



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**Civil Appeal 156 of 2006**

**SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT**

**VERSUS**

**EZEKIEL JUMA OTIENO .....RESPONDENT**

**RULING**

The appellant filed an application seeking stay of execution of the judgment and decree in Kisii CMCC No. 186 of 2003 pending hearing and determination of an appeal.

The application was made on the grounds that the trial court had made an order of stay of execution of its judgment on condition that the decretal sum, Kshs. 146,481/= be deposited in an interest earning account in the joint names of the advocates for the parties herein.

The appellant's legal services manager stated in his affidavit that the aforesaid ruling was to be delivered on 23<sup>rd</sup> August, 2006 but the same was not delivered on that day. The appellant's advocate learnt that the same was delivered on 11<sup>th</sup> October, 2006 without notice to them. They learnt about the ruling on 15<sup>th</sup> August, 2008 when a notice to show cause why the decree should not be executed by attachment of the appellant's moveable property was served.

On 2<sup>nd</sup> September, 2008 the appellant's advocate filed an application for extension of time to enable the appellant comply with the said court ruling. On 7<sup>th</sup> October, 2008, sum of Kshs. 186,481/= was deposited in the joint names of the advocates for the parties herein at Kenya Commercial Bank, Migori Branch. The appellant averred that unless stay of execution is ordered she would suffer substantial loss in the nature of the decretal sum.

The respondent filed grounds of opposition and stated that the appellant was in breach of the orders made on 2<sup>nd</sup> September, 2008, by the subordinate court which orders were given by consent. He said that on 11<sup>th</sup> October, 2006, when the ruling was delivered the appellant was represented by counsel. It is further contended that the appellant had not demonstrated that she will suffer substantial loss unless the orders sought are granted.

Responding to the grounds of opposition, Mr. Odhiambo for the appellant conceded that on 11<sup>th</sup> October, 2006, when the subordinate court delivered its ruling, Mr. Oguttu advocate held brief for Mr. Okongo for the appellant. He did not state whether Mr. Okongo was notified about the ruling by Mr. Oguttu. Mr. Odhiambo further conceded that on 2<sup>nd</sup> September, 2008, a consent had been recorded to the effect that the appellant be given an additional period of 30 days to deposit the money. However, that was not done within the stipulated period of time.

If the appellant violated the terms of the consent that was recorded on 2<sup>nd</sup> of September, 2008, having failed to comply with the ruling that was delivered on 23<sup>rd</sup> August, 2006, the respondent is not to blame. Given that there was a consent regarding the time frame

within which the money was to deposited, this court cannot vary the said consent. In any event, I am not satisfied that the appellant has sufficiently demonstrated that she will suffer substantial loss if the orders sought are not granted. The appellant's application is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT KISII THIS 16<sup>TH</sup> DAY OF DECEMBER, 2009.**  
**D. MUSINGA**

**JUDGE.**

**16/12/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Ochwangi HB for Mr. Oduk for the Respondent

N/A for the applicant

**Court:** Ruling delivered in open court on 16<sup>th</sup> December, 2009.

**D. MUSINGA**  
**JUDGE.**