



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CIVIL APPEAL NO. 98 OF 2017**

**EZEKIEL OMAMBIA OMOKE.....APPELLANT/RESPONDENT**

**-VERSUS-**

**SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT/APPLICANT**

**RULING**

1. A judgment in this appeal was rendered on 08/08/2018. The appeal was by the Appellant/Respondent against the judgment of the lower court delivered on 20/09/2017 where in a suit for breach of contract and compensation the court awarded the proceeds for the plant crop amounting to Kshs. 1,021,120/= with costs and interests from date of filing of the suit. The appeal was on the compensation for the expected yields from the first and second ratoon crops.

2. Whereas the Appellant/Respondent appealed the judgment to this Court, there was no Cross-Appeal by the Respondent/Applicant. In allowing the appeal, this Court compensated the Appellant for the proceeds for first ratoon crop and the second ratoon crop. A sum of Kshs. 2,312,640/= was instead awarded subject to transport and harvesting charges. It is that judgment which prompted an appeal to the Court of Appeal. A Notice of Appeal was lodged in this Court on 20/08/2018.

3. The Respondent then moved this Court for the prayers contained in the Notice of Motion dated 07/09/2018 which are: -

***a) This application be certified as urgent and the same be admitted to hearing ex-parte in the first instance.***

***b) There be interim order of stay of execution of the judgment and or the decree and or any other consequential orders in this appeal pending and eventual disposal of this application inter partes.***

***c) The applicant be granted leave to effect Notice of Change of Advocates in terms of the Notice of Change of Advocates filed which should be deemed duly filed, served and effected on such leave being granted.***

***d) The court be pleased to grant an order of stay of execution of the judgment and of the consequential decree of this court in this appeal and a stay of execution of the judgment and decree of the subordinate court in Rongo SRMCC No. 35 of 2016 pending hearing and eventual determination of an Intended Appeal to be lodged in the Court of Appeal.***

***e) Costs of this application be provided for.***

4. The Original Respondent is now the Applicant in respect to the current application. The application was supported by the affidavit of **Maurice Omondi Ng'ayo** sworn on 04/02/2019 which detailed the background of the application.

5. The Original Appellant (now Respondent) opposed the application by filing a Replying Affidavit he swore on 26/11/2018. The Appellant challenged the application in its entirety and contended that the Applicant had not taken any steps since the filing of the Notice of Appeal and that the intended appeal was deemed withdrawn. That, he was a person of means capable of repaying the decretal sums in the event the appeal succeeds. He prayed that the application be dismissed.

6. Directions were given and the application was to be heard by way of written submissions. The Applicant did not file any such submissions, but the Appellant. The Applicant requested this Court to peruse the application and render its decision. The Respondent challenged the validity of the alleged appeal before the Court of Appeal which to him none was pending for failure to lodge the Record of Appeal within the appointed time under **Rule 82** of the **Court of Appeal Rules, 2010**. That, allowing the appeal would then be an exercise in futility.

7. I have carefully considered the application. It is true that under **Order 42 Rule 6(4)** of the **Civil Procedure Rules** the filing of a Notice of Appeal is deemed as the filing of an appeal from the High Court to the Court of Appeal. **Rule 82** of the **Court of Appeal Rules** requires an

Appellant to lodge the Record of Appeal in the Court of Appeal Registry within 60 days of the date the Notice of Appeal was lodged. In this case the Notice of Appeal was lodged on 20/08/2018. The Applicant therefore had up to 19/10/2018 to have lodged the Record before the Court of Appeal. The Applicant did not file any Further Affidavit after being served with the Replying Affidavit to explain if it complied with the law.

8. As at now this Court is not aware whether the Applicant lodged the Record of Appeal as required under **Rule 82** of the **Court of Appeal Rules**. The failure to comply with **Rule 82** is addressed in **Rule 83** of the **Court of Appeal Rules**. The failure is deemed to be a withdrawal of the Notice of Appeal. There is as well no indication that an application to extend time within which to lodge the Record of Appeal is pending before the Court of Appeal. I therefore agree with the Appellant's Counsel that as matters stand there is no competent appeal against the decision of this Court rendered on 08/08/2018.

9. In view of the foregone there is no basis upon which the application may be granted. I must also say that even if the Applicant had demonstrated the pendency of the appeal, since it did not appeal against the decision of the trial court I would have ordered the satisfaction of that decision and that the further sums awarded on appeal be held in a joint interest earning account.

10. The upshot is that the Notice of Motion dated 07/09/2018 is hereby dismissed with costs.

**DELIVERED, DATED and SIGNED at MIGORI this 28<sup>th</sup> day of March 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open court and in the presence of: -**

**Mr. Marvin Odera** Counsel instructed by the firm of Messrs. Okong'o Wandago & Co. Advocates for the Applicant.

**Mr. Gembe** Counsel instructed by the firm of Messrs. Gembe Capis Omolo & Company Advocates for the Appellant/Respondent.

**Evelyne Nyauke** – Court Assistant