



**South Nyanza Sugar Company Limited v Agutu (Civil Appeal
E025 of 2023) [2024] KEHC 2924 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2924 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E025 OF 2023
RPV WENDOH, J
MARCH 19, 2024**

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED APPLICANT

AND

BENARD JUMA AGUTU RESPONDENT

RULING

1. This ruling is in respect to the Notice of Motion dated 8/6/2023 (the application) filed by South Nyanza Sugar Company Limited (the applicant). The applicant seeks the following orders: -
 1. Spent;
 2. Spent;
 3. Spent;
 4. That there be a stay of execution and decree of the subordinate court in Rongo PMCC No. E078 of 2022 dated and delivered on 23/11/2022 pending the hearing and determination of this appeal, on any condition as the court may adjudge just and affordable.
 5. That the security availed by the applicant in compliance with the court's order made pursuant to prayer 3 above, as the condition for the grant of prayer 2 above, be ordered to remain in place as a condition for grant of prayer 4 above pending the hearing and determination of this appeal or until further orders of the court are made.
 6. Costs of this application be in the appeal.
2. The grounds upon which the application is based, are found in the body of the application and the supporting affidavit of Maurice Omondi Ng'ayo, the applicant's Legal Service Manager. Counsel deponed that on 23/11/2022, the lower court entered judgement in favour of the respondent for Kshs.



350,000/=, interest from the date of filing suit and costs; that the applicant filed an application in the lower court on 26/1/2023 to set aside the judgement delivered on 23/11/2022 which was dismissed by a ruling dated and delivered on 29/3/2023; that being aggrieved, the applicant filed a memorandum of appeal dated 28/4/2023; that costs of the suit was assessed at Kshs. 92,780/=, the interest on the principal award stands at Kshs. 52,920/= and therefore the total outstanding debt stands at Kshs. 495,000/=.

3. It was further deposed that the respondent has threatened to commence execution proceedings which would render the appeal nugatory since it has a reasonable high chances of success; that the applicant will stand to suffer substantial loss and it is in the interest of justice that stay of execution be granted pending appeal.
4. The application was opposed. The respondent filed a replying affidavit sworn by himself dated 28/6/2023. The respondent stated that the application is frivolous, mischievous; that the appeal was filed 33 days after the orders appealed from were delivered; that the appeal was therefore filed out of time without obtaining leave of this court; that even if the memorandum of appeal is dated 28/4/2023, the court stamp indicates otherwise; that therefore, there is no competent appeal before this court.
5. The respondent further deposed that the interlocutory/default judgement against the applicant which it sought to set aside was entered on 19/9/2022 but the applicant waited until 26/1/2023 a period of 129 days to apply to set it aside; that the delay in making the application was inordinate, an afterthought and an abuse of the court process; that the applicant was aware of the lower court proceedings but chose not to file a response; that the remedy of setting aside is an exercise of judicial discretion which the lower court exercised judiciously in the circumstances. The respondent urged that this application be dismissed with costs.
6. The applicant filed a supplementary affidavit dated 6/11/2023 and deposed that the ruling subject of this appeal was delivered on 29/3/2023; that the applicant being aggrieved by the said order, filed a Memorandum of Appeal dated 28/4/2023; that a decision to appeal has to be made by the applicant's Board of Management; that the following day, 29/4/2023 was a Saturday which was not a working day; that on 30/4/2023 was on a Sunday; that 1/5/2023 was a Public Holiday and therefore the aforementioned three days are excluded from computation of time.
7. It was further deposed that the last day for filing the appeal was on 2/5/2023 and it is on that date which the appeal was registered after payment and therefore there was no need for grant of leave; that the Management of the applicant resolved to appeal against the ruling on 26/4/2023 and order of 29/3/2023 which decision was communicated to Counsel for the applicant on 27/4/2023 and the present application was filed on 28/4/2023.
8. The respondent stated that the CTS network was not working on 28/4/2023; that the date when the ruling was delivered on 29/3/2023 was an excluded day and it is not reckoned within the 30 days window for filing appeals under Order 50 Rule 8; that even if the date of 29/3/2023 is included in computation, the last day of filing fell on 29/4/2023 which was a Saturday.
9. Both parties filed their respective submissions which I have duly considered. I hereby render my findings hereunder.



10. This appeal is predicated on the ruling and order of Hon. S.N. Mutava dated and delivered on 29/3/2023. An appeal from the subordinate should be filed within 30 days from the date of the decision. Section 79G of the Civil Procedure Act provides: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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.”

11. In this instance, the ruling and order was delivered on 29/3/2023. The 30 days within which to file the appeal was on or before 29/4/2023. The Memorandum of Appeal is dated 28/4/2023 but it was filed on 2/5/2023. On 28/4/2023 fell on a Friday. The reason given by the applicant on why it never filed the appeal on time was that the CTS was not working on that day. Admittedly, there are some technological challenges which are beyond human intervention one of them being ICT challenges. The applicant promptly ensured that the appeal was filed on 2/5/2023 since on 1/5/2023 was a Public Holiday. I will therefore give the applicant the benefit of doubt on the explanation given and I find that the appeal has been filed within time.

12. The applicant has also asked this court to issue a stay pending the hearing and determination of the appeal. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules makes provision for stay pending appeal. A court seized with the application should consider the following factors:- whether substantial loss will be suffered if stay is not granted, whether the application has been made without unreasonable delay, whether the applicant is willing to furnish security for due performance of the decree and whether the applicant has an arguable appeal.

13. The decretal sum is Kshs. 350,000/=. By an order dated 12/6/2023, this court directed that the applicant deposits in court the decretal sum within 14 days. There is evidence that the same was deposited on 30/6/2023. Therefore, there is no substantial loss that will be suffered as the applicant has furnished security for the due performance of the decree.

14. The application herein was filed on 8/6/2023 after the respondent’s Counsel wrote a letter dated 4/6/2023 demanding payment of the decretal sum or execution to commence. I find that there was no delay in filing the instant application.

15. In the Memorandum of Appeal dated 28/4/2023, the applicant contends that the trial court erred by not setting aside the ex - parte judgement even after finding that the draft defence raised triable issues, that the trial court failed to consider the reasons advanced by the applicant in failing to serve its pleadings on time and failing to appear in court for formal proof hearing. I find that these are arguable grounds.

16. In the premise, I allow the application dated 8/6/2023 on the following terms:-

1. That there be a stay of execution of the judgement and decree of the subordinate court in Rongo PMCC No. E078 of 2022 – Benard Juma Agutu vs South Nyanza Sugar Company Limited dated and delivered on 23/11/2023 pending the hearing and determination of the applicant’s intended appeal.
2. The Applicant is hereby granted leave to file and serve its Record of Appeal within 60 days hereof.



3. Mention before the Deputy Registrar on 22/5/2024 to confirm compliance.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 19TH DAY OF MARCH, 2024

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

Mr. Odero for the Applicant.

No appearance for the Respondent.

Emma & Phelix Court Assistants.

