REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL 54 OF 2005

(Being an appeal from the Judgment and Decree of the SRM's Court at Kisii

***in CMCC No. 46 of 2004 – A.A. INGUTYA, SRM*)**

SOUTH NYANZA SUGAR COMPANY LIMITED……..…… APPELLANT

VERSUS

SAMUEL OMOKE OBAGE ……..... RESPONDENT

RULING.

The respondent filed an application by way of a notice of motion brought under **Section 3A** of the **Civil Procedure Act** and orders XL1 rule 4(1) and 50 rule 1 of the Civil Procedure Rules. He sought the following prayers:

"**(a) That the Honourable Court be pleased to dismiss the plaintiff's appeal herein for want of prosecution.**

(b) That in the alternative and without prejudice to the foregoing this Honourable Court be pleased to lift the stay of execution of the decree appealed from and order execution to issue forthwith and/or order the release of funds (if any) deposited in a joint earning account with Kenya Commercial Bank, Migori, to the respondent's advocates.

(c) That costs of the appeal and application be provided for in any event."

The aforesaid application was supported by an affidavit sworn by Rose Obaga, the respondent's advocate. She deposed that the appeal herein was filed on 13th April 2005. On 20th April 2005 the appellant applied and obtained a stay of execution pending the hearing and final disposal of the appeal. It was a condition of the stay that the decretal sum be deposited in an interest earning account as security. Since the appellant obtained the order of stay he had not moved the court and/or taken any steps towards the hearing and disposal of the appeal. Counsel stated that over 4 years had since lapsed. The delay in prosecuting the appeal is inordinate and has caused prejudice to the respondent who has been denied enjoyment of the fruits of his judgment by the appellant, counsel added. She further deposed that the appellant had not filed a certified copy of the decree appealed against in accordance to the provisions of **Order XL1 rule 1A** of the Civil Procedure Rules. For the aforesaid reasons she urged this court to grant the orders as sought.

A replying affidavit was sworn on behalf of the appellant by Gabriel Ouma Otiende, an advocate of this

court who is the Legal Services Manager of the appellant. He stated that he had been duly authorized by the management and the Board of Directors of the appellant to swear the affidavit. The affidavit was largely based on advise given to Mr. Otiende by Mr. Okong'o, the appellant's advocate. He deposed, ***inter alia,*** that the appeal had not been admitted as required under **Section 79B** of the **Civil Procedure Act.** Directions had also not been taken as required under **Order 41 rule 8B** of the **Civil Procedure Rules.** Under **Rule 8B**, it is this court's deputy registrar who is supposed to list the appeal for giving of directions and notify the parties accordingly. Those vital steps' not having been taken it was not possible for the appellant to fix hearing dates for the appeal. He urged the court to dismiss the respondent's application.

Ms Obaga for the respondent cited several authorities in support of her submissions. She cited, ***inter alia,*** **ADNAN KARAMA PETROLEUM LIMITED –VRS- NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY, CIVIL APPEAL NO. 878 OF 2005 AT NAIROBI.** In that matter, the respondent applied by way of notice of motion to strike out the appeal for want of prosecution. The appeal had been filed on 8th November 2005 and the memorandum of appeal was served upon the respondent on the same day. The application to dismiss the appeal for want of prosecution was filed on 21st February 2007. Apart from applying for certified copies of the proceedings, the appellant had done nothing towards having the appeal heard. The appellant had not moved the court to have the appeal admitted to hearing.

The appellant's explanation for his inactivity was that he had been waiting for the National Environmental Tribunal whose decision was appealed against to supply it with a certified copy of the proceedings. However the court established that there was evidence that the proceedings had been supplied. It was held that there was no reasonable explanation for the delay and the court proceeded to dismiss the appeal for want of prosecution.

A similar decision was also made in **DUNCAN KINYANJUI -VS- PENINAH MUCHENE,** Civil Appeal No. 5 of 2001 at Nairobi. The appellant in the aforesaid appeal filed a memorandum of appeal and took no other step at all to have the appeal admitted and directions taken. He had also not filed a record of appeal by the time the respondent moved the court to strike out the appeal for want of prosecution.

