

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII

Civil Appeal 69 of 2004

SOUTH NYANZA SUGAR COMPANY LTD APPELLANT

VERSUS

JUSTUS AMENYA OKETCH RESPONDENT

RULING

The respondent filed an application pursuant to provisions of **Order XL1 rule 31(1)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. He urged this court to dismiss this appeal herein for want of prosecution.

In an affidavit sworn by Albert Okumu Mudeyi, the respondent's advocate, he deposed that for a period exceeding one year the appellant had failed and/or neglected to take any steps towards disposal of their appeal. In his view, the appellant had lost interest in the appeal.

The appellant filed grounds of objection and stated, inter alia, that it had been making effort to have the appeal heard and disposed of. It was stated that on 30th November 2006 the appeal was listed for hearing but it could not be reached and as a result it was stood over generally. It was further stated that the appellant had deposited in an interesting earning account in the joint names of the advocates for the parties the decretal sum as ordered by the trial court pending the hearing and determination of the appeal. That was an indication that the appellant was keen on pursuing the appeal.

While it is true that over the last one year or so the appellant has not taken any steps towards the disposal of the appeal, it is not in dispute that on 30th November 2006 the appeal came up for hearing but could not be reached because there were many other matters that were listed for hearing on that day.

Deposit of the decretal amount in court or in a bank is itself not a bar to the dismissal of any appeal where it is evident that the appellant is not keen on proceeding with the same. Under the provisions of **Order XL1 rule 31(1)** where the appeal has not been set down for hearing by the appellant within three months after the giving of directions, the respondent is at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution. The Respondent chose the latter and he cannot be faulted for that. However, in exercise of this court's discretion I will not dismiss the appeal but I order that the same be prosecuted within the next two months from date hereof, failing which it will stand dismissed with costs. The appellant will bear the cost of this application.

DATED, SIGNED and DELIVERED at KISII this 22ND day of APRIL, 2008.

D. MUSINGA

JUDGE.

Delivered in the open court in the presence of:

Mr. Nyambati for the appellant.

N/A for the respondent

D. MUSINGA

JUDGE