



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS NO. E005 OF 2021**

**WEST KENYA SUGAR CO. LTD.....APPLICANT**

**VERSUS**

**JACOB WANJA WERUGA.....RESPONDENT**

**RULING**

1. The Applicant approached the court by way of Notice of Motion dated 1<sup>st</sup> November 2021 seeking 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. 195 OF 2015 JACOB WANJA WERUGA V WEST KENYA SUGAR CO. LTD 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. 195 OF 2015 JACOB WANJA WERUGA V WEST KENYA SUGAR CO. LTD.
  - d. That this Honorable Court be pleased to grant stay of execution of the decree in BUTALI SRMCC NO. 195 OF 2015 JACOB WANJA WERUGA V WEST KENYA SUGAR CO. LTD pending 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.
2. Orders b and e are spent.
3. The Application is supported by the Affidavit of Dancan Otieno Ngoga Advocate sworn on the 1<sup>st</sup> November 2021 and a further affidavit by same Advocate sworn on the 29<sup>th</sup> November, 2021.
4. The Application is brought under Section 1a, 1b and 3a of the Civil Procedure Act ( Cap 21) and order 42 Rule 6 (1) Order 51 Rule 1 and of the Civil Procedure Rules 2010 and all the enabling Provisions of the law.
5. The Application is opposed by the Respondent whose Advocate filed grounds of opposition dated 4<sup>th</sup> November 2021 namely:-
  - a. That the Application is bad in law , non-starter , misconceived, incurably defective and unsustainable and offends the mandatory provisions of Orders 9 and Rule 9 and 19 rule 3 of the Civil Procedure Rules.
  - b. That the Applicant has no demonstrated sufficient cause to warrant grant of orders sought.
  - c. That the application is brought under the wrong provisions of the law.
  - d. That this Honourable Court is devoid of jurisdiction.
  - e. That the application is aimed at wasting the court's limited judicial time

- f. That the application is an afterthought meant to steal a judicial match
- g. That the application is an abuse of court process as it is frivolous, vexatious and untenable.
- h. That no decretal sum is being held in a joint account.
- i. That it is in the interest of justice that the Applicant's application be struck out forthwith with costs.

6. The Application was canvassed by way of written submissions. The Applicant's written submissions are dated 29<sup>th</sup> November 2021. They are filed by L.G. Menezes & Company Advocates. The Respondents/Plaintiff's written submissions are dated 30<sup>th</sup> November 2021 and filed by Abok Odhiambo & Co. Advocates.

## DETERMINATION

### ***Jurisdiction of the court.***

7. The Respondents to the Application have stated in grounds of opposition that the Honourable court is devoid of jurisdiction. The Respondent did not address the issue in his written submissions which issue in the opinion of the court is a serious issue. The court cannot take a further step in this application without jurisdiction. What is before the court is an application for leave to file appeal out of time and for grant of stay of execution of the Judgment at the lower court pending the lodgment, hearing and determination of appeal to be filed.

8. The Applicants had previously filed appeal at Kakamega High court being Civil Appeal No. 166 of 2018. The Appeal was struck out by the court before the hearing for being filed in the wrong court. It is trite law that a party whose appeal has been struck out as incompetent has the liberty and right to restart the appellate process. Consequently, this court has jurisdiction to deal with this application and also any appeal that may be filed if leave is granted to the Applicants.

### **Whether the Applicant's Advocate is competent to file this application**

9. The Respondent submits that this application is incompetent having been filed by a stranger. That the Applicant has not complied with the strict and mandatory provisions of order 9 rule 9 of the Civil Procedure Rules which states :-

*'Incase there is a change of advocates or when a party decided to act in person having previously engaged an advocate, after judgement has been passed. Such change or intention to act in person shall not be affected without an order of court:-*

*a) Upon an application with notice to on the parties or*

*b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or a party intending to act in person as the case may be.'*

10. The Applicant in further affidavit dated 29<sup>th</sup> November 2021 admits that the law firm of Olendo, Orare & Samba Advocates was on record at trial court. The Affidavit further states that on the 16<sup>th</sup> October, 2021 they entered a consent with the former law firm to allow the firm of MS L.G. Menezes & Company advocates to come on record for the Applicant, Respondent in the original suit Kakamega CMCC NO. 195 of 2015. The said consent is annexed as "DOM1". The court notes the consent is stamped by the said trial court on 25<sup>th</sup> October 2021 and signed by both law firms.

