



**REPUBLIC KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**

**MISC. NO. E006 OF 2021**

**WEST KENYA SUGAR CO. LTD & GODFREY SILIBWA.....APPLICANT**

**VERSUS**

**TIMOTHY AGENO KIYESI.....RESPONDENT**

**RULING**

1. This is a ruling on the Notice of Motion application dated 1<sup>st</sup> November 2021 brought under section 1a,1b and 3a of the Civil Procedure Act Cap 21 laws of Kenya and Order 42 Rule (6)(1) Order 51 Rule 1 and 3 of the Civil Procedure Act and all enabling provisions of the law .

2. The application seeks the following orders:-

- a. That the application be certified urgent and the same be heard exparte in terms of prayer 2 in the 1<sup>st</sup> instance.
- b. That this honorable court be pleased to grant stay of execution of the decree in BUTALI SRMCC NO. 103 OF 2016 TIMOTHY AGENO KIYESI V WEST KENYA SUGAR CO. LTD AND ANOTHER pending hearing and determination of this application inter partes.
- c. That this honorable court be pleased to grant leave to the Applicant to file appeal out of time from this judgment and decree in BUTALI SRMCC NO. 103 OF 2016 TIMOTHY AGENO KIYESI V WEST KENYA SUGAR CO. LTD AND ANOTHER.
- d. That this honorable court be pleased to grant stay of execution of the decree in BUTALI SRMCC NO. 103 OF 2016 TIMOTHY AGENO KIYESI V WEST KENYA SUGAR CO. LTD pending the lodgment hearing and determination of the appeal to be filed in this honourable court.
- e. That the date for inter partes hearing of this application be granted.
- f. The intended appeal be admitted out of time.
- g. Cost of this application be provided for.

3. Order (a) and (e) are spent.

4. The grounds of the Application are set out being Judgment in lower court was delivered on 20<sup>th</sup> September 2018, Appeal lodged at Kakamega High Court be Appeal no. 136 of 2018 which was struck out vide ruling delivered on the 6<sup>th</sup> August 2021 by the High Court for want of jurisdiction following application by Respondent. The Applicant filed application to have the High Court transfer the case to this court and the same was dismissed on the 4<sup>th</sup> October 2021 exposing the Applicant to possible execution proceedings, that the delay to appeal was due to the fact the previous appeal at High Court was struck out on technicality and was not heard on merit. That the intended appeal has high chances of success. That the delay in filing this appeal has been explained hence excusable and not inordinate. That the decree holder is a person of straw as per his evidence in court and as such if the decretal sum is paid the intended appeal will be rendered nugatory as it will be well -nigh impossible to recover the same if the appeal succeeded . That the security of performance of the decree had been deposited in the joint interest earning accounts in the names of Advocates on record for the parties at the trial court.

5. The Application is supported by the Affidavit of Dancan Otieno Njoga Advocate sworn on the 1<sup>st</sup> November 2021annexing the initial memorandum of appeal lodged in wrong court (DON 1)intended draft Memorandum of Appeal (marked 'DON/5'), Decision striking out the appeals in the series (marked DON/3) and the application to transfer and the ruling of the High Court dismissing application to transfer the appeal to this court(Marked DON/4 a and b). The Applicant filed a further affidavit sworn on the 29<sup>th</sup> November 2021 by Dancan Otieno

Njoga in response to the Respondent's response and annexing the consent and change of advocates.

6. The Respondent is opposed to the Application and filed replying affidavit sworn by himself on the 3<sup>rd</sup> November 2021. The Respondent is opposed to the application on the grounds that no reason offered as to why the Applicant did not instruct counsel to file appeal timeously and in the proper court with jurisdiction, the Applicant has not demonstrated seriousness on their part, have not produced letter addressed to the lower court requesting for typed and certified proceedings nor have they produced receipt for deposit on fees for typed proceedings, that is now 3 years and 2 months since lower court decision of 16<sup>th</sup> August 2018 hence inordinate delay in filing appeal without sufficient cause, that the decree holder will be prejudiced should application before the court be allowed as he is a successful litigant and should be allowed to access fruits of the judgement. The no amount of costs would suffice to compensate him. That there is no appeal with high chance of success as the Applicant closed their case without calling any witness or producing any documentary evidence leaving the evidence by the Respondent at the lower court unrebutted, that the affidavit has not been sworn by authorized agent by Applicant but incoming advocate hence the affidavit is hearsay. That the rights of the Applicants have to be balanced with those of the Respondent which in the circumstances he urges outweigh those of the Applicant.

