



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

MISC. NO. 11 OF 2021

(FORMERLY KISUMU CIVIL CASE E 072/2021)

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

VERSUS

JASON WAFULA KALIBORESPONDENT

RULING

1. This is a ruling on the Application in this case dated 26th October, 2021 by way of Notice of Motion. Order 1 and 2 have been spent pursuant to Order of this court by Lady Justice Baari dated 27th October 2021.

2. The Court then is tasked to consider orders 3,4,6 & 7 of the application. Prayer 5 is spent. Order 3 seeks leave to the applicant to file appeal out of time from Judgement and decree in **Butali SRM CC NO. 104 OF 2016 Jason Wafula Kalibo -Vs West Kenya Sugar Company Limited.**

3. That this court grant stay of execution of decree in Butali SRM CC NO. 104 of 2016 Jason Wafula Kalibo -Vs – West Kenya Sugar Company Limited pending the lodgment, hearing and determination of the appeal to be filed in this Honourable court.

Prayer 6 that the intended appeal be admitted out of time.

Prayer 7 that the costs of this application be provided for.

4. The grounds of the Application are set out being Judgment in lower court was delivered on 12th March 2016, Appeal lodged at Kakamega High Court which struck out the appeal for want of jurisdiction following application by Respondent. The decision of the High Court Kakamega being on 6th August 2021. The Applicant's application to have the High Court transfer the case to this court was dismissed on the 4th 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.

5. 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. The Application is supported by the Affidavit of Dancan Otieno Njoga Advocate of the Applicant annexing the intended Memorandum of Appeal and the pleadings filed at the Kakamega High court and the the rulings.

6. The Respondent is opposed to the Application and filed sworn affidavit in response on the 3rd November 2021 on grounds that the Applicants to note demonstrate 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 9 months since lower court decision hence inordinate delay in filing appeals 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.

7. 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 evidence, that the affidavit has not been sworn by authorized agent by Applicant but incoming agent hence hereby.

DETERMINATION

8. The Application was canvassed by way of written submission. The Applicants submissions are dated 29th November 2021 and the Respondents submissions are dated 16th 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 deposition made by the Appellants 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.

9. The Applicant has not listed issues. The court will address issues raised by respondent and other issues which the court will find necessary. Section 95 of the Civil procedure Act states:

Where there is any period is fixed or granted by the court for the doing of any prescribed act or allowed by this Act, the court may in its discretion, from time to time enlarge such a period, even though the period originally fixed or granted may have expired”.

Should the court grant leave as sought?

The Applicant had initially filed appeal before Kakamega High Court which struck it out for want of jurisdiction. 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 6th August 2021 of Hon. Justice Musyoka.

10. The Application before court was filed 26th October, 2021. The Respondent submits there is unexplained 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. 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 court finds the Appellant has complied with the provision.

11. 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 memorandum of appeal annexed to the Application and among issues raised is that the court ignored defence filed and their submissions, the trial court ignored principles applicable in amounting quantum of challenges and the relevant authorities in the written submission filed by the Appellants. 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*. Under the said decision another issue to consider in exercising discretion on whether or not to grant leave to appeal out of time is whether the Respondent can be compensated in costs for any prejudice he may suffer as a result of favorable exercise of discretion.

12. The Respondent says no amount of costs can compensate him. This being a monetary claim that averment is baseless. The Applicant has already deposited decreed amount in joint account held by advocates at trial court. This is a condition for grant of stay pending appeal. The Applicant has met the threshold for grant of leave. The mistakes of advocate in filing appeal in wrong court cannot be visited on the Applicant in the instant case. The court takes judicial notice that there has been jurisdiction confusion under the WIBA matters.

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 explains issues which the counsel as an Advocate is competent to address and has annexed court ruling and pleadings. 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. 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.

14. The Applicant submits that the Application is brought without evidence 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.

16. In conclusion the court finds merit in the Application and grant the following order:-

- a. That Leave is granted to the Applicant to file appeal out of time from the judgment and decree in *Butali SRM CC NO. 104 of 2016 Jason Wafula Kalibo -Vs West Kenya Sugar Company Ltd*.
- b. That order of stay of execution of decree in *Butali SRM CC NO. 104 of 2016 Jason Wafula Kalibo -vs - West Kenya Sugar Company Ltd* is granted pending the lodging, hearing and determination of the appeal to be filed in this court.

c. That the intended appeal be admitted out of time.

d. Costs in the cause.

It is so ordered.

RULING DATED, DELIVERED AND SIGNED THIS 20TH DAY OF DECEMBER, 2021

J. W. KELI

JUDGE

In the presence of

Court Assistant- Brenda

Applicant -Oduor

Respondent : Chanzu on record.