



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 165 OF 2009**

**(Being an appeal from the judgment in the original CMCC 513 of 2004 at Kisii – Mrs. R.S. Wewa, RM)**

**BETWEEN**

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

**VERSUS**

**YUNITA AOKO  
DACHE.....RESPONDENT/  
APPLICANT**

**RULING**

After delivery of the judgment in CMCC No. 513 of 2004, the appellant filed an application under the provisions of **sections 3, 3A and 80** of the **Civil Procedure Act** and **orders XXI rule 22, XX rule 1** and **order L rule 1** of the **Civil Procedure Rules**. The application sought orders for:

- (a) Stay of execution of the judgment.

- (b) **Review of the judgment.**
- (c) **Recall and cancellation of warrants that had been issued to an Auctioneer.**
- (d) **Costs of the application.**

The trial court heard the application and dismissed the same. The appellant then preferred an appeal to this court and ground 1 thereof states as hereunder:

**“1. The learned trial magistrate erred in law and fact in dismissing the appellant’s application to review whose main and only purpose was to the court to comply with the law and has thus occasioned to the appellant gross injustice in that it is forever shut (sic) from appealing against a judgment read without notice and on a date not communicated to the appellant, which judgment has aggrieved the appellant.”**

On 3<sup>rd</sup> February 2010, the respondent filed an application under the provisions of **order XLI rule 8B (2)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking striking out of the appeal because no leave had been sought to file the same.

Mr. Oduk for the respondent stated in his affidavit in support of the application that his perusal of **section 75 and 80** of the **Civil Procedure Act** revealed that it was necessary of the appellant to seek leave of the court before filing the appeal. He urged the court to strike it out because it did not lie.

The appellant filed grounds of opposition and stated that the respondent’s application is fatally defective, bad in law and calculated to delay expeditious disposal of the appeal.

When the respondent’s application came up for hearing on 20<sup>th</sup> July, 2010 in the presence of Mr. Otieno for the appellant and Mr. Oduk for the respondent, it was agreed by consent that Mr. Oduk would file and serve his submissions within 14 days from the aforesaid date and Mr. Otieno would file and serve his, 7 days from the date of service by Mr. Oduk. It was further agreed that the submissions and the ruling herein shall apply to **HCCCA No. 164 of 2009, South Nyanza Sugar Company Limited –vs- Andrew Onyim Obonyo** where the respondent had made a similar application as in this matter.

Mr. Oduk filed his submissions on 2<sup>nd</sup> August, 2010 but Mr. Otieno did not file his and if at all he did, they are not in the court file. I have carefully perused the submissions on record and my take on the application is as follows:

**Section 80** of the **Civil Procedure Act** provides that:

**“Any person who considers himself aggrieved-**

**(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

**Order XLIV** of the **Civil Procedure Rules** which deals with review finds its origin from the provisions of **section 80** quoted hereinabove. Although it would have been preferable for the appellant’s counsel to cite **order XLIV** in the application that was filed before the trial court, the application was otherwise competent since he had cited the provisions of the parent Act.

Did the respondent require leave of the court to file any appeal following dismissal of the application for review of the judgment? I will answer this question by citing one of the authorities that were referred to by Mr. Oduk in his submissions, that is, **PROTEIN & FRUIT PROCESSORS**

**LIMITED –VS- ENKASITI FLOWER GROWERS**, Civil Appeal (Application) No. 27 of 2006. The Court of Appeal held as hereunder:

**“Section 75 of the Civil Procedure Act and Order XLII of the Civil Procedure Rules list the orders out of which appeals lie to this court as of right. In any other case under Chapter 21 Laws of Kenya not provided for, an appeal only lies with leave of the court. Such leave must be sought and obtained in the court of the first instance. If the leave is refused then this becomes a ground of appeal.”**

A perusal of **order XLII rule 1 (1) (aa)** shows that where an application for review is dismissed by a trial court an appeal lies as of right. The same states as hereunder:

**“An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (I) (h) of the Act –**

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- (aa) Order XLIV, rule (application for review).**

**Section 75 of the Civil Procedure Act** sets out the orders from which an appeal lies as of right and **subsection (h)** thereof states:

**“any order made under rules from which an appeal is expressly allowed by rules.”**

There can be no dispute that an order of dismissal of an application for review is one such order as aforesaid. It is therefore my finding that the appellant did not require leave of the court to prefer an appeal. Consequently, this application is dismissed with costs to the appellant. This ruling shall apply to **HCCA No. 164 of 2009**.

**DATED, SIGNED AND DELIVERED AT KISII THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2010.**

**D. MUSINGA**

**JUDGE.**

**17/9/2010**

Before D. Musinga, J.

Mobisa – cc  
Mr. Nyambati for Mr. Otieno for the Appellant

Mr. Oguttu for Mr. Oduk for the Respondent

**Court:** Ruling delivered in open court on 17<sup>th</sup> September, 2010.

**D. MUSINGA**

**JUDGE.**