#### **DETERMINATION**

7. The Application was canvassed by way of written submission. The Applicants submissions are dated 29<sup>th</sup> November 2021 and the Respondents submissions are dated 23<sup>rd</sup> November, 2021. The Respondent has identified the following issues for determination:-

- (a) Whether the court should grant leave to the Applicant to file an appeal out of time.
- (b) Whether the depositions made by the Appellant's counsel should be admitted by the court.
- (c) Whether the Applicant stands to suffer loss if the stay of execution is not granted.
- (d) Who shall bear costs of this application.

8. The Applicant has not listed issues. The court will address issues raised by Respondent and other issues which the court will find necessary.

#### **Whether the court should grant leave to the Applicant to file an appeal out of time.**

9. The court is guided by the provisions of the law on leave to file appeal out of time under Section 95 of the Civil procedure Act states: -*'Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.'*

*And*

*SECTION 79(G) 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.*

The Applicant also invoked the oxygen principle under sections 1a, 1b and 3 A of the Civil Procedure Act which the court further notes are now supported by Article 159(2)(d) of the Constitution.

The applicant has to satisfy the court that they have good and sufficient cause for not filing the appeal out of time.

10. The Applicant states that they had initially filed appeal before Kakamega High Court being No. 136 of 2018 which struck it out for being filed in wrong court. The attempt to get the court to transfer the appeal from Kakamega High court to this court was rejected by the court in judgement dated 4<sup>th</sup> October 2021.

11. The Application before court was filed 1<sup>st</sup> November, 2021. The Respondent submits there is unexplained inordinate delay. The court does not think so as the period between the decision of the lower court and this Application is explained as has been held in *George Kangethe Waruthiu -vs Estina Nyamweru & another (2021) eKLR* that the whole period of delay be explained. Further in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral boundaries commission and 7 others (2014) Eklr* the Supreme Court held that the while discretion to extent time is unfettered the Applicant must explain the reasons for the delay in making the application and whether there are any extenuating circumstances to enable the court exercise discretion in its favour. Section 79G of the Civil Procedure Act allows appeal to 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 matter was struck out for being filed in wrong court and immediately there was an application for transfer which was rejected on 4<sup>th</sup> October 2021 and this application was lodged on the 1<sup>st</sup> November 2021. The court finds the Appellant has complied with the provision and explained the delay satisfactorily. The mistake of counsel of filing appeal in the wrong court should not be visited on the innocent litigant. The court also takes judicial court that there has been jurisdiction uncertainty in the past over WIBA matters.

12. On whether the appeal has high chance of success the test being if appeal is arguable and not frivolous. The court has looked into the

intended draft memorandum of appeal annexed to the Application and among issues raised is that the court treated the defence evidence on record and their submissions superficially arriving on wrong conclusion on liability and damages, that the trial court erred in fact and law by arriving at finding that the appellant was liable for the accident and or Respondent's injuries when there was no evidence of breach of duty of care and or contract at all on the part of the Appellants and that the trial court arrived at wrong conclusion. The court finds these to be arguable issues deserving a day in court. This is consistent with decision cited by Respondent of First *American Bank of Kenya -vs- Gulab P shah 2 others Nairobi HCC NO. 2255 of 2000 (2002)/EA 65*.

