



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 118 of 2006

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

AND

RIEWA ONYANGO GENGA.....DEFENDANT

(Being an appeal arising from the order and ruling of Mr. Ezra O. Awino Esq., Principal

Magistrate Migori dated and delivered on the 19th May 2006 in Migori SRMCC NO.309 of 1999)

RULING

1. The Appellant/Decree holder filed a notice of motion under **section 3, 3A** of the **Civil Procedure Rules** and **Rules 75; 82, 83 & 84** of the **Appellant's jurisdiction Act** dated 10th August 2012 for orders:-

1. That the Notice of Appeal dated 10th May 2010 and lodged on 17th May 2010 be struck out with costs as no appeal lies.

2. That the balance of the decretal sum of money held in a joint interest earning account with Kenya Commercial Bank Limited in the names of M/S OKONGO & CO. ADVOCATES AND M/S ODHIAMBO & CO. ADVOCATES be released to the applicant forthwith.

2. The application was supported by an affidavit sworn by Riewa Onyango Genga in his capacity as the applicant/decreed holder averring that the respondent/judgment debtor lodged a Notice of Appeal dated 10th May 2010 and filed on 17th May 2010, that the respondent/judgment debtor has failed, refused and neglected to lodge the appeal to date and that the balance of the decretal sum lodged in the joint account in the names of counsel for the parties as ordered by the court still lies at the bank.

3. He further averred that the intended appeal by the respondent/judgment debtor should have been lodged within 60 days from the date of lodging the Notice of Appeal, that the delay, failure and neglect on the respondent/judgment debtor amounts to abandoning the intended appeal and that in law the respondent is deemed to have withdrawn the notice of appeal.

4. He therefore prayed that the court do strike out the Notice of Appeal dated 10th May 2010 with costs and make an order for the release of the balance of the money still lying in the joint interest earning account of the parties' advocates.

5. The respondent/judgment debtor on their part filed a replying affidavit sworn by Gabriel Ouma Otiende in his capacity as the respondent/judgment debtor's Legal Service Manager dated 25th October 2012 and

filed in court on the same day. He averred that being dissatisfied with the judgment delivered on 7th May 2010 they sought to appeal against it and that their advocates on record wrote a letter dated 10th May 2010 to the Deputy Registrar requesting for certified copies of the proceedings, judgment and decree after paying the requisite fee.

6. That having lodged the Notice of Appeal to the Court of Appeal on 10th May 2010 and served a copy thereof on the respondent on 13th May 2010 the appeal was deemed lodged, that no record of appeal in an appeal to the Court of Appeal can be lodged or filed in the absence of the typed copies of proceedings and that no copies of proceedings have been made available to their Advocates despite numerous visits and verbal inquiries on when the typed proceeding would be availed.

7. He further averred that a Notice of Appeal having been lodged on 10th May 2010, this court became *functus officio* and ceased to have any jurisdiction over the matter and any challenge to the notice of appeal can only be made to the Court of Appeal. In addition, that the application dated 10th August 2012 is premature, does not lie in this court, that the orders being sought cannot issue because there is no Notice of Appeal on record duly lodged on 11th May 2010 and the same should be dismissed with costs.

8. Lastly, the deponent of the Replying Affidavit averred that the prayer to have the balance of the decretal sum held in a joint interest earning Account released is premature because the intended appeal is breathing life and the release of the decretal sum would render it nugatory.

9. The applicant/decretal holder in a further replying affidavit filed on 2nd November 2012 contended that he had obtained a copy of the proceedings and judgment duly satisfied and signed on 7th May 2010. He reiterated that after expiry of sixty days from the date of lodging of the Notice of Appeal the same stands withdrawn unless the intended appeal is instituted and that the respondents herein have not acted with due diligence to obtain the proceedings, judgment and decree to enable them institute the appeal.

10. He further averred that though the notice of appeal was dated 10th May 2010 the same was lodged once again in court on 17th May 2010 when the respondents made an application for stay of execution.

