



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 77 of 2007

SOUTH NYANZA SUGAR CO. LTD. APPELLANT

AND

KENNEDY OCHIENG ONDIGO RESPONDENT

(Being an appeal from the judgment and decree of Hon. S.M. Soita, PM in

Kisii CMCC No.220 of 2004 dated and delivered on 9th May 2007)

RULING

1. Before me is the Notice of Motion dated 29th February 2012 which seeks the following substantive orders:-

- *That there be a stay of execution of the judgment and decree of the subordinate court appealed from pending the determination of this application interpartes.*
- *That the ruling/order dated 27th February 2012 dismissing the application dated 13th February 2012 be set aside.*
- *That the Honourable court be pleased to reinstate the application dated 13th February 2012.*
- *That costs of this application be provided for.*

2. The application is supported by the grounds on the face thereof and the affidavit sworn by Samuel Odhiambo Kanyangi on 29th February 2012. The deponent of the supporting affidavit avers that the reason why he did not appear in court on 27th February 2012 when the file was called out was because he was before High Court No. 2 in Civil Appeal Nos.150 of 2009, 77 of 2010 and 161 of 2009 and was under the impression that his colleague, Mr. Z. Ogweno Advocate would indulge him by having the file placed aside until he finished with his matters before High Court No.2. He prays that this application be allowed so that the appellant may get an opportunity to prosecute the appeal.

3. To put this whole matter into perspective, the application dated 13th February 2012, brought by way of Notice of Motion under **sections 1A, 1B and 3A** of the **CPA** and **Order 42 Rules 20 and 35** and **Order 51 Rule 1** of the **CPR, 2010** sought *inter alia*, an order of stay of execution of judgment and decree of the lower court appealed from pending the determination of the application and a further order

that the ruling and order dated 17th January 2012 dismissing the appeal herein be set aside. When the said application came up for hearing on 28th February 2012, counsel for the appellant/applicant was absent and the court accordingly dismissed the application with costs to the respondent. Mr. Z. Ogweno for the respondent was in court and he urged the court to dismiss the application for non-attendance.

4. On the 17th January 2012, this appeal, together with **CA No.165 of 2008 – South Nyanza Sugar Co. Ltd. –vs- James O. Oluoch** was before the court. On the said date, counsel for the appellant was not in court. Mr. Z. Ogweno was present in court and he brought it to the attention of the court that the appellant, who had been ordered to compile file and serve his Record of Appeal within 45 days from 17th October 2011 had failed to do so. Counsel urged court to dismiss the appeal together with this appeal for want of prosecution. There being no response to the application for dismissal, the court proceeded to dismiss the appeals as prayed with costs to the respondent.

5. It is these orders that have given rise to the present application. The application is opposed vide the replying affidavit sworn by Don Z. Ogweno on 8th March 2012. The deponent avers that no good cause has been shown by the appellant/applicant for the order sought taking into account the fact that:-

a) *The appeal was lodged way back on 17th September 2008.*

b) *The appeal was dormant for ages, necessitating the court to take out Notice of Dismissal of the appeal on 17th July 2011.*

c) *The lower court file with typed proceedings being CMCC No.220 of 2004 had always been available in the appeal file and on the 6th December 2011, the Deputy Registrar noted as much in the presence of the applicant's counsel but no record of appeal was filed by 17th January 2012 nor to date.*

d) *The applicant and so its advocates failed to attend court on 17th January 2012 thus necessitating the dismissal of the appeal.*

e) *Even after filing this spurious application on the 29th February 2012, the same was not served until a week later.*

6. The deponent therefore contends that the instant application is an abuse of the court process because:-

i) *It is admitted that no appeal subsists thus stay cannot be granted against the decree arising in Kisii CMCC No.220 of 2004.*

ii) *The orders of this court of 17th January 2012 only dismissed the appeal with costs and these are the only executable orders herein.*

iii) *The court cannot stay a negative order and more so cannot stay payment of costs.*

7. When this application came up for hearing, both Mr. Odhiambo for the applicant and Mr. Ogweno for the respondent appeared and made their submissions. Mr. Odhiambo relied on the application as filed together with the supporting affidavit and the annexures thereto. Counsel also filed a list of authorities and urged the court to allow the application. I have read through the said authorities.

8. Mr. Ogweno for the respondent reiterated the averments in his Replying Affidavit and also submitted that because the orders made by the court on 17th January 2012 and 29th February 2012 were negative in nature, such orders cannot be stayed. Reliance was placed on a number of authorities, all of which the court has read.

9. I have now considered the rival submissions and the law cited to me in this matter. I have also

considered the record which speaks for itself. In my humble view, I do not think that the appellant/applicant has made out a case for the orders sought. A look at the record shows a consistent thread of lethargy and indolence on the part of the appellant and its counsel. The appellant has thrown away every opportunity that has been given to it and as submitted by counsel for the respondent, no effort was made, even after filing the instant application to compile, file and serve the Record of Appeal as a way of ameliorating an otherwise bad situation. In my considered view, the appellant/applicant is not entitled to the orders sought because it has not shown diligence in pursuing its rights of appeal, not just once but three times. The law is clear that in dealing with applications for setting aside, the court should only exercise its judicial discretion in favour of setting aside a judgment or order to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors and will not assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. See **Shah –vs- Mbogo & another [1967] EA 116 at p. 123**. In the instant case, it does appear clear to me that the appellant has, by its conduct, and that of its advocate, sought to delay the course of justice in favour of the respondent. There was no Record of Appeal for this appeal which was filed way back in 2007 and even after being given a chance to remedy the situation, the appellant continued to sleep.

10. For the reasons above given, the Notice of Motion dated 29th February 2012 is found to have no merit. The same is dismissed with costs to the respondent.

11. The orders herein shall apply *mutatis mutandis* to **Civil Appeal No.165 of 2008 – South Nyanza Sugar Company Ltd. –vs- James O. Oluoch**.

12. Finally, the delay in delivering this ruling is very much regretted. It was caused by circumstances brought about by other official engagements in which the court was involved.

Dated and delivered at Kisii this 1st day of November, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Odhiambo Kanyangi (absent) for Appellant/Applicant

Mr. G.J.M. Masese for Ogweno (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.