



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**MISC. CIVIL APPLN. NO. 168 OF 2018**

**SOUTH NYANZA SUGAR CO. LTD.....APPLICANT**

**-VERSUS-**

**PETER MURIMI MWITA.....RESPONDENT**

**RULING**

1. Before me is an application by way of the Notice of Motion dated 19/04/2018 seeking leave to file an appeal out of time as well as a stay pending the determination of the intended appeal.
2. The application was made on the grounds as appearing on the face thereof and was supported by the Affidavit sworn by one Gabriel Otiende the Applicant's Company Secretary on 12/04/2018.
3. The Respondent opposed the application by filing Grounds of opposition on 02/05/2018.
4. The application was thereafter heard by way of oral submissions where it emerged that there was no serious issue on the leave to file the appeal, but the issue of security was hotly contested. According to the Applicant, this Court ought to consider any other mode of security other than a deposit of the decretal sum which soars to past Kshs. 1,500,000/= as the Applicant undertook to have the appeal heard within 4 months. The Respondent was of a contrary position. That, the stay of execution ought to be conditional to depositing the decretal sums in an interest earning account in the joint names of the parties' Counsels.
5. Since the issue of the leave to appeal out of time is majorly uncontested by the parties, I am of the position that the same ought to issue. I say so having regard to the period of delay and the reasons tendered for the delay.
6. The contested issue is whether a stay of execution of the decree ought to be granted and if so whether conditional. Again, Counsels are largely in agreement that a stay of execution of the decree ought to issue given that leave to appeal is unopposed. On the issue of security, I have considered the rival submissions. The decree sought to be stayed is a money decree and the general practice as developed by Courts is that the security in such cases is by depositing some monies in a bank account in the joint names of the parties' Counsels. This Court is aware of the number of appeals preferred by the Applicant before this Court. They are indeed many hence the concern by the Applicant that it be allowed to otherwise offer any other form of security, or that this Court expedites the hearing of the intended appeal.
7. The Respondent on the other contended that since he has a lawful judgment then the only way to be sure of reaping the fruits thereof is by depositing the decretal sum in a bank account in the joint names of the parties' Counsels.
8. The conditions to be considered in dealing with an application seeking a stay of execution pending appeal in the High Court are clearly provided for under **Order 42 Rule 6** of the **Civil Procedure Rules 2010**. One of the conditions is the security. An Applicant must provide a form of security which the Court may approve, or the Court may order the furnishing of any other form of security. In this case the Applicant has submitted that it be given 4 months within which to deal with the appeal and if the same will not be determined by then then it be ordered to furnish the security.
9. It is also imperative to bring to the fore that the Respondent herein, who was the Plaintiff before the lower court, levied execution against the Applicant through Mocco Auctioneers. According to the copies of the Warrants of Attachment and Warrants of Sale issued by the lower court which are part of the record, the Applicant protested upon proclamation on 12/02/2018 that **'similar warrants have been issued on 07/02/2018 to and served by Demigen Auctioneers today at 09:00am. Further amount had been paid.'**
10. I have patiently considered this the application and I am of the view that the best way forward is attempting to strike a balance between the two rival positions and to fast track the determination of the intended appeal. With that in mind, and in the unique circumstances in this matter, the following final orders therefore issue: -

**(a) The Applicant herein be and is hereby granted leave to file and serve the Memorandum of Appeal within 10 (ten) days of**

today.

**(b) The Applicant herein shall file and serve the Record of Appeal within the next 30 days of (a) above.**

**(c) The Appeal shall be listed for directions within 30 days of compliance of (b) hereinabove.**

**(d) There be a stay of the execution of the decree in Migori Chief Magistrates Court Civil Suit No. 79 of 2015 pending the hearing and determination of the intended appeal on condition that the Applicant deposits the sum of Kshs. 500,000/= in a bank account in the joint names of the parties' Counsels within 30 days of this order and in default the stay of execution order shall stand discharged and execution shall forthwith issue.**

**(e) The Applicant shall bear the costs of the application.**

**(f) This matter be and is hereby marked as closed.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 5<sup>th</sup> day of July 2018.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Mr. Nicholas Bosire** Counsel instructed by Messrs. Moronge & Company Advocates for the Applicant.

**Mr. Kerario Marwa** Counsel instructed by Messrs. Kerario Marwa & Company Advocates for the Respondent.

**Evelyn Nyauke** - Court Assistant