



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 18 OF 2015**

**SOUTH NYANZA SUGAR COMPANY LIMITED....APPLICANT**

**-VERSUS-**

**AWINO OREKO.....RESPONDENT**

**RULING**

1. This ruling relates to the application by way of Notice of Motion dated **26/08/2015** filed by the Appellant/Applicant on **27/08/2015** seeking the setting aside of the dismissal order made on **17/04/2015** and the reinstatement of the appeal to be heard on its merits. The Applicant further prays that upon the grant of the reinstatement order an order of stay of execution of the decree in Rongo SRMCC No. 108 of 2012 ought to issue pending the determination of the appeal.
2. The application was premised on several grounds and the cardinal one being that of non-service of the Notice of Dismissal upon the Applicant. The Applicant contends that he was condemned unheard despite having filed its appeal timeously and obtained a stay of execution of the lower court decree and was anxiously awaiting the hearing of the appeal but for an interlocutory application which was filed by the Respondent herein which remain unprosecuted. The said grounds are expounded in the Affidavit sworn by one **GABRIEL OUMA OTIENDE** on 26/08/2015 in support of the application.
3. The application stood opposed. The Respondent is of the firm view that the order of reinstatement of the appeal cannot issue and that the only way open to the Applicant was to prefer an appeal instead. It is hence contended that this court lacks the jurisdiction to entertain the instant application. The Respondent further contends that proper notice of the Notice of Dismissal was given by the court and the Respondent ought to face consequences of failing to prosecute the appeal timeously.
4. Whereas the Applicant tendered brief oral submissions in support of the application, the Respondent relied on the written submissions she filed on 05/10/2015.
5. Before I deal with the application at hand, I wish to briefly revisit the history of the matter at hand. In 2012 the Respondent herein filed a civil claim at Rongo Law Courts against the Applicant which was determined by the judgment rendered on 30/04/2014. Being aggrieved by the said judgment, the Applicant herein preferred an appeal in the High Court at Kisii which was registered as Civil Appeal No. 62 of 2014. Upon the establishment of the High Court at Migori the said appeal was transferred and became Civil Appeal No. 18 of 2015. The transfer order was made on 20/11/2014 by Hon. Justice Wakiaga. On 05/03/2015 the appeal file was placed before Hon. Majanja, J who issued directions that the appeal be fixed for mention on 13/04/2015 for directions with notice to issue to the parties.
6. Come the 13/04/2015 there being no appearances by any of the parties the court ordered for the issuance of a Notice to Show Cause why the appeal ought not to be dismissed and fixed the hearing of that Notice three days later that is on 17/04/2015. Service was ordered. As there was again no appearance of the parties on 17/04/2015, the appeal was dismissed with no order as to

- costs. It appears that the Respondent therefore proceeded on with the execution of the decree in the lower which action prompted the filing of the application under consideration.
7. That being the case, I will now turn back to the application. As earlier on pointed out, the Respondent contends that this court lacks the jurisdiction to entertain the application since the dismissal order was final and the law does not provide for any room for setting-aside or review of such an order and that the only way out for the Applicant was to instead lodge an appeal challenging that order.
  8. I have perused **Order 42** of the **Civil Procedure Rules 2010** which deals with appeals. Under **Rule 35** an appeal can be dismissed for want of prosecution subject to the conditions therein. That rule however does not expressly provide for the setting-aside or review of a dismissal order issued under that rule. I have equally revisited the Notice of Dismissal in issue. The same is dated 14/04/2015 and is addressed to the parties' Counsels. It indicated that the matter was set for mention on 17/04/2015 for dismissal of the appeal for want of prosecution under **Order 17 Rule 2 of the Civil Procedure Rules**. **Order 17** of the Civil Procedure Rules deals with prosecution of suits and not appeals. As stated earlier on all issues of appeals are dealt with under Order 42 of the Civil Procedure Rules.
  9. It therefore means that the Notice which resulted to the dismissal of the appeal was issued under wrong provisions of the law. That aside, **Rule 3** of the Order 17 provides that if a party fails to attend the hearing, the court may dispose of the suit in one of the modes in **Order 12** of the Civil Procedure Rules or may make any such order the court deems fit. **Order 12 Rule 7** of the Civil Procedure Rules provided that an order of dismissal may be set-aside or varied on an application. Since the notice herein was issued and the dismissal order made under Order 17 of the Civil Procedure Rules, it cannot therefore be said that this court has no jurisdiction to entertain an application to set-aside or vary that order. Rule 7 of Order 12 is so clear.
  10. I however wish to state that even in instances where a dismissal is made under Order 42 of the Civil Procedure Rules, the court making such an order has jurisdiction to entertain an application to set-aside or vary that order by dint of **Sections 1A, 1B,3A and 63(e) of the Civil Procedure Act**, Chapter 21 of the Laws of Kenya. Further the court is enjoined under **Article 159** of the Constitution of Kenya to instead dispense substantive justice with undue regard to procedural technicalities. In a case like this one, justice call for the court to hear and determine such an application.
  11. Having satisfied myself of the jurisdiction to deal with the application at hand, I will now consider if the said notice dated 14/04/2015 that resulted to this dismissal of the appeal was duly served upon the Applicant. I have carefully perused the record and did not come across any evidence of service in respect to that notice on the Applicant's Counsel. I therefore return a verdict that the notice dated 14/04/2015 was not duly served upon the Applicant and as such the proceedings of 17/04/2015 condemned the Applicant without a hearing. As I went through the record it is clear that the Applicant, had it been served and possibly appeared before court on 17/04/2015, would have succeeded in persuading the court that a dismissal order was not befitting in the circumstances of that appeal. However such an opportunity was not availed to the Applicant.
  12. I will hence not venture into the other grounds put forth in support of the application since the issue of non-service goes to the root of the matter. Since the Respondent filed a Notice of Motion dated 16/12/2014 seeking vacation of the stay of execution orders and alternatively the deposit of the decretal sum in court and going by the order of this Court on the deposit of security made on 31/08/2015 and which order the Applicant has so far complied with and further to the fact that the Applicant has already filed a Record of Appeal, this Court will hence make the following Orders towards an earlier determination of the substantive appeal;-

*a) The order made on 17/04/2015 dismissing the appeal for want of prosecution is hereby set-aside and the Civil Appeal No. 18 of 2015 is hereby reinstated;*

*b) There shall be a stay of execution of the judgment and decree in Rongo SRMCC NO. 108 of 2012 pending the determination of the appeal;*

*c) The Appellant shall file and serve its written submissions to the appeal within 14 days of the date hereof and the Respondent shall file her written submissions to the appeal within*

*14 days of service;*

*d) Matter shall be fixed for highlighting of the submissions on 05/05/2016.*

*e) For avoidance of doubt, the Respondent's application by way of Notice of Motion dated 16/12/2014 is deemed as overtaken by events.*

Orders accordingly.

**DELIVERED, DATED and SIGNED AT MIGORI this 17<sup>TH</sup> day of MARCH 2016.**

**A. C. MRIMA**

**JUDGE**

**Delivered in the presence of:**

Mr. Nyagesoa instructed by the firm of Okong'o, Wandago & Company Advocates for the Applicant.

No appearance for the firm of Oduk & Company Advocates for the Respondent

Court Clerk - Mr. Magige