



**West Kenya Sugar Co Ltd v Angulu (Appeal E004 of 2024)
[2024] KEELRC 1698 (KLR) (26 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1698 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
APPEAL E004 OF 2024**

**JW KELI, J
JUNE 26, 2024**

BETWEEN

WEST KENYA SUGAR CO LTD APPLICANT

AND

JAMES ANGULU RESPONDENT

RULING

Representation:

For Appellant/Applicant – Masinde & Company Advocates

For Respondent- Omundi Bw’Onchiri Advocates

(On the Notice of Motion Application dated 7th March 2024 by the Appellant/Applicant)

1. The ruling is on application by way of a Notice of Motion application by the Appellant/Applicant (herein “Applicant”) dated 7th March 2024 and filed on 13th March 2024 brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act, and Article 50(1) of the Constitution of Kenya 2010, seeking the orders: -
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. There be a stay of execution of the decree pending the hearing and determination of the Appeal herein.
 - e. Costs of this application be granted.



2. The Notice of Motion was premised on the grounds on the face of the application and the grounds in the supporting affidavit of Masinde Johnson Simiyu Advocate sworn on 7th March 2024 as follows: -
 - i. That the Advocate was served with warrants of attachments against their client from Lufree Auctioneers (MJS-1).
 - ii. That the Applicant filed an appeal in the matter which has a high success rate (MJS-2), as the lower court's judgment was excessive and failed to recognize the liability of the respondent (MJS-3) and that it was not established as per the standards and evidence.
 - iii. The Applicant's goods are at risk of being auctioned off yet there is a legitimate appeal yet to be heard and the same may be rendered nugatory in the event of success.
 - iv. The application is brought timely and without delay and it is in the interest of time that the stay be granted. The appellant is a legal person of means and is willing to abide by any conditions of stay if the same is granted by the court to preserve the substratum of the appeal.
 - v. That the Respondent will not be prejudiced if the stay is granted.
3. The Application was opposed by the respondent through his Relying affidavit sworn on 18th March 2024 and filed on 21st March 2024 on the grounds that: -
 - i. The application is frivolous, vexatious, an abuse of the due process of court, and the same ought to be dismissed, as the appeal on which the present application is premised was filed out of time without the leave of court and in contravention of Section 79G of the *Civil Procedure Act*.
 - ii. That the application is a gimmick to delay the Respondent from enjoying the fruits of his judgment, as on the delivery of the judgment, the applicant asked through the letter of 28th January 2024(JA 1a) for 30 days to settle the decree and a consent to that effect was signed dated 30th January 2024(JA 1b).
 - iii. Further through the letter of 3rd February 2024(JA II), the Applicant further asked for time to settle the decretal sum.
 - iv. That his counsel upon expiry of the 30-day consent period, informed the Applicant through the letter of 28th February 2024(JA IIIa) sent via email (JA IIIb) that execution proceedings would commence unless the decretal sums were paid out.
 - v. That the applicant has not met the threshold for grant of stay orders sought under Order 42 Rule 6(2) of the Civil Procedure (Amendment) Rules, 2020.
 - vi. That the respondent is a person of means able to meet the decretal sum in the unlikely event that the appeal succeeds.
 - vii. The appellant wrote an affidavit on contested issues requiring cross-examination.
 - viii. That he stands to suffer irreparably should the order of stay of execution be granted considering that he sustained very serious bodily injuries that require specialized medical attention.
4. The Respondent further filed a Preliminary Objection dated 9th April 2024 on the point of law that the appeal upon which this application was premised was filed out of time without leave of the Court hence contravening the provisions of Section 79 G of the *Civil Procedure Act*.
5. The Applicant in rejoinder filed the Supplementary affidavit sworn by Eunice A. Owuor on 8th April 2024, the Applicant's Manager of Legal and Insurance services stating that: -



- i. On delivery of the judgment, they forwarded the Decree to their Insurers M/s Kenindia Assurance Co. Ltd, who on due diligence noted that there was no evidence to show that the Respondent was an employee of the Applicant or that he was injured in the course of his employment.
- ii. That this prompted the Applicant to apply for a certified copy of the Proceedings and judgment within the 30-day stay period (EAO-1).
- iii. They have never received the proceedings and judgment in BGM CMCC No. 237 f 2018, and due to the said delay and lapse in time, it becomes necessary to forestall the appeal being rendered nugatory.
- iv. That without the judgment and proceedings it was not possible to understand the basis of the judgment considering there was no proof of employment.
- v. That the time of appeal runs from the date when proceedings are availed and the Court can therefore not invoke the provisions of Section 79G of the *Civil Procedure Act* to lock out the Applicant from its right to challenge the judgment of the lower court.
- vi. That the power to dismiss an appeal is exercised sparingly, and the present memorandum of appeal raises substantial grounds of law on the liability of the Applicant and whether the same was established on a balance of probability.
- vii. That it would be premature to invoke Section 79G without the record and the proceedings and judgment of the lower court and the court would be acting in a vacuum.
- viii. That the Applicant will suffer gross injustice if their right of appeal is denied.
- ix. That the Applicant has an arguable appeal with high chances of success and every party should have its day in court and the right of appeal is such forum.
- x. The Applicant is willing to furnish security for the performance of the decree.
- xi. That the Respondent will suffer no prejudice once security for performance of the Decree is provided and the Respondent had not himself provided evidence of his means that he can refund the decretal sum should the appeal be successful.

