



NO. 359

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO. 326 OF 2005

SOUTH NYANZA SUGAR CO.
LIMITED.....APPELLANT

-VERSUS-

KENNEDY OKINDO
NYANDORO.....RESPONDENT

RULING

(Being an appeal from the judgment and decision of Hon. Mr. Chepseba (Senior Resident magistrate) at Kilgoris

dated 2nd November, 2005 in the Original Kilgoris SRMCC.NO. 142 of 2003)

On or about 18th November, 2005 South Nyanza Sugar Company Limited, hereinafter ***“the appellant”*** lodged the instant appeal against the judgment and decree of **Hon. Chepseba**, the Senior Resident Magistrate at Kilgoris dated 2nd November, 2005 in **SRMCCC.No. 142 of 2003**. On or about 20th August, 2007 the appellant served its record of appeal upon **Kennedy Okindo Nyandoro**, hereinafter ***“the respondent”***. Directions in the appeal were then taken on or about 21st may 2007. Since then the appellant had not taken any steps on record to have the appeal heard and determined. For this reason on or about 8th April, 2009, the respondent took out a Chamber summons application seeking that the appeal be dismissed with costs to him for want of prosecution. The application was anchored on **orders XVI rule 5 and XLI rule 31(1) of the Civil Procedure rules and sections 3A and 63(e) of the Civil Procedure Act**. In support of the application, **Mr. Don. Z Ogweni**, learned counsel swore an affidavit. That supporting affidavit merely reiterated and expounded on the uncontested facts aforesaid.

In response, the appellant filed grounds of opposition stating that the application was a ploy to defeat the cause of justice by failing to appreciate that the court diary in Kisii for the year 2008 was closed in April, 2008 while that of 2009 was closed in January, 2009. It was not therefore possible to fix the appeal for hearing. That the appellant was prepared to argue the appeal rather than the application for substantial justice to be met. Finally, that the appeal presents germane issues to be addressed which issues the respondent seeks to shield the court from.

In a replying affidavit sworn by **Mr. Geoffrey O. Yogo**, learned counsel, he explained at length his unsuccessful attempts and efforts to have the appeal fixed for hearing and determination once the directions were taken.

When the application came before me for interpartes hearing on 19th November, 2010, parties agreed to canvass the same by way of written submissions. In the end however, only the respondent filed his submissions. For reasons which are not clear to court, the appellant failed and or neglected to file its written submissions. I have carefully read and considered the written submissions of the respondent and cited authorities.

It is common ground that once the appellant lodged the appeal, it took the necessary steps timeously to have the appeal fixed for hearing. There was no inordinate delay in lodging the record of appeal once the memorandum of appeal was filed. Thereafter the appellant timeously again had the appeal set down for directions. All these facts are not disputed nor discounted by the respondent. The appellant only ran into brick wall when it came to getting hearing dates for the appeal once the directions were given. Those directions were given on 21st May, 2008. By then and this is a matter in the public domain, the court diary for that year had been closed by April 2008; while that of 2009 was closed in January, of the same year. That being the case, the appellant cannot be blamed for not fixing the appeal for hearing in those years.

Subsequent thereto, the court file is replete with letters from the appellant beseeching the court to avail dates so that the appeal could be fixed for hearing. However, this was not to be. In the replying affidavit, the appellant has deposed that on 17th February, 2009, its counsel personally appeared in the Civil appeals registry of this court and requested for a list of files to enable him take hearing dates, but was told by the registry that even for the year 2009, the court diary had been closed. He has deposed further that he knew as of personal knowledge, the fact that this court's diary closure in February, 2009 was a matter in the public domain and was widely captured, by the press in an exclusive article carried by the East Africa Standard of 11th February, 2009. All these depositions have not been discounted or rebutted by the respondent. They must therefore be true. The appellant cannot therefore be blamed for an omission which was not of its own making. The appellant has demonstrated his desire and wish to have the appeal heard and determined on merit but has not been given the opportunity by court to do so due to the overcrowded calendar. In the premises, it would be a travesty of justice if this application was allowed.

The application thus stands dismissed with no order as to costs. However, since the court diary for this year is open, the appellant is given seven (7) days from the date of this ruling to fix the appeal for hearing, failing which the appeal shall stand dismissed with costs to the respondent.

Ruling dated, signed and delivered at Kisii this 31st January, 2011.

ASIKE-MAKHANDIA

JUDGE