



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO.165 OF 2006

BETWEEN

SOUTH NYANZA SUGAR CO. LTD. APPELLANT

AND

JAMES OGESA ONWONGA RESPONDENT

(Being an appeal from the judgment and order of the Resident Magistrate K. Kemei dated and delivered at Rongo on 18th August 2005 in Rongo RMCC No. 35 of 2004)

RULING

1. By an order of this court dated 19th June 2006, the appellant herein was granted leave to file appeal out of time. Pursuant to that order, the appellant filed its Memorandum of Appeal dated 28th June, 2006 on the 3rd July 2006. On the 31st August 2006, M/s Nteng'a Marube & Co. Advocates filed their Notice of Appointment on behalf of the Respondent. The Memorandum of Appeal was filed by Yano & Company Advocates.

2. By the Notice of Motion dated 29th December 2010 and filed in court on the same day, the Respondent seeks an order dismissing this appeal for want of prosecution. The Respondent also prays that upon dismissal of the appeal, the monies hitherto deposited in a joint account in Family Bank Solanax Branch Nairobi, Account Number 335623 be released to the Respondent's advocates. The respondent also prays for costs of this application.

3. The application, which is brought under **sections 1A, 1B, 3A and 63** of the **Civil Procedure Act** and **Order 41 Rule 31** and **Order 50 Rules 1, 2 and 3** of the **Civil Procedure Rules** and all enabling provisions of the law is premised on grounds that for over 4 years now, the appellant has neither prepared a Record of Appeal nor taken any other step towards prosecution of the appeal.

4. The application was duly served upon M/s Yano & Company Advocates on 13th January, 2011 though service was received under protest. M/s Yano & Co. Advocates alleged, when receiving notice of the application that they no longer acted for the appellant. A hearing notice for the application was also served directly upon the appellant vide the Respondent's advocates' letter dated 22nd January 2011. The letter was sent by **Fargo Courier**. No Replying Affidavit or any other response to the application is on the file.

5. When the application came up for hearing on 2nd February 2011, Mr. Kisia of M/s Okong'o Wandago & Co. Advocates appeared for the Appellant/Respondent while Mr. Marube appeared for the Respondent/Applicant. The appellant's attempts to have the application adjourned were rejected by the court.

6. In response to the application, Mr. Kisia submitted that the reason why the appeal had not been prosecuted was because the firm of Yano & Co. Advocates never took any steps to do so. Mr. Kisia urged the court not to visit the mistake of counsel upon the appellant. He urged the court to allow the appellant an opportunity to prosecute the appeal, citing relevant provisions of the Constitution of Kenya.

7. I have considered the submissions and the relevant provisions under which the application was filed. I note that fundamental human rights as enshrined in the constitution are not absolute, and further note that the sword of justice cuts both ways. The provisions of **section 1A** of the **Civil Procedure Act** are clear, that the courts should aim at expediting the process of civil litigation in the most cost-effective way.

8. It is not denied in this case that since filing of the Memorandum of Appeal on 3rd July 2006, the appellant went to sleep. This appeal belongs to the appellant and not to anybody else. The appellant was under a duty to ensure that appropriate steps were taken to move the appeal from the stage of filing the Memorandum of Appeal to admission and compilation and filing of the Record of Appeal. Having failed to do so, appellant cannot be heard to cry over the issue now. In any event, the hearing notice was served upon the appellant on 13th January 2011, more than 3 weeks to the hearing date. Indeed, as it is clear from the very beginning when the appellant failed to file appeal within time, the appellant has not acted diligently.

9. Accordingly and for the reasons above stated the Respondent's Notice of Motion dated 29th December 2010 and filed in court on the same day is allowed in terms of prayers 1 and 2 thereof. Respondent shall also have the costs of the appeal and of the application.

10. It is so ordered.

Dated and delivered at Kisii this 24th day of March, 2011

RUTH NEKOYE SITATI
JUDGE.

In the presence of:

Mr. Odhiambo (present) for Appellant/Respondent

Mr. Marube (present) for Respondent/Applicant

Mr. Bibu - Court Clerk.