11. When the matter came before me for hearing *inter partes* on 28th January 2013, counsel for the applicant Mr. Odhiambo Roch reiterated the averments contained in the supporting affidavit and the further affidavit and that the law clearly stipulates that unless the actual appeal is lodged within 60 days of filing of the Notice of Appeal, then the intended appeal is deemed to have been abandoned. He urged the court to so find and to strike out the Notice of Appeal dated 10th May 2010. Reliance for this position was placed on **Rules 75, 82, 83 and 84** of the **Court of Appeal Rules 2010**, and on the fact that the respondents had only indicated they would lodge an appeal but failed to do so. Counsel also submitted the Respondents have been indolent since even after being served with the instant application in August 2012, they have not sought leave to file the appeal out of time. He therefore prayed for the orders sought.

12. Mr. Odhiambo Kanyangi learned counsel for the respondent in response opposed the application by submitting that in due compliance with **Rule 82** of the **Court of Appeal Rules**, they wrote a letter to the Deputy Registrar, High Court requesting for copies of proceedings, judgment and certified copy of decree after paying deposit, but that the same are yet to be supplied. Counsel submitted that the 60 days within which to file appeal had not lapsed as there is a period of exemption under **Rule 82** of the Court of Appeal rules which refers to application for proceedings within 30 days and exclusion of period required for preparation and delivery of the proceedings. He therefore submitted that they were still within the 30 days for lodging their appeal as the Deputy Registrar would have to prepare certificate of delay.

13. Counsel also referred to **Rule 83** of the **Court of Appeal Rules** concerning the effect of default in instituting an appeal and contended that the said provisions are inapplicable because the Deputy Registrar of this Honourable Court is yet to give a positive indication on status of typed proceedings in the matter.

14. Counsel finally submitted that if the balance of the decretal sum is released to the applicant, the

intended appeal will be rendered nugatory with the result that the appellant will suffer prejudice. Counsel also contended that this court is *functus officio* once the notice of appeal was filed. He therefore prayed that the application to be dismissed.

15. Mr. Odhiambo Roch, learned counsel for the applicant in reply to the above submission reiterated stated that the issue of proceedings not being typed is a phantom as they had annexed a copy of the full proceedings to their further affidavit, that it was the duty of the respondent to get the proceedings and decree which they have not done for 2¹/₂ years. Counsel submitted further that merely writing a letter would not militate against the issuance of the orders sought herein as the 60 days allowed for institution of the appeal have long lapsed.

16. After carefully reading through the pleadings and listening submission by counsel, the issue that arises for determination is whether this court has jurisdiction to strike out a notice of appeal which has been filed. In **Centre for Rights Education and Awareness (CREAW) & 8 others –vs- Attorney General & another [2012] e KLR** the court persuasively stated the following in part of its judgment:-

“The matter at hand is now before the Court of Appeal, the Appellate

jurisdiction Act (Chapter 9 of the Laws of Kenya) and the Court of Appeal Rules govern how the right of appeal is to be exercised including how and by whom the Notice of Appeal is to be filed. It therefore becomes very clear that this court cannot entertain to strike out a notice of appeal. It is the Court of Appeal that has jurisdiction to hear and determine issues relating to the validity or otherwise of the Notice of Appeal including the issue whether the person lodging the notice has capacity to do so. This is an issue that is pending before that court and to proceed in the manner suggested by the applicant would undermine the jurisdiction of the appellate court.”

17. In my considered view, the only power given to the High Court in matters pending before the Court of Appeal matters was laid out in **DT Dobie & Co. (Kenya) Limited –vs- Alfred Machago [2005] e KLR** where the court stated that:-

“The only power donated to the superior court under section 7 of the Appellate Jurisdiction Act Cap 9 Laws of Kenya, is for extension of the time for giving notice of intention to appeal from a judgment of a High Court. All other procedures are governed by the Court of Appeal Rules.”

18. In as much as this court appreciates the agony and concerns of the applicant in this matter, this court has no jurisdiction to strike out the Notice of Appeal dated 10th May 2010 as to do so would undermine the jurisdiction of the Court of Appeal. This therefore means that the Notice of Motion dated 10th August 2012 is dismissed but with no order as to costs.

Dated and delivered at Kisii this 21st day of February, 2013

**RUTH NEKOYE SITATI
JUDGE.**

In the presence of

Mr. Ben Masese h/b for Odhiambo Kanyangi for Appellant

Mr. S.M. Sagwe for Odhiambo Roch for Respondent/Applicant

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI
JUDGE.**