



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
OF KISII Civil Appeal 230 of 2004

**BETWEEN**

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

**VERSUS**

**DALMAS A. MBOGO ..... RESPONDENT**

**(Being an appeal arising from the Judgment and decree of  
Mr. S.M.S. Soita Esq., PM in Kisii CMCC No. 43 of 2002)**

**RULING**

The respondent filed an application dated 31<sup>st</sup> July 2009 seeking dismissal of this appeal for want of prosecution. The application was by way of Notice of Motion brought under the provisions of sections 3A and 63 (e) of the Civil Procedure Act and order XLI rules 27 & 31 of the Civil Procedure Rules. The application was made on the following grounds:

- The judgment appealed against was delivered on 25<sup>th</sup> August 2004.
- The appellant served upon the respondent the memorandum of appeal on 27<sup>th</sup> September 2004.
  
- On 30<sup>th</sup> March 2005 the appellant obtained an order of stay of execution pending appeal on condition that it pays to the plaintiff half the decretal amount and deposit the other half in a joint interest earning account.
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- On 23<sup>rd</sup> May 2005 the above order was varied to have the entire decretal sum deposited in a joint interest earning account but that has not been done.
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- To date the appellant has not taken any step to collect the proceedings and compile the record of appeal or otherwise taken any appropriate step towards disposing of the appeal.
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- That the appellant is no longer interested in prosecuting the appeal and the continued delay in prosecuting the same is prejudicial to the respondent.
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The trial court entered judgment for the respondent in the sum of Kshs. 103,800/= plus costs and interest.

The appellant filed a replying affidavit through Gabriel Ouma Otiende, its Legal Services Manager. He stated that the record of appeal had been compiled and filed but the appeal had not yet been admitted to hearing as required under **section 79 B** of the **Civil Procedure Act** and it was therefore not possible for the appellant to list it for directions and fix a hearing date. He alleged that it was the court that had failed to comply with important procedural steps that would have paved way for the disposal of the appeal. The appellant did not state why the decretal sum had not been availed for deposit in a joint interest earning account as ordered by this court on 23<sup>rd</sup> May 2005.

Mr. Oduk for the respondent/applicant and Mr. Odhiambo for the appellant made brief submissions in support of their respective clients' positions as regards the application.

Although the memorandum of appeal was filed on 2<sup>nd</sup> September 2004 and the decree appealed against filed on 9<sup>th</sup> May 2005, the deputy registrar did not cause the file to be placed before a judge for perusal as required under **section 79B** of the **Civil Procedure Act**. The appeal has therefore not been admitted to hearing. That notwithstanding, the appellant has never written to the deputy registrar to ask him to comply with the provisions of **section 79B** aforesaid. An appellant who is keen on prosecuting an appeal cannot just sit back for over five years and do nothing about his own appeal. I believe the reason why the appellant was not keen on having this appeal admitted to hearing is that she is enjoying the order of stay of execution although she has not complied with the condition that was set by the court requiring the decretal amount to be deposited in a joint interest earning account.

A party to civil proceedings is under a legal obligation to assist the court in doing all that is necessary in expediting disposal of

disputes before it. **Section 1A (3)** of the **Civil Procedure Act** states as hereunder:

**“A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.”**

The overriding objective of the Civil Procedure Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. See **section 1A** of the **Act**. Can the appellant herein be said to have done all within her power to assist the court to expeditiously dispose of this appeal? The answer is definitely in the negative.

Where a party is acting in abuse of the court process, the court will not hesitate to invoke its inherent jurisdiction in terms of the provisions of **section 3A** of the **Civil Procedure Act** to make such orders as are necessary for the ends of justice or to prevent abuse of the process of the court. See **SALKAS CONTRACTORS LTD. –VS- KENYA PETROLEUM REFINERIES LTD.**, Civil Appeal No. 250 of 2003 at Mombasa.

The appellant has not given any explanation as to why she has not moved the court in any way for over five years and neither has she explained why she deliberately failed to comply with the court order issued on 23<sup>rd</sup> May 2005. This clearly shows that the appellant has lost interest in this appeal. The appellant’s conduct is outrightly an abuse of the court process and the long delay in disposal of this appeal is prejudicial to the respondent who is unable to enjoy the fruits of his judgment.

Whereas it cannot be disputed that this court’s deputy registrar failed to place this appeal before a judge for perusal with a view to admitting the same to hearing, parties and their respective advocates must always bear in mind that they are the main protagonists in an adversarial system of justice and must therefore actively engage the court and assist it so that it can expeditiously dispose of disputes before it.

For the aforesaid reasons, this appeal is dismissed for want of prosecution and being an abuse of the court process.

The appellant shall bear the costs of the appeal including the costs of this application.

**DATED, SIGNED AND DELIVERED AT KISII THIS 24<sup>TH</sup> DAY OF MARCH, 2010.**

**D. MUSINGA**  
**JUDGE.**  
**24/3/2010**

Before D. Musinga, J.

Mobisa – cc

Mr. Oduk for the applicant

N/A for the respondent

**Court:** Ruling delivered in open court on 24<sup>th</sup> March, 2010.

**D. MUSINGA  
JUDGE.**