



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.147 OF 2001

BETWEEN

SOUTH NYANZA SUGAR COMPANY RESPONDENT/APPELLANT

AND

ALFRED SAGWA MDEIZI

T/A PAVE AUCTIONEERS APPLICANT/RESPONDENT

(Being an appeal from the ruling and order of Nicholas

Ateya Esq., SPM – Migori delivered on 29th May 2001)

RULING

Introduction

1. By the Notice of Motion dated 22nd August 2012, expressed to be brought under **Sections 1A, 1B, 3, 3A and 63 (e)** of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules**, the Respondent in this appeal seeks orders:-
 1. Spent.
 2. That *PENDING* the hearing of this application interpartes, there be a stay of proceedings in Migori SPMCC NO.135 of 1999 and more particularly there be a stay of the execution proceedings commenced therein.
 3. That *PENDING* the hearing and determination of the application dated 31st May 2011 filed herein there be a stay of proceedings in Migori SPMCC No.135 of 1999 and more particularly there be stay of execution proceedings commenced therein.
 4. That costs of this application be provided for.
2. The application is premised on the grounds that are set out on its face and particularly that the applicant/respondent filed an application dated 31st May 2011 to set aside the ex parte proceedings and judgment delivered on 16th July 2010 in **Kisii HCCA No.147 of 2001 – South Nyanza Sugar Company Ltd. –vs- Alfred Sagwa Mdeizi**. The application is supported by an affidavit sworn by Alfred Sagwa Mdeizi dated 22nd August 2012. The applicant depones that if the orders sought herein are not granted, he risks being exposed to execution proceedings against a background of a judgment sought to be set aside in this court and that in such circumstances, his right to be heard shall have been taken away.
3. The application is opposed vide an affidavit sworn by Gabriel Ouma Otiende Advocate who is the

Legal services Manager of the appellant herein. He states that he is duly authorized by the appellant's Board of Directors and by the Management to make and swear the affidavit. The gist of the said affidavit is that the applicant herein is justly indebted to the appellant, which indebtedness the applicant has never bothered to settle since delivery of judgment on 16th July 2010; that since there has been no appeal against the said judgment to the Court of Appeal, any orders granted by this court in the instant application would amount to this court sitting on appeal on its own decision. The deponent urged the court to resist the applicant's plea for the orders sought, and to dismiss the application with costs.

Other Applications

a. Application dated 31/05/2011

4. This application was filed on behalf of the respondent herein by the firm of Sam Onyango & Co. Advocates for orders:-

1. *That this application be certified urgent and be heard ex-parte on priority basis in the first instance.*
2. *That PENDING the hearing and determination of this application there be a stay of execution of the orders of this court issued on 16th day of*

July 2010.

3. *That the orders made on the 16th day of July 2010 be set aside ex debito justitiae.*
4. *That the appeal herein be reinstated and heard on merits interpartes.*
5. *That the costs of this application be provided for.*

5. The grounds in support of that application were similar to the grounds in support of the instant application. The orders sought by the applicant were not granted.

b. Application dated 14/05/2012

6. This application was filed in the lower court and sought among other orders, that the application be treated as a suit in terms of **Section 34** of the **Civil Procedure Act** between South Nyanza Sugar Company Limited and Alfred Sagwa Mdeizi t/a Pave Auctioneers only and for refund of Kshs.43,000/= paid to the applicant in the instant application in many suits whose particulars are given in the application. The ruling in that application gave rise to the instant appeal No.147 of 2001 in which judgment was delivered on 16th July 2010.

(c)Application dated 06/06/2012

7. This application was also filed in the lower court. The application was dismissed with costs. It is to be noted that the application dated 6th June 2012 was filed after the applicant was denied ex-parte orders of stay by the High Court.

Hearing of Instant Application

8. When the application came up for hearing on 10th March 2014, the

parties agreed to canvass the same by way of written submissions. The submissions were duly filed on 24th April 2014 and 12th May 2014

respectively.