13. On issues of whether the depositions made the Appellant's counsel should be admitted by this Honourable court. The issues raise in the said affidavit of counsel in support of the Application are issues which the counsel as an Advocate is competent to address and has annexed court rulings and pleadings. The Respondent submits that the change of advocates by applicant is non compliant with provisions of Order 9 Rule 9 of the Civil Procedure Rules. The Applicant in further affidavit sworn on the 29<sup>th</sup> November 2021 has produced consent filed with counsel in trial court in compliance. The mischief of the rule was defined in *S.K. Tawadi v Veronica Muehlmann(2019)eKLR* where the Judge observed and I uphold:- '*in my view the essence of Order 9 Rule 9 of the CPR was to protect advocates from mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace them*'. The rule in my view is intended to protect the interest of the outgoing advocate. Failure to comply with the rule does in any way prejudice the other party. This court is satisfied the interest of the outgoing advocate was addressed in the filing of the consent in the lower court before the filing of the instant application. Further, the court finds the claim that the affidavit offends rules of procedure to be a technicality which cannot defeat justice under Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities.

14. The third issue raised by Respondent is whether the Applicants stand to suffer loss if the stay of execution is not granted. Order 42 (Rule 6 (2) of the Civil Procedure Rules states that stay can only be granted if the Applicant satisfies the court that substantial loss will result to the Applicant if the order is not granted. The Applicant submits that the Application is brought without delay and security performance of the decree given by deposit in joint account held by Advocates. The Applicant says the Respondent is a man of straw as demonstrated at the hearing. The Respondent has not addressed this issue in response or submissions.

15. Substantial loss prove is defined in case referred to by Respondent of *Shell Ltd -vs- Kibiru & Another Civil Appeal No. 97 of 1996*. Where court held substantial loss to include prove of loss of money if the payment was made since the Respondent would not be able to repay the money. That is a potential loss that the Applicant has demonstrated and the Respondent has demonstrated he is capable of refunding the money held in security if the appeal succeeds.

16. The court is satisfied of merit of the application and is guided by the decision of Court of Appeal cited by Justice Ong'udi in *MFI Document Solutions Ltd v Paretto Printing works limited (2021)eKLR* being *Butt v Rent Restriction Tribunal (1982) 417* where the Court of Appeal gave guidance on how a court should exercise discretion in an application for stay of execution and held in part that:-

*i. the power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

*ii. the general principle in granting or refusing a stay is : if there is no other overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the Judge's discretion (sic)(trial court judgment).*

*iii. A judge should not refuse a stay if there is good grounds of granting it merely because in his opinion a better remedy may be available to the Applicant at the end of the proceedings.*

*v. the court in exercising its powers under Order XLI Rule 4(2)(b) of the CPR can order security upon application by either party on its own motion. Failure to put in security of costs as ordered will cause the order of stay of execution to lapse'.*

17. The Applicant averred through the advocate that there is security of performance deposit on joint interest earning account of the advocates for parties in trial court and that is not disputed or rebutted by the Respondent.

18. I find merit in the application and issue the following orders:-

a. That Leave is granted to the Applicant to file appeal out of time from the judgment and decree in BUTALI SRMCC NO. 103 OF 2016 TIMOTHY AGENO KIYESI V WEST KENYA SUGAR CO. LTD AND ANOTHER. The appeal should be filed within 14 days.

b. That order of stay of execution of decree BUTALI SRMCC NO. 103 OF 2016 TIMOTHY AGENO KIYESI V WEST KENYA SUGAR CO. LTD AND ANOTHER is granted pending the lodgment, hearing and determination of the appeal to be filed in this Court.

c. Failure to comply and file appeal within 14 days as ordered will lead to automatic vacation of orders (a) and (b) above.

d. Costs to the Respondent in any event.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 27<sup>TH</sup> DAY OF JANUARY 2022**

**J. W. KELI**

**JUDGE**

**IN THE PRESENCE OF**

**COURT ASSISTANT- BRENDA**

**APPLICANT – OTIENO NJOGA ADVOCATES**

**RESPONDENT : ABOK HOLDING BRIEF FOR CHANZU ADVOCATE.**