



West Kenya Sugar Company Limited v Magona & 3 others (Civil Application E042 of 2023) [2023] KECA 1311 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KECA 1311 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E042 OF 2023
M NGUGI, JA
OCTOBER 27, 2023**

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED APPLICANT

AND

**PCM (SUING ON HER OWN BEHALF AND ON BEHALF OF
PNM) 1ST RESPONDENT
BRIAN MAGOMBA MAGONA 2ND RESPONDENT
MICHAEL MAGOMBA 3RD RESPONDENT
CHARLES JOSEPH EGESA MAKONA 4TH RESPONDENT**

(Being an application to come on record and for extension of time to file and serve Memorandum and Record of Appeal from the Judgment and Decree of the Environment and Land Court at Busia (Hon. A. Omollo J.) dated 27th October 2022 in Environment and Land Court Case No. 43 of 2013)

RULING

1. In the notice of motion dated March 17, 2023, the applicant seeks the following substantive orders:
 - i. ...
 - ii. That this Honourable Court be pleased to allow the firm of O&M Law LLP to come on record on behalf of the Applicant herein in place of the firm of Olendo, Orare & Samba Advocates LLP
 - iii. That the honourable court be pleased to extend the time within which the Applicant is to file and serve a Notice of Appeal and a Record of Appeal against the Judgment and Decree of the Environment and Land Court at Busia (Honourable Lady Justice Anne Omollo) dated and



delivered on September 27, 2022 in Busia ELC No. 43 of 2013 Penina Chepkesis Makona (Filing on her own behalf and on behalf of Patricia Namulunda Magomba) & 3 Others v Charles Joseph Egesa Makona & West Kenya Sugar Company Limited.

2. The application is brought under articles 48, 50 (1) and 164 (3)(a) of *the Constitution*, sections 3 (1), 3A and 3B of the *Appellate Jurisdiction Act*, and Rules 4, 49(1), 77 and 84 of the *Court of Appeal Rules*, 2022. and all enabling provisions of the Law. It is based on the grounds set out on the face of the application and on an affidavit sworn by Gerald Okoth, the General Manager of the applicant, on March 17, 2023.
3. The applicant states that on September 27, 2022, the trial court delivered a judgment in favour of the respondents and awarded them costs of the suit. It avers that the delay in filing the notice of appeal and the record of appeal was occasioned by its previous counsel's slow action of transmitting the file to the current advocates on record. The file was only received on February 8, 2023. A notice of appeal was filed on November 9, 2022, outside the 14 days prescribed time.
4. The applicant avers that the delay in filing the intended appeal is not inordinate and the mistake of counsel was unintentional and its consequences should not be visited upon the applicant. It contends that it is desirous of prosecuting the appeal and has already requested and obtained certified copies of the proceedings and judgment from the trial court. It is ready to institute the intended appeal, albeit outside the prescribed statutory period, thereby necessitating the present application.
5. The applicant contends, finally, that it has an arguable appeal with high chances of success and unless the orders sought are granted, its intended appeal will be rendered nugatory as there is imminent danger of execution.
6. In submissions dated April 19, 2023 in support of the application, the applicant reiterates that the delay in filing the notice of appeal and the record of appeal was occasioned by its previous counsel who filed a notice of appeal dated November 9, 2022 due to a misconstrued belief that the judgment was delivered on October 27, 2022. (I observe that the applicant maintains the reference to this erroneous date in the header to this application). The applicant relies in support of its submission on the case of *Geoffrey Oguna & another vs Mohammed Yusuf Osman & 2 others* (2022) eKLR. It is its case that it has placed before the court sufficient explanation on the basis of which the court can exercise its discretion for extension of time as sought.
7. The respondents oppose the application and have filed a replying affidavit sworn by their advocate, Vincent Mukoya, and submissions dated July 17, 2023. They aver that the instant application is an abuse of the court process as there is a similar application filed by the applicant before the superior court. Further, that the applicant has not moved the trial court in a bid to correct or expunge the decree issued on December 2, 2022 which makes reference to a judgment dated October 27, 2022.
8. It is the respondents' contention further that the prayers sought offend Rule 46 of the *Court of Appeal Rules* as the notice of appeal dated November 9, 2022 is still on record and a subsequent notice of appeal cannot be filed before the one already filed has, with the leave of the Court, been withdrawn.
9. The respondents submit that though a party is at liberty to change advocates, the court must be persuaded on the circumstances and reasons for the change. They contend that in this case, the only reason given is that the previous advocates filed a bad notice of appeal which did not capture the correct date of the judgment appealed against.
10. Regarding the prayer for extension of time, the respondents submit that until the notice of appeal filed by the firm of Olendo, Orare and Samba LLP Advocates on November 9, 2022 is expunged, the court lacks jurisdiction under Rule 46 of the *Court's Rules* to grant the orders sought.



11. I have considered the application, the grounds in support and the averments in respect thereof. I have also considered the averments and submissions in opposition thereto.
12. Under Rule 4 of the *Court of Appeal Rules*, this Court has the discretion to extend the time required for the doing of any act prescribed under the Rules. In doing so, it is required to consider the length of the delay, the reasons for the delay, (possibly) the chances of success of the intended appeal, and the prejudice that the respondent would suffer if the orders sought are granted- see *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 and *Fakir Mohammed v Joseph Mugambi & 2 other* [2005] eKLR.
13. The judgment that the applicant seeks to appeal against was delivered on September 27, 2022. The present application is dated March 17, 2023 it is not clear from the record when it was filed- but taking this as the date of filing, there was a delay of five months and twenty days. The applicant blames the delay on its former advocates whom it avers filed a notice of appeal on November 9, 2022 under the mistaken belief that the impugned judgment was delivered on October 27, 2022. The applicant further blames its former advocates for delaying in releasing its file to its current advocates. It avers that the file was released to its current advocates on February 8, 2023.
14. I have perused the documents annexed to the affidavit in support of the application. I have not found any correspondence between the applicant's counsel and the former advocates requesting for the file. The only letter in this regard is the one dated February 6, 2023 forwarding the file to the firm of O&M Law LLP. In this letter, the firm of Olendo, Orare & Samba Advocates states at paragraph 3 that:

“Please note that we had filed Notice of Appeal. However, we did not file Memorandum of Appeal and an application of (sic) stay of execution as the General Manager of Olepito Sugar Factory did not sign the Supporting Affidavit.”(Emphasis added).
15. There was thus a delay in seeking extension of time to file the notice of appeal in this matter. The notice of appeal should have been lodged, as required under Rule 77(2) of the Rules of this Court, within 14 days of the decision sought to be challenged.

The delay is for a period of close to six months. The applicant blames his counsel for the delay, but its own exhibit- the latter dated February 6, 2023 whose contents I have set out above- puts the lie to its unfairly blaming its counsel for the delay.
16. I find that the delay in this matter was inordinate, and I am not satisfied with the reasons advanced to explain it. I therefore decline to exercise discretion in favour of the applicant and dismiss the application dated March 17, 2023 with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF OCTOBER, 2023

MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