In his ruling, Khamoni J., in striking out the appeal delivered himself thus:

"**Before me in this notice of motion, the respondent raises points of technicalities which cannot stand his main contention being that he is waiting for the registrar of this court to summon him and the applicant for directions as to the hearing of the appeal. As I have already stated, no directions as to the hearing can properly be taken before the filing of the appeal is complete and the appeal admitted to hearing. The respondent/appellant having filed a naked memorandum of appeal and thereafter having moved no step further in the appeal, he is not entitled to sit back and claim that it is the registrar of this court to blame, allegedly, the registrar having failed to set down the appeal for directions. To my mind, that stand by the respondent in the light of his inaction in the appeal is a vindication of what the applicant is saying that the respondent filed this appeal, not to prosecute it, but to maintain a stay of execution of the order for maintenance made against him and being the subject matter of this appeal."**

On the other hand, Mr. Okong'o for the appellant cited several authorities in his submissions. He stated that the appellant had filed not only the memorandum of appeal but the entire record of appeal. It was therefore the deputy registrar of this court who was supposed to forward the file to a judge for perusal with a view to admitting or rejecting the appeal. In the event that the appeal was admitted the registrar was then supposed to list the appeal for directions and notify the parties. In **AFRICAN HIGHLANDS PRODUCE COMPANY LIMITED –VS- COLINS MOSETI ONTWEKA,** Civil Appeal No. 38 of 2002 at Kericho, Kimaru J., refused an application to strike out an appeal for want of prosecution where the appellant had failed to file the record of appeal for a considerable period of time allegedly because the court had delayed in supplying typed proceedings to the appellant. Counsel also cited **EUNICE NJERI KIMANI –VS- MUIRURI KARIUKI,** Civil Appeal No. 179 of 2003 at Nakuru where the respondent

also filed an application seeking dismissal of an appeal for want of prosecution. The appellant had been supplied with copies of the proceedings and judgment but had not been supplied with a certified copy of the decree without which he could not file the record of appeal. The appellant had written severally to the court requesting for the decree but no response had been given to her. The court refused to dismiss the appeal and held that the trial court, in failing to provide a vital document in the appeal process was to blame for the delay in having the record of appeal filed by the appellant.

I have carefully considered the rival arguments advanced by counsel for the parties herein. I have also considered all the authorities that were cited before this court. The appellant filed the memorandum of appeal on 13th April 2005. However no certified copy of the decree appealed against was filed. **Order XLI rule 1** of the **Civil Procedure Rules** state as follows:

"**Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79 B of the Act until such certified copy is filed."**

In the absence of the certified copy of the decree appealed against, the deputy registrar of this court could not place the file before a judge to consider whether to admit the appeal or not as required under **Section 79 B** of the **Civil Procedure Act.** This clear provision of the law was known or ought to have been known to the appellant. The appellant took no step towards prosecution of the appeal until the respondent filed this application on 12th January 2009. The appellant moved to court on 10th February 2009 and filed the record of appeal as well as the decree appealed against. For nearly four years the appellant was indolent. All along the appellant felt secure because of the order of stay of execution obtained on 7th September 2005.

The appellant cannot blame the court for the delay in admission of the appeal when it is the appellant who had failed to comply with mandatory provisions of the law as aforesaid without which the appeal could not be admitted. This was a clear case of abuse of the court process. The appellant's counsel did not have to wait for the court to write to him and inform him that the appeal had not been admitted because of his failure to file a certified copy of the decree. Counsel for the appellant ought to have been proactive and not only comply with the law as regards filing of appeals but also follow up his client's appeal to ensure that the same was processed expeditiously.

For these reasons, I allow the respondent's application and strike out the appeal herein. The funds which are deposited in a joint interest earning account at Kenya Commercial Bank, Migori Branch, should be released to the respondent's advocates. The appellant shall bear the costs of this appeal as well as the costs of this application.

DATED, SIGNED AND DELIVERED AT KISII THIS 18TH JUNE, 2009.

D. MUSINGA

JUDGE

18/6/2009

Bfore D. Musinga. J

Mobisa – C.c

Mr. Okong'o for the appellant present.

Miss Obaga for the respondent present.

Court: Ruling delivered in open court on 18th June, 2009.

D. MUSINGA

JUDGE