



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CIVIL APPEAL NO. 45 OF 2017**

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

**-VERSUS-**

**RISPA AKOTH OKOTH.....RESPONDENT**

**(Being an appeal from the judgment and decree by Hon. M. M. Wachira, Senior Resident Magistrate in Migori Chief Magistrate's Court Civil Suit No. 62 of 2005 delivered on 28/02/2017)**

**JUDGMENT**

1. The Appellant raised several issues in its submissions among them a preliminary one which I must deal with first. The issue is on the competency of the appeal. It is submitted that the suit which the Respondent instituted in the lower court being **Migori Chief Magistrate's Court Civil Suit No. 26 of 2005** against **South Nyanza Sugar Co. Ltd** (hereinafter referred to as '**the suit**') was dismissed and never reinstated and as such no further proceedings would legally hold.

2. I have perused the record before the trial court I noted the court proceedings of 09/09/2009 before **Hon. Kibet Sambu** Resident Magistrate. It is true that the suit was dismissed under the then **Order XVI** of the then **Civil Procedure Rules**. The said Rules were revoked by the current **Civil Procedure Rules, 2010** where the old **Order XVI** was replaced with the current **Order 17** which deals with '**Prosecution of Suits**'.

3. From the record, the suit having been dismissed on 09/09/2009 has not been reinstated to date. However, further proceedings were initiated 3 years later where the suit was by the consent of the parties consolidated with another claim and referred to the then Sugar Arbitration Tribunal for hearing, determination and final disposal. The suit was eventually returned to the lower court upon the disbandment of the Sugar Arbitration Tribunal by operation of the law and was heard, evidence taken and culminated with the judgment under appeal.

4. The suit having been dismissed and not reinstated could not therefore legally proceed for hearing even in the face of a consent by the parties to that effect. Since there was no order of the court reinstating the suit the proceedings post 09/09/2009 and the resultant judgment are therefore a nullity and cannot stand. The same be are hereby set aside and are expunged from the record accordingly.

5. The upshot is that the appeal succeeds on that ground which is apparent on the face of the record. Therefore, the suit, **Migori Chief Magistrate's Court Civil Suit No. 62 of 2005**, stands dismissed as from 09/09/2009. The appeal being incompetent is hereby struck out with costs of the Appellant.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 19<sup>th</sup> day of September 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open court and in the presence of: -**

**Mr. Marvin Odero** Counsel instructed by the firm of Messrs. Okong'o Wandago & Company Advocates for the Appellant.

**Mr. Mwita Kerario** Counsel instructed by the firm of Messrs. Kerario Marwa & Company Advocates for the Respondent.

**Evelyne Nyauke** – Court Assistant