



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 341 OF 2005

(Being an appeal from the judgment and decree of the SRM's court at Kilgoris in SMCC No. 64 of 2004 – Wilson Kiberia, RM)

BETWEEN

SOUTH NYANZA SUGAR CO.

LTD.....APPELLANT

VERSUS

SAMSON OMENGE

MOSETIRESPONDENT

RULING

The respondent's application dated 15th January 2010 was brought under the provisions of **sections 1A and 3A** of the **Civil Procedure Act**. It seeks dismissal of this appeal for being an abuse of the court process and otherwise for lack of prosecution.

In an affidavit sworn by Mr. Don Z. Ogweno, the respondent's advocate, he stated that the appeal was admitted to hearing on 23rd November, 2006 and the lower court file was forwarded to the High Court on 16th March, 2006 together with the typed and certified copies of the proceedings and judgment. However since then the appellant had not taken any step towards prosecution of the appeal.

Mr. Patrick J. Otieno, the appellant's advocate, stated in his replying affidavit that after the memorandum of appeal was filed he had made several attempts to get the lower court proceedings and judgment with no success. He had been informed that once the same were ready he would be notified. However, it was only recently that he knew that the proceedings and the judgment were now available. He collected the same and compiled the record of appeal and is awaiting a date for directions to be set. He urged the court to disallow the respondent's application so that the appeal can be heard on its merits.

The appellant filed its record of appeal on 8th July, 2010 but the same does not contain a certified copy of the decree appealed against. I perused the lower court file and I did not find the decree. That notwithstanding, Bauni, J. admitted the appeal to hearing on 16th November 2006 and not on 23rd November 2006 as stated by Mr. Ogweno. As at that date the lower court file had already been availed to this court. The certified copies of the proceedings and judgment were in the file as at the said date. There is however no indication that the appellant's advocate was notified that the same were available for collection.

In the circumstances, I will not dismiss the appeal as sought but direct that a certified copy of the decree appealed against be filed within the next 10 days from the date hereof. Thereafter the appeal should be set down for directions. The appellant shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF JULY, 2010.

D. MUSINGA

JUDGE.

29/7/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Otieno for Mr. P.J. Otieno for the Appellant

Mr. Ogweno for the Respondent

Court: Ruling delivered in open court on 29th July, 2010.

D. MUSINGA

JUDGE.