

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA OF KISII

Miscellaneous Civil Case 51 of 2010

SOUTH NYANZA SUGAR CO. LTD.....APPLICANT

VERSUS

MARY AKINYI OGWEYO.....RESPONDENT

RULING

As per the ruling dated 28th June, 2010, the applicant was to file and serve an application for stay of execution within seven days from the date of filing the memorandum of appeal. The memorandum of appeal was filed on 2nd July, 2010. The application for stay of execution was also filed on the same date but service of the same was effected on 12th July, 2010, three days outside the given period of time. That was the contention by Mr. Oduk, the respondent's advocate. Since there was no compliance with the orders regarding service, the appellant should not be given any further indulgence in so far as the application for stay is concerned, counsel added.

Mr. Odhiambo for the appellant responded that the court process server went to the respondent's advocate's office on 7th July, 2010 for purposes of effecting service but when he tendered the documents upon Mr. Oduk's clerk, he refused to accept service saying that he had to consult Mr. Oduk first. The process server went back with the documents but returned on 12th July, 2010 when service was accepted

However, the affidavit of service on record shows that service was effected on 7th July, 2010 which Mr. Oduk contests. He pointed out that the served documents were duly date stamped as having been received on 12th July, 2010.

Mr. Odhiambo told the court that the application for stay of execution was filed before the trial court and came up for hearing on 19th July, 2010 when he sought leave to file a supplementary affidavit to explain the alleged delay in service. Leave was granted and the process server has prepared the affidavit. That affidavit is not before this court and so I shall not concern myself with it. It has been demonstrated that the affidavit of service that is on record is not factually correct as due service was not effected on 7th July, 2010 but was done on 12th July, 2010. In the circumstances, it cannot be denied that there was no compliance with the court's orders issued on 28th June, 2010. The question that must now be determined is whether that delay *per se* ought to disentitle the appellant from being given a hearing in respect of the application for stay of execution. Court orders are not issued in vain. They must be complied with. But having said that, I hasten to add that parties should not be punished unduly for mistakes of their counsel or counsel's agents. A court of justice, dealing with an application of this nature, ought to ask itself whether locking out a party due to a delay which did not occasion any prejudice to the other side is the appropriate thing to do. My answer is in the negative. This court out to give meaning to the provisions of **section 1(A)** of the **civil procedure Act** which states that:-

“ The overriding objective of this Act and the rules made thereunder is to facilitate

the just, expeditious proportionate and affordable resolution of the civil disputes governed by the Act.”

Bearing in mind the aforesaid provisions of the law, I will not make a finding that the appellant is not entitled to any further indulgence as urged by Mr. Oduk. That will not be a just determination of the dispute. I will excuse the short delay but compensate the respondent by an award of costs for this application which costs are assessed at Kshs 5,000/=

The same should be paid before the application for stay of execution is heard.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF JULY, 2010.

D. MUSINGA
JUDGE.
27/7/2010

Before D. Musinga, J.

Mobisa - cc

Mr. Odhiambo for the Applicant.

Mr. Oguttu for Mr. Oduk for the Respondent.

COURT: Ruling delivered in open court on 27th July, 2010.

D. MUSINGA
JUDGE.