



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 72 OF 2009**

**SOUTH NYANZA SUGAR CO. LTD.....APPELLANT**

**VERSUS**

**MASIGA MIKWANGA.....RESPONDENT**

***(An appeal from the judgment and decree of Hon. SYLVIA WEWA (Senior Resident Magistrate) dated and delivered on the 18<sup>th</sup> day of March, 2009 in the Original Kisii CMCC No. 1497 of 2004)***

**RULING**

1. In his application dated 21<sup>st</sup> April, 2016, the Respondent/Applicant seeks the dismissal of the appellant's appeal for want of prosecution. The application is brought under **Sections 1A, 3A and 63 (e) of the Civil Procedure Act** and **Order 42 Rule 32 and 35 of the Civil Procedure Rules**.
2. The application is supported by the affidavit of Ezekiel Oduk advocate for the applicant who avers that soon after the respondent/applicant obtained judgment in Kisii CMCC 1497 of 2004, the appellant filed the instant appeal and on 8<sup>th</sup> December 2009 obtained stay of execution orders pending appeal but that as at the time of filing the instant application, the appellant had not taken any steps towards disposing of the appeal. He further avers that the appellant's failure to prosecute the appeal is prejudicial to the applicant who had through a similar application dated 6<sup>th</sup> June 2012 sought orders to dismiss the instant appeal which application was not successful as the court then observed that it would be prudent to hear the appeal on its merits.
3. The respondent/appellant opposed the application through the replying affidavit of Gabriel Ouma Otiende, dated 2<sup>nd</sup> June 2016 in which he deposes that he is the appellant's company secretary and therefore familiar with the circumstances of the appeal. He avers that the appellant took all the necessary steps towards preparing the appeal for hearing but that there was failure on the part of the court.
4. He contends that the application falls short of the provisions of **Orders 42 Rule 13** which sets out the circumstances under which an appeal can be dismissed for want of prosecution and adds that the court lacks the jurisdiction to dismiss the appeal for want of jurisdiction.
5. The appellant attributes its delay in prosecuting the appeal to the many court cases that it has been engaged in defending which it states, is a matter of general and local notoriety that the court should take judicial notice of. He further states that the delay in prosecuting the appeal was due to inadvertence and genuine mistake which this court should overlook and pardon in the interest of justice.
6. He further avers that the appellant is keen on prosecuting the appeal and craves for an opportunity to do so in line with the provisions of Constitution regarding the delivery of substantive justice.

7. When the application came up for hearing on 4<sup>th</sup> April 2017, parties agreed to canvass it by way of written submissions which they both filed and which I have perused.

8. When the application came up for mention on 5<sup>th</sup> June 2017 to confirm the filing of the submissions, the appellant intimated to court that it had already prepared, filed and served the Record of Appeal, and was ready to prosecute the appeal in which case, the instant application should be shelved so that the merits of the appeal can be determined.

9. Mr. Nyambati who held brief for Mr. Oduk at the mention maintained that the application should be heard as scheduled whereupon the court proceeded to list the application for ruling.

### **Analysis and determination**

10. Upon considering the instant application, the appellant's replying affidavit, the parties respective submissions and the authorities cited, I note that the main issue for determination is whether the appeal herein should be dismissed for want of prosecution.

11. It was not disputed that the judgment appealed from was delivered by the lower court on 18<sup>th</sup> March 2009 and orders of stay of execution pending appeal made on 8<sup>th</sup> December 2009. I note that the stay of execution order was made on condition that the appellant pays one half of the decretal sum to the applicant and deposits the other half in court.

12. The appellant attributed the delay in the prosecution of its appeal to the delay by the trial court in supplying them with the lower court's proceedings.

13. I have however perused the Record of Appeal filed on 29<sup>th</sup> May 2017 and I note that the said typed proceedings were as at 14<sup>th</sup> April 2011 ready when they were signed and certified by the trial magistrate as true copies of the original. Clearly, therefore, the appellant cannot claim that the court delayed in typing the proceedings and thus its delay in preparing the record of appeal which it only prepared and filed on 29<sup>th</sup> May 2017, more than 6 years, after the proceedings were typed, signed and certified by the trial court.

14. The appellant also claimed that it was prevented from prosecuting the appeal due to the many cases that it was engaged in defending. Once again, the appellant did not demonstrate to this court any proof of the said cases and instead invited the court to take judicial notice of the fact that it is a state corporation that prosecutes thousands of suits. It is my finding that state corporations just like any other litigant, are not exempted from the legal provisions setting timelines within which certain actions ought to be taken. Lastly, it was the appellant's case that Order 42 Rule 35 of the Civil Procedure Rules envisages only 2 scenarios under which an appeal may be dismissed for want of prosecutions which scenarios were not obtaining in this appeal.

15. Order 42 Rule 35 of the Civil Procedure Rules stipulates as follows:

**"[Order 42, rule 35.] Dismissal for want of prosecution.**

**35. (1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.**

**(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal."**

16. In the instant case, I find that even though directions had not been taken on the appeal, the appeal has

been pending in court for a period of over 7 years and under those circumstances, the applicant was justified to apply directly for the dismissal of the appeal while invoking the inherent jurisdiction of the court under Section 3A of the Civil Procedure Act. **See Adan Karama Petroleum Ltd vs National Environment Management Authority HCCA No. 878 of 2005.**

17. In the instant case, all indications are that the appellant has been an indolent litigant who chose to sit pretty for over 7 years after filing the appeal and did not move a muscle, as it were, towards the prosecution of the appeal. The appellant has not been keen in assisting the court in expediting the disposal of the matter before it as even an earlier application dated 6<sup>th</sup> June 2012 seeking to dismiss the same appeal for want of prosecution did not jolt the appellant from its deep slumber.

18. I find the appellant's conduct in this case to be totally inexcusable and I would have been inclined to allow the instant application had it not been that half (½) of the decretal sum has already been paid to the applicant while the other half was deposited in court and further, that the appellant has at the eleventh hour on 29<sup>th</sup> May 2017, probably upon the realization that it was staring at the imminent dismissal of its appeal, filed the all important record of appeal.

19. Having regard to all the circumstances of this case, I decline to grant the orders to dismiss the appeal for now and direct that the appellant moves to set the appeal down for hearing within 30 days from the date of this ruling failure of which the appeal shall stand dismissed with costs to the respondent/applicant herein.

20. The Respondent/Applicant will also have the costs of this application.

21. It is so ordered.

**Dated, signed and delivered in open court this 28<sup>th</sup> day of June, 2017**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Ochoki for the Appellant

Mr. Oduk for the Respondent

Omwoyo court clerk