Written Submissions

6. The court directed that the Preliminary objection and application be canvassed concurrently by way of written submissions. The parties complied. The Applicant's written submissions dated 23rd April 2024 were filed by Masinde & Company Advocates on an even date. The Respondent's written submissions dated 7th April 2024 were filed by Omundi Bw'Onchiri Advocates on 18th April 2024.

Determination

Issues for determination.

7. The Applicant submitted globally on the discretion of the court to extend the time for filing of appeal considering the special circumstances of each case and urged that they met the threshold for grant of stay of execution pending the hearing and determination of their appeal, which they state has a high chance of success and that they are bound to suffer irreparable damage should the stay not be granted.
8. The Respondent addressed the following issues in his written submissions: -



- a. Whether the Appeal upon which the application for stay of execution of Decree premised was filed out of time and without leave of court.
 - b. Whether the Applicant has met together the conditions for stay of execution of the Decree.
 - c. Who is to pay costs.
9. The court having perused the pleadings by the parties and their submissions was of the considered opinion that the issues placed before the court by the parties for determination of the application are: -
- a. Whether the Appeal upon which the application for stay of execution of Decree was premised was filed out of time and without leave of court.
 - b. If (a) in the affirmative, Whether the Applicant satisfied the conditions for the stay of execution of the Decree.

a). Whether the Appeal upon which the application for stay of execution of Decree was premised was filed out of time and without leave of court.

10. The Applicant seeks for stay of execution to enable it pursue appeal against the decision of the lower court. The respondent's position is that the appeal relied on was filed out of time without leave of the court contrary to provisions of Section 79G of the *Civil Procedure Act*.
11. The Applicant in the supplementary affidavit of Eunice Owuor states that the proceedings were delayed and that time only starts running after the judgment and proceedings sought to be relied on are availed.
12. That the court cannot invoke the provisions of section 79G of the *Civil Procedure Act* to lock the Applicant out of its legal right to challenge the judgment of the lower court.
13. Section 79G of the *Civil Procedure Act* provides for time for filing appeals from subordinate courts to wit: 'Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.'
14. The impugned judgment was of Hon. T.M. Orlando in Bungoma CMCC NO, 237 of 2018 and dated 24th January 2024. The memorandum of appeal dated 27th February 2024 was filed in court on even date. It is clear the memorandum was filed outside 30 days of delivery of judgment. There was no application filed to extend the time for appeal.
15. The Applicant relied on section 79(G) of the *Civil Procedure Act* proviso, 'excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order, to state the court could not lock them out as the lower court delayed to avail judgment and proceedings on time'. Further, they also relied on proviso under the section that, 'Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time'.
16. The Applicant relied on several authorities to support its application on the extension of time.
17. The Respondent on the other hand submits that the last day of filing an appeal was 24th February 2024 as time runs from the date of judgment. In the supplementary affidavit, the Applicant admitted they filed the memorandum of appeal out of time.



18. It was not in dispute that the memorandum of appeal was filed outside the 30 days. What was in dispute is when time started running. None of the parties cited authority on the issue. The court finds time started running on delivery of judgment and there was no application before the court prior to filing the appeal or even thereafter for an extension of time.
19. The instant application for a stay of execution of the Decree of the lower court was premised on the pending appeal. When there is a delay beyond 30 days under section 79G there is a proviso for application for extension of time to wit: 'Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time'. The court cannot grant orders not sought by a party. There was no application before the court for an extension of time to file an appeal. What was sought was a stay of execution of the Decree of the lower court pending the hearing and determination of the appeal.
20. An appeal filed without leave of the court is not valid. The Supreme Court considered a similar application in *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR and held: - 'What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires..... No appeal can be filed out of time without leave of the Court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.'
21. The court holds that the memorandum of appeal dated 27th February 2024 filed on an even date to challenge the judgment dated 24th January 2024 was filed out of time and without leave of the court of extension of time outside the 30 days within which an appeal is to be filed against a judgment from the lower court under section 79 G of the *Civil Procedure Act*. There is still no application before the court to extend the time.
22. The court applying the decision of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] e KLR (supra) holds the said memorandum of appeal dated 27th February 2024 as a nullity and of no legal consequence.
23. Consequently, having held the memorandum of appeal dated 27th February 2024 as a nullity it follows that the instant application based on the nullified appeal cannot stand. It fails automatically.
24. The application dated 7th March 2024 is held to have no basis, the appeal having been held as a nullity for lack of leave of court extending time to file. There is no application for an extension of time to appeal before the court and the court cannot grant unpleaded reliefs. The court then has no basis to consider the merit of the order of stay.
25. The application dated 7th March 2024 is dismissed and the interim orders in place are set aside with costs to the respondent. The memorandum of appeal/appeal dated 27th February 2024 is consequently struck out for being a nullity.
26. Right of appeal.
27. It is so Ordered.



DATED, SIGNED, AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 26TH DAY OF JUNE 2024.

J.W. KELI

JUDGE

In the presence of: -

Court Assistant: Brenda Wesonga

Applicant: - Mtunda

Respondent: Bw'onjiri

