



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL CASE NO. 156 OF 2006

(Being an appeal from the original judgment and decree of the

PM Kisii CMCC No. 186 OF 2003- S.M.S. SOITA, PM)

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT

VERSUS

EZEKIEL JUMA OTIENO.....RESPONDENT

RULING

1. This ruling is in respect to the Notice of Motion dated 22nd August 2016 brought under Order **42 Rule 32 and 35 (2) of the Civil Procedure Rules, Sections 1A, 3A and 63 (e) of the Civil Procedure Act** in which the applicant seeks dismissal of the appeal for want of prosecution together with costs.
2. The application is premised on the grounds that judgment was delivered in the lower court in Kisii CMCC 186 of 2003 on 7th June 2006 after which the appellant filed an appeal and obtained an order of stay of execution pending appeal on 11th October 2006. The applicant contends that the appellant has to-date not compiled, filed or served the record of appeal in which case, he has not taken any appropriate steps towards disposing of the appeal thereby necessitating this application.
3. The application is supported by the affidavit of Ezekiel Oduk, the applicant's advocate in which he states that the appellant did not comply with the condition for stay of execution requiring it to deposit the decretal sum in a joint interest earning account thereby leading to the execution of the decree and therefore, it is apparent that following the said execution of the decree, the appellant had lost interest in the appeal as is evident from its failure to prosecute the appeal.
4. When the application came up for hearing on 14th November 2016, counsel for both parties agreed to adjourn to 6th December 2016 whereupon the appellant was granted leave to file response to the application. When application came up for hearing on 6th December 2016, the appellant had not filed the response as agreed and neither was there any appearance by the appellant or his counsel.
5. The applicant then informed the court that he had filed written submissions to the application dated 22nd August, 2016 after which the matter was listed for ruling.
6. I have considered the instant application, the written submissions filed by the applicant, the law and the authorities cited. The only issue to be determined in this application is whether the applicant has made out

a case to warrant the granting of the orders sought.

7. As a starting point, the appellant did file any response to the application and therefore, the same stands unopposed and ought to be allowed as prayed.

8. **Order 42 rule 35 (2) of the Procedure Rules** stipulates as follows:

“(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

9. In the case of **South Nyanza Sugar Co. Ltd vs Dalmas A Mbogo. CA No. 230 of 2004**, an appeal that had not been set down for hearing for 5 years was dismissed by Justice Musinga who had the following to say:

“An appellant who is keen on prosecuting an appeal cannot just sit back for over five years and do nothing about his own appeal. I believe the reason why the appellant was not keen on having this appeal admitted to hearing is that she is enjoying the order of stay of execution.....

A party to a civil proceedings is under a legal obligation to assist the court in doing all that is necessary in expediting disposal of disputes before it.”

10. In the instant case, the appellant has literally been sitting on its laurels since 2006 when the appeal herein was filed. The appellant has not made any move whatsoever towards the prosecution of the said appeal. Even after the institution of the instant application, the appellant has not woken up from its slumber and has continued to sit pretty despite being aware of the existence of the application.

11. Under the above circumstances, I find that the application dated 22nd August 2016 is merited and I allow it as prayed, with costs to the applicant

Dated, signed and delivered in open court this 14th day of February, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

- Mr. Oduk for the Applicant
- N/A for the Appellant
- Omwoyo: Court Clerk