



REPUBLIC OF KENYA



KENYA LAW
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South Nyanza Sugar Company Limited v Owino (Miscellaneous Civil Application E117 of 2021) [2023] KEHC 20994 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20994 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION E117 OF 2021**

RPV WENDOH, J

JULY 19, 2023

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPEAL
OUT OF
TIME
AGAINST AN ORDER OF A SUBORDINATE COURT TO THE HIGH
COURT**

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED APPLICANT

AND

MARGARET A OWINO RESPONDENT

RULING

- 1 The applicant filed an application dated September 23, 2021 seeking the following orders
 1. Spent;
 2. Spent;
 3. The court be pleased to extend the time of the applicant within which to prefer an appeal against the judgement and decree of the subordinate court dated and delivered on June 3, 2021 in Migori CMCC No 366 of 2015 in terms of the annexed draft Memorandum of Appeal;
 4. That the court be pleased to order a stay of execution of the judgement and decree of the subordinate court dated and delivered on June 3, 3021 in Migori CMCC No 366 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.



5. That the costs of this application be in the intended appeal.
- 2 The application is supported by the grounds found on the face of the application and the supporting affidavit of Maurice Omondi Ngayo the Legal Officer of the applicant. He deponed that on June 3, 2021, the subordinate court entered judgement for the respondent for Kshs 687.45/= in Migori CMCC No 366 of 2015 Margaret A Awino vs South Nyanza Sugar Company Limited plus costs of the suit and interest on the sum at court rates from the date of filing suit to the date of judgement; that he was informed of the judgment but due to the fact that the top Management of the applicant, including the Board of Directors was out of the office during the period when the ruling was delivered, the decision to appeal was not made in time and the time for filing the appeal lapsed; 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 applicant filed a further certificate of urgency dated October 21, 2021 seeking stay orders which orders were granted on even date.
- 4 The application is not opposed. The applicant filed submissions on February 28, 2023 and asked this court to allow its application as prayed.
- 5 I have duly considered the application.
- 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 an applicant should establish for orders of stay of execution orders to issue are: -
 - a. He shall suffer substantial loss if stay is not granted;
 - b. That the application has been filed without unreasonable delay;



- c. The applicant is willing to furnish security for the due performance of the decree;
- d. The applicant has an arguable appeal.
- 8 On the issue of substantial loss, the amount in contest is a sum of Kshs 687/= and the subsequent costs of Kshs 54, 200/= which make a total of Kshs 58,012/=. Since the respondent did not respond to this application, the court will not address itself in depth on this issue.
- 9 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 impugned judgement was delivered on June 3, 2021, and therefore, the appeal ought to have been lodged on or about July 4, 2021. The instant application was filed on September 23, 2021. This is a period of about two months after the lapse of the statutory period of 30 days. The reason for the delay was that the applicant's Board of Directors was not present to issue instructions on filing of an appeal. It is common knowledge that at times instructing clients especially corporates take time to issue instructions. The Legal Officer of the applicant deposed that the lower court file went missing and therefore their Counsel was not in a position to analyse the judgement in order to draft the grounds of appeal.
- 10 I find that the applicant has advanced good reasons for the delay in filing this appeal and I therefore find there was no inordinate delay.
- 11 On security for the due performance of the decree, on the October 21, 2021, this court directed the applicant to deposit the decretal sum within 7 days. There is no mention by the applicant that it complied with this order.
- 12 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 in 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.
- 13 In the end, I make the following orders: -
1. In the event the applicant has not complied with the order of depositing the security for due performance of the decree, it is ordered to do so as per the orders of October 21, 2021 within 7 days hereof, failure of which the respondent is at liberty to proceed with execution.
 2. Upon compliance with order No 1 hereinabove, a stay of execution of the judgement and decree dated and delivered on June 3, 2021 in Migori CMCC No 366 of 2015 is hereby issued pending the hearing and determination of this appeal;
 3. The applicant to file and serve the draft Memorandum of Appeal within 7 days after payment of the requisite court fees;
 4. The applicant to file and serve the record of appeal within 60 days hereof;
 5. The orders herein shall apply to Misc Civil Application E111 of 2021 and E110 of 2021;
 6. Costs of this application do abide the outcome of the appeal.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 19TH DAY OF JULY 2023

R. WENDOH



JUDGE

Ruling delivered in the presence of: -

Mr. Odero for the Applicant.

No appearance for the Respondent.

Emma and Phelix Court Assistants.

