



No.45

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CIVIL APPEAL NO. 175 OF 2003**

**BETWEEN**

**SONY SUGAR COMPANY  
LIMITED .....APPELLANT**

**AND**

**NYAMOKO  
OKOTH.....RESPONDENT**

**(Being an appeal from the judgment and decree of S.M.S. Soita, Esq., P.M. Kisii**

**dated 26<sup>th</sup> September, 2003 in Kisii CMCC No. 735 of 2002)**

**RULING:**

**1.**The memorandum of Appeal herein is dated and filed in court on 23<sup>rd</sup> October, 2003. The appeal challenges the judgment and decree of the Principal Magistrate dated 26<sup>th</sup> September, 2003 in Kisii CMC's Civil Case Number 735 of 2002. The Record of Appeal which is dated 30<sup>th</sup> May 2005 was filed in court on 31<sup>st</sup> May 2005.

**2.** By the Chamber Summons dated 23<sup>rd</sup> November 2010, the Respondent herein, Nyamoko Okoth seeks to have this appeal dismissed for want of prosecution with costs to the Respondent. The application which was brought under the old **Order XLI Rule 31 (1)** of the **Civil Procedure Rules** and **section 1A of the Civil Procedure Act, Cap 21 Laws of Kenya** and all other enabling provisions and enactments of the

law was premised on the affidavit sworn by Don Z. Ogweno dated 23<sup>rd</sup> November 2010 and also on grounds that:-

- i) Directions under Order XLI Rule 8B were taken herein on the 23<sup>rd</sup> April 2008.**
- ii) It is more than [three] (3) months from taking of such directions and still it is more than two years since the last time this appeal was in court yet no action has been taken to prosecute the appeal.**
- iii) It is deem, fair, just and expeditious (sic) that this appeal be dismissed for want of prosecution as it is evident that the appellant has lost interest in it.**

3. In Don Ogweno's affidavit, it is averred that this appeal was last in court on the 29<sup>th</sup> September 2008 and that since the appellant has taken no other step whatsoever, thereafter to prosecute the same, then it is mete that the appeal be dismissed.

4. The application was opposed vide the Replying affidavit sworn by Kennedy Okong'o advocate on 14<sup>th</sup> February, 2011. The deponent avers that the appellant is ready and willing to prosecute this appeal as has been demonstrated by efforts made by the appellant, on 2<sup>nd</sup> October, 2009; 18<sup>th</sup> November 2009 and 31<sup>st</sup> May 2010 to have the appeal fixed for hearing to no avail. The deponent also says that the appellant is ready and willing to abide by any terms that this court may impose in exchange for an opportunity to be heard on this appeal.

5. At the hearing of this application on 16<sup>th</sup> February, 2011, counsel for the Respondent/Applicant, reiterated the Respondent's contention that the appellant has lost interest in the appeal and urged the court to grant the orders sought as prayed. Reliance was placed on a number of authorities which the court has considered. In particular, counsel submitted that the deponent of the Replying Affidavit did not exhibit authority donated to him by the appellant to swear the Replying Affidavit and that as such the said Replying Affidavit should be struck out. All the authorities relied upon by counsel for the Respondent/Applicant were all to the effect that an appeal belongs to the appellant and that if the appellant goes to sleep, the appeal should or ought to be struck out or dismissed.

6. In response to the applicant's submissions, counsel for the appellant submitted that the applicant has not demonstrated that this appeal is ripe for dismissal, especially in view of the fact that at one point, inspite of efforts on the part of the appellant to set down the appeal for hearing, the court file was missing. Counsel urged court to find that proper steps have been taken in the matter and to save this appeal from dismissal.

7. With regard to the alleged incompetence of the Replying Affidavit, counsel submitted that an advocate who comes on record is an agent of a litigant for all intents and purposes and does not therefore need any other authority from the litigant to swear affidavits notwithstanding that the appellant is a company. Further, it was submitted that the issues deponed to in the affidavit are non-contentious issues which do not require the deponent to seek any authority other than the authority he has as an agent of the appellant.

8. I have now carefully considered the application as filed, the affidavits on record, the submissions made and all the authorities to which the court has been referred. In light of the above, the issue for determination is whether the order sought should be granted. In my humble view, I think that since the appellant has expressed the interest and willingness to prosecute its appeal, it should not be denied the

opportunity to do so although the applicant herein was perfectly in order to seek dismissal of the appeal under the provisions of **Order XLI Rule 31 (1)** of the **Civil Procedure Rules**. I am also of the view that under **section 1A** of the **Civil Procedure Act**, the applicant could get the orders sought, were it not for the fact that the appellant herein has expressed its desire to proceed with the appeal. The right to appeal is a constitutional right which cannot be taken away without very good reason. The Record of Appeal herein is already filed and served. This is, in my view, an indication that the appellant is keen on prosecuting the appeal.

**9.**In the circumstances, the application by the Respondent is dismissed but with costs to the Respondent. Further, and in order to avoid any further delays in having this appeal prosecuted, the appellant is directed to set down the appeal for hearing within sixty (60) days from today failing which the appeal shall stand dismissed for want of prosecution with costs to the Respondent.

**10.** It is so ordered.

**Dated and delivered at Kisii this 18<sup>th</sup> day of March, 2011**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:-

Mr. Odhiambo (absent) for Appellant/Respondent

Mr. Ogwenyo (present) for Respondent/Applicant

Mr. Bibu (present) - Court Clerk