11. The Respondent submits the rule requires court order which has not been presented. The Applicant states by having filed the consent before these proceedings commenced and in the trial court they are compiled and are competently before the court. The Respondent submits that the reasoning behind the provisions of Order 9 Rule 9 of the Civil Procedure Rules is articulated in the case of *SK Tarwadi -vs Veronica Meiehhmann (2019) eKLR* it is stated the Judge observed:-

*"In my view the essence of the order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him."*

12. The Respondent has filed several persuasive authorities of the High Court including one in which consent had been filed like in the instance case and the Judge said there was no order of court being in *John Langat -vs Kipkemboi Terer & 2 others (2013) EKLR* to *Simon Barasa Obiero -vs- Onyango Obiero (2016) eKLR*.

13. The court finds that the outgoing advocate and the advocates now for Applicants having filed consent in the lower court the mischief alluded to in the *SK Tarwadi case* has been addressed. The court is mindful of the constitutional provisions under Article 159 (2) (d) on procedural technicalities. The mischief having been addressed the insistence on full compliance by the court issuing an order when the filed consent was addressed to court would then amount to procedural technicality.

14. I am persuaded by my brother Judge of the High Court W. Korir where he held a similar opinion in *Simon Barasa Obiero -vs Jackson Onyango Obiero (2016) eKLR* paragraph 12 which I adopt with approval to wit:-

*" The rule in my view is intended to protect the interests of the outgoing Advocate. Failure to comply with the rule was not in any*

way prejudice to the other party. Unlike my brother S. M Kibunja Judge who holds the view that any thing filed where there is non compliance with order 9 Rule 9 is null and void ab-initio, I would look at such omission which a kinder eye and depending on the circumstances of the case. I would allow such non-compliance to pass where the interest of the outgoing advocate have been taken care of and where no prejudice would be suffered by the other party". I do uphold this holding.

15. The court has said enough and is satisfied that the law firm of L G Menezes is not a stranger having filed notice of change and consent with outgoing advocate on 25<sup>th</sup> October 2021 before lodging the instant application .

#### **Whether to grant leave to file appeal out of time.**

16. The Judgement in the lower court Kakamega SRMCC NO. 195 of 2015 was delivered on the 30<sup>th</sup> November 2018 and appeal lodged against the Judgement vide Kakamega High Court Civil Appeal No. 166 of 2018 . The appeal was dated 11<sup>th</sup> December 2018 and filed on a date which is not clear in December 2018. There was no issue of non-compliance in that court with timelines but the appeal was struck out for being filed in the wrong court vide a ruling dated 6<sup>th</sup> August, 2021.

17. The Applicant states that they applied for transfer and the Application was dismissed on 4<sup>th</sup> October, 2021. They state that the delay in filing the appeal is due to the fact that the previous appeal to the High court at Kakamega was struck out on technicality and its merits not considered, that their appeal has high chances of success and the delay is excusable. That the Respondent is a person of straw as her evidence in court and if the decretal sum is paid the intended appeal will be rendered nugatory as it is impossible to recover the amount if appeal succeeds. The Applicant states security of performance has been deposited in joint interest earning amount in the names of advocates for parties who were on record at the trial court.

18. The application to appeal out of time is opposed by the Respondent on ground that the Applicant has not demonstrated sufficient cause to warrant orders sought. The Respondent on grounds of opposition states that no decretal sum is being held in joint amount and the application is an after thought meant to steal a judicial match. The court notes that there was proclamation ( exhibit DON 4(a-d) and in the further affidavit filed after response the Applicant did not give evidence of the deposit of security performance which was denied by the Respondent. The court believes that there is no deposit of security performance as alleged by Applicant .

