE SHIKUKU WASULA 2ND RESPONDENT

WILSON KARIUKI 3RD RESPONDENT

*(Being and appeal from the Judgment and decree of the Hon. H. Wandere
(SPM) delivered on 2nd December 2022 in Kakamega CMC No. 416 of 2016)*

RULING

1. The Applicant's notice of motion dated 18.1.2023 seeks for stay of execution of the judgment and decree of the subordinate court in Kakamega CMCC No. 416 of 2006 pending the hearing and determination of the Appeal.
2. It also seeks for enlargement of time to file the Appeal and the filed memorandum to be deemed as validly filed.
3. The Application is supported by affidavit of Esther Oribo who describe herself as the legal officer of the Applicant. She has deponed that the award by the trial court was colossal; that the Applicant will suffer substantial loss unless stay is granted and further that the Applicant is willing to provide security to guarantee compliance and that the application has been bought without undue delay. On the delay in filing the Appeal, it is pleaded that there that the people charged with the decision making on filing the Appeal were not immediately available



4. The application is opposed. It is contended that the appeal stands no chance of succeeding; that the applicant's Agent had been convicted of a traffic offence; that the lower court's finding was reasonable and finally that there is no appeal pending before court.

Appellants' Submission

5. It is the Appellant's submission that the application has been brought without undue delay. The appellant has relied on the case of *Almas Haulers Ltd v Abdulnasir Abiker Hassan* [2017] eKLR where the court considered a delay of 4 months not to be inordinate.
6. It is further submitted that the decretal sum is colossal and no evidence has been brought forth to demonstrate the Respondent's ability to refund the decretal sum in the event that the appeal succeeds. The appellant has relied on the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR and *victory Construction v BM* [2019] eKLR to buttress their submissions in this regard.
7. It is further submitted that the Appeal stands a high chance of succeeding. Finally, it is submitted that the applicant is willing to abide by any conditions on security to ensure due performance of the decree.
8. The Appellant reiterates that the delay in filing the Appeal was occasioned partly by the non-availability of the court file and the fact that the top management of the Applicant who the decision makers on whether the Appeal should be filed were not immediately available.

Respondent's Submissions.

9. It is the respondent's submission that there is no appeal pending. It is further submitted that substantial loss has not been demonstrated. On liability, it is submitted that the Applicant's agent was found guilty of a traffic offence and thus any chance of success on appeal on the aspect of liability in this regard is not tenable. It is contended that the award on damages was also reasonable.
10. It is finally submitted that portion of the award should be released to the respondent in the event that the application succeeds.
11. On the delay in filing the Appeal, it is submitted that the allegations made are not supported by any evidence, and are not plausible in any event.

Determination

12. I have considered the pleadings, the submissions of the parties and the Authorities relied on.

Leave to appeal out of time

13. Judgment on the lower court suit was delivered in 1st December 2022. Under section 79G of the *civil procedure Act* the Applicant had 30 days within which to file the appeal.

Order 50 rule 4 of the *Civil Procedure Rules* provide as follows. 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 amending, delivering or filing of any pleading or doing any other act, provided that this rule shall not to apply to any application in respect of a temporary injunction.”

14. Thus the period between 21st December 2022 and 13th January 2023 was excluded in the computation of 30 days' period within which the Applicant could file the Appeal as a matter of right. The Applicant



had up to 24th January 2023 to file the appeal. The Appeal herein was filed on 17th January 2023. It was therefore filed within time. The prayer for extension was therefore not necessary. It seems the prayer was based on a misapprehension of the law.

Stay pending Appeal

15. Order 42 Rule 6(2) set out the conditions for granting stay of execution pending Appeal. These are:
 - i. The court must be satisfied that substantial loss would result unless stay is granted.
 - ii. The Application for stay has been made without unreasonable delay
 - iii. Security of due performance of the decree must be given by the Applicant
16. The applicant must also show that the appeal is arguable.
17. On substantial loss it is trite law that the onus is on the respondent to demonstrate their ability to refund the decretal sum in the event that the appeal succeeds (see Victory construction v BM(a minor suing through next friend PMM) [2019] eKLR.
18. The Applicant has expressed its apprehension of the financial capability of the respondents and once this apprehension is expressed the onus was on the Respondents to address it. The respondents' reply is silent on this. I am satisfied that the award is huge and the applicant's apprehension is real.
19. Is the Appeal arguable? In the case of Stantely Kangethe kinyanjui v Tony Keter & 5 others [2013] eKLR , It was held: an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before court, one which is not frivolous.” without going in other merits and demerits of the appeal, I have perused the memorandum of appeal and I am satisfied that the grounds set out are not frivolous. They are indeed arguable.
20. Am equally satisfied that there was no delay in filing the present Application. Judgment was delivered on 2nd December 2022 and the Application herein was filed on 18th January 2023. In the circumstances which have been explained, the delay cannot be said to be inordinate.
21. On security, the Applicant has offered to deposit half of the decretal sum. However the security must be one which can fully satisfy the decree or judgment. Half of the decretal sum does not meet the requirements of order 42 Rule 6(2) (b) of the Civil Procedure Rules. Consequently, I make the following orders.
 - a. The prayer for leave is moot ,as the Appeal was filed on time.
 - b. Stay of execution of the judgment and the decree in Kakamega CMCC NO. 416 of 2016 is hereby granted on condition that the Applicant do deposit the decretal sum in an interest earning account in the joint names of the respective advocates within 30 days from the date of this ruling.
 - c. Costs of this Application to be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 20TH DAY OF APRIL 2023.

S. CHIRCHIR

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JUDGE



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Erick- Court Assistant

Ms Odunga for the Applicant

No appearance by the Respondent.