The Submissions

9. From the filed written submissions of the applicant, the following points emerge:-

- *The appeal herein arises from the decree in Migori SPMCC No.135 of 1999 – Geoffrey Onyango –vs- South Nyanza Sugar Co. Limited;*
- *The applicant/respondent herein, who is a licensed auctioneer was issued with warrants of attachment and sale of moveable property by the court to execute and realize the lower court decree;*
- *After the case was concluded, the auctioneer/applicant/respondent had his costs assessed by the trial court;*
- *By an application dated 14th May 2012, the respondent/appellant sought for orders to compel the respondent/applicant to refund certain monies being amounts paid to the applicant on 86 files all of which were consolidated with SPMCC Number 139 of 1999;*
- *The application dated 14th May 2012 was for refund of auctioneer’s charges paid to him by the appellant vide Migori SPMCC being SPMCC NO.135 of 1999 and for stay of execution for the sums allegedly levied upon the appellants/respondents;*
- *Because of the delay in hearing and determining the application dated 31st May 2011, the appellant/respondent herein continued with the process of execution;*
- *Subsequently and because of misplacement of the appeal file, a skeleton file was reconstructed vide orders made in Misc. Application Number 217 of 2012 dated 18th July 2012;*
- *Two other applications dated 6th June and 22nd August 2012 were filed;*
- *Because the appeal herein was heard ex-parte the applicant, vide the application dated 31st May 2011, wants the appeal heard afresh and contends that if execution is levied before then, he stands to suffer substantial loss and will have his constitutional rights violated;*
- *The appellant/respondent herein is acting in bad faith;*
- *The application dated 22nd August 2012 is well founded.*

10. The appellant’s submissions dated 12th May 2014 and filed in court on the same day highlight the following:-

- *The application dated 22nd May 2012 is grossly incompetent and the same ought to be struck out because the same was filed by an advocate who is not properly on record.*
- *The firm of Sam Onyango & Co. Advocates never sought leave to come on record in place of M/s Kerario Marwa & Company who have always appeared for the applicant.*
- *The appointment of M/s Minda & Company Advocates to act alongside the firm of Sam Onyango & Co. Advocates is also irregular and contrary to **Order 9 Rule 9 of the Civil Procedure Rules.***
- *The errors committed by the applicant and his counsel touching on representation are errors that go to the root of the application thereby making the application incompetent.*
- *The applicant is not deserving of the orders sought by reason of vexing the court and the appellant with a multiplicity of applications.*
- *The application is an abuse of the court process and is hopelessly incurable.*
- *The applicant is guilty of material non-disclosure.*
- *If any stay orders are to be granted, the same should be made conditional to applicant providing security for this and all the other 86 files.*

Findings

11. I have now carefully read through the pleadings on this file. I note from the above, that the applicant herein has filed several applications before the court seeking same prayers, both before this court and before the lower court at Migori Principal Magistrate’s Court. The question that arises for determination is whether the applicant is deserving of the orders sought.

12. In my considered view, the applicant is not deserving of the orders sought vide the Notice of Motion dated 22nd August 2013. To start with the orders sought by the applicant in the said application are similar to those sought vide the application dated 31st May 2011. It is also worthy noting that when this court refused the applicant stay orders at the ex-parte stage of hearing the

application dated 31st May 2011, he immediately rushed to the lower court seeking similar orders. The applicant is clearly a vexatious litigant who takes every opportunity to abuse the process of the court. The rules of natural justice do not allow him to do so and this court will not allow him to do so.

13. In the premises and for the reasons stated above, the application dated 22nd August 2013 lacks merit and the same is hereby dismissed with costs to the appellant.

14. Orders accordingly.

Dated and delivered at Kisii this 12th day of June, 2014

R.N. SITATI

JUDGE

In the presence of:-

Miss Kusa for Minda for the Respondent/Applicant

Mr. Nyamurongi for Odhiambo Kanyangi for the Appellant/Respondent

Mr. E. Mongare - Court Assistant