

SOUTH NYANZA SUGAR COMPANY

LTD.....PLAINTIFF

-VERSUS-

JOHNSON AGWAYA

OKWARO.....RESPONDENT

(Being an appeal from the Judgment and Decree of Mrs Wewa, RM dated and delivered

on 19th December 2006 in Kisii CMCC No. 57A of 2004)

RULING

The instant appeal was listed for directions before me on 14th November 2011. When the matter came up, **Mr Oduk** for the respondent drew the court's attention to an earlier ruling of the Court (**Sitati J.**) which had granted stay upon specified conditions to be met by the appellant. He submitted that since the appellant had failed to comply with the terms of stay and particularly timelines set for the filing and prosecution of the appeal, there was no appeal properly on record for which the Court would give directions as to its hearing and determination. He urged the Court to dismiss the appeal formally.

Mr. Odhiambo for the appellant urged the Court not to dismiss the appeal noting that one of the conditions set by the court in its ruling of 7th July 2011 was that the appellant do file and serve the Record of Appeal and take directions within 60 days.

He explained that they were just 2 days outside timeline. **Mr. Odhiambo** conceded that the appellant did not deposit the cheque within 30 days as required by the court. He however endeavoured to explain to the Court that the decretal sum had earlier been deposited in Court and that the Court delayed in releasing the same money to the appellant to facilitate its being deposited in an account in the joined names of the advocates for both parties as required by the Court. He drew the Court's attention to a series of correspondence to the Deputy Registrar of the Court requesting him to release the money in question.

I have perused the record and considered submissions by both counsel. It is apparent from the record that the conditions for stay set by the Court related firstly, to safeguarding the interests of both parties through the requirement to deposit the decretal amount and interest thereon in the joint names of the advocates and secondly, to ensuring that the appeal was expedited the same having been filed way back in 2007. The default clause of the ruling at paragraph 19 stated;

“In default of any of the limbs of this order, the stay order shall lapse immediately”.

In my considered view, the default clause clearly relates to the stay orders and not the appeal. It is the stay order that would lapse, it is not the right to appeal that would be extinguished. The appellant has explained to the satisfaction of the Court the reason for the delay in depositing the cheque which is clearly attributable to the delay by the administrative arm of the Court. Indeed the record bears out the appellant. In my view, I do not think that the Court ought to penalise the appellant for such delay.

In the circumstances, the oral application for the dismissal of the appeal is not merited and must fail. I order that the appeal be set down for directions within the next 45 days failing which the appeal will stand dismissed.

Ruling dated, signed and delivered at Kisii this 23rd day of August, 2012.

R. LAGAT-KORIR

JUDGE

In the presence of :

Edwin Mongare Court clerk

.....Counsel for the plaintiffs/Appellant

.....Counsel for the defendants/respondent

R. LAGAT-KORIR

JUDGE