19. The Respondent states that Application for leave to appeal out of time has been brought under the wrong provisions of the law. That the Applicant cannot purport to rely on the provisions of Order 42 Rule 6 of the Civil Procedure Rules since the same deals with stay of execution pending appeal. That is correct, however the court notes that the Applicant invoked all enabling laws and the court is also guided by Article 159 (2) (d). Section 79 (a) of the civil procedure Act states. “ *Every appeal from a subordinate court to the high court shall be filed within a period of thirty days from the date of decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite from the preparation and deliver to the Appellant of a copy of decree or orders.- “ provided that an appeal may be admitted out of time if the appellants satisfies the court that the had good and sufficient cause for not filing the appeal out of time” Section 95 of the Civil Procedure Act gives discretion to court to extend time where it was expired.*

20. Has the Applicant satisfied the court of good and sufficient cause for not failing appeal out of time. As outlined earlier in this decision the Applicant explained the cause of delay and of the entire time from the date of judgement what transpired to the appeal struck out for having been filed in wrong court and rejection of application to transfer the struck out appeal. The court is satisfied the entire period of delay is explained as was held in the case of *George Kangethe Waruhiu -vs Esther Nyamwerur & another (2021) eKLR* where it was held that the entire period must be explained satisfactory.

21. The Applicant has annexed a draft memorandum of Appeal which challenges the findings on quantum and liability and on perusal of the entire memorandum the court is satisfied there is arguable points and it is in the interest of justice to allow a meritorious appeal to be argued.

#### **On the issue of stay decree of lower court pending the filing and determination of the appeal**

22 I already agreed with the Respondent there is no evidence of decretal amount having been deposited in a joint amount between advocates on record at trial court. The Applicant had a burden to prove the same in the further affidavit, the Respondent having denied the allegation. Order 42 (6) (2) sets two key conditions for grant of stay.

*(1) That substantial loss may result to the Applicant unless the order is made and application is made without unnecessary delay.*

*(2) Such security as the court order for the due performance of such decree as order as may ultimately be binding on her has been given by the Applicant.’*

23. As it stands there is no compliance with issue of security for performance deposit. I will proceed to address the question of substantial loss. The Applicant submits that this is a money decree that the Applicant seeks to appeal against and there will be substantial loss to the Applicant if the stay is not granted. That the Respondent has not shown they are able to refund the decretal amount if the appeal succeeds.

24. The court of appeal has settled the principles for leave to file appeal out of time and stay of execution in the case cited by Justice Ongudi in *MFI Document Solutions Ltd v Paretto Printing Works Limited (2021)eKLR of Butt -vs Rent Restriction Tribunal ( 1982) KLR 417* where the Court of Appeal gave guidance on how a court should exercise discretion in an application for stay of execution and held that:-

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

2. *The general principle is 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 judgement).*

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

4. *The court in exercising its powers under order XLI rule 4 (2) (b) of the civil procedure Rules can order security upon application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse”.*

25. The Decree/Judgement sought to be challenged in the instant application is a monetary decree. Costs and Interest can adequately cover any prejudice the Respondent may suffer if the Application is granted. The Applicant is a limited company which indicates there is security of performance given and the court having found no evidence of the security the same must be met.

26. I find merit in the Application dated 1<sup>st</sup> November 2021 and issue the following orders:-

1. That Leave is granted to the Applicant to file appeal out of time from the judgment and decree in BUTALI SRMCC NO. 195 OF 2015 JACOB WANJA WERUGA V WEST KENYA SUGAR CO. LTD . The appeal should be filed within 14 days.

2. There shall be a stay of execution of the judgment and Decree in BUTALI SRMCC NO. 195 OF 2015 JACOB WANJA WERUGA V WEST KENYA SUGAR CO. LTD on condition that Kshs. 398,938/- is deposited in a joint interest earning account in the names of the two law firms Abok Odhiambo & Company advocates and M/S L.G Menezes & Company which are representing parties in the instant application within 14 days.

3. Failure to comply with any of the orders will lead to automatic vacation of the orders Nos. 1 and 2 above.

4. 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 Wesonga

Applicant: - ABOK ADVOCATE

Respondent: - OTIENO NJOGA ADVOCATE