



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Appeal 155 of 2006

**(Being an appeal arising from the Judgment and decree of
Mr. S.M.S. Soita Esq., PM in Kisii CMCC No. 398 of 2002)**

BETWEEN

SOUTH NYANZA SUGAR CO. LTD. APPELLANT

VERSUS

ONGORO OGUTU RESPONDENT

RULING

The respondent filed an application dated 31st 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 27th day of June, 2006.**
- **The appellant served upon the respondent the memorandum of appeal on 27th July 2006.**
- **On 26th July 2006 the appellant obtained an order of stay of execution pending appeal on condition that it deposits the decretal amount in a joint interest earning account but that has not been done.**
- **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.**
- **That the appellant is no longer interested in prosecuting the appeal and the continued delay in prosecuting the same is prejudicial to the respondent.**

The trial court entered judgment for the respondent in the

sum of **Kshs. 79,342/=** plus costs and interest.

The appellant filed a replying affidavit through Gabriel Ouma Otiende, its Legal Services Manager. He stated that 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 the appeal for directions and fix a hearing date for the same. The appellant did not state why the decretal sum had not been deposited in a joint interest earning account as ordered by the trial court on 29th June 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 19th June 2006, the decree appealed against has to date not been filed as required under **order XLI rule 1A** of the **Civil Procedure Rules**. The deputy registrar cannot therefore place the appeal before a judge for perusal as required under **section 79B** of the **Civil Procedure Act**. The respondent also filed a memorandum of cross appeal on 26th July, 2006. The

appeals have not been admitted to hearing. An appellant who is keen on prosecuting an appeal cannot just sit back for nearly four years and do nothing. I believe the reason why the appellant has not been keen on having this appeal admitted to hearing is that she is enjoying the order of stay of execution despite the fact that 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.”

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 filed the decree appealed against for nearly four years and neither has she explained why she deliberately failed to comply with the court order issued on 26th July 2006. This clearly shows that the appellant has lost interest in this appeal. The appellant’s conduct is clearly 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.

The respondent has also not done anything towards disposal of his cross appeal. He is also abusing the court process.

Consequently, this appeal is dismissed for being an abuse of the court process. The appellant shall bear the costs of the appeal including the costs of this application. The respondent’s cross appeal is also dismissed but with no order as to costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF MARCH, 2010.

D. MUSINGA
JUDGE.