



REPUBLIC OF KENYA
HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL 310 OF 2004

SOUTH NYANZA SUGAR CO. LTD APPELLANT

VERSUS

CHARLES ONYANGO ONDIEKI RESPONDENT

RULING

The appeal herein was lodged on 3/12/04 against the judgment delivered by the lower court on 12/11/04. On 14/4/05 the parties agreed to have the decretal sum of Kshs.77,280/= deposited into joint account as a condition of stay of execution of the decree pending the hearing and determination of the appeal.

The Memorandum of appeal was not filed with the decree. No certified copy of decree has been filed since.

On 3/12/04 the appellant wrote to the lower court for typed proceedings to enable the filing of appeal. On the same day the appeal was filed. Similar letters were written on 10/1/06, 19/1/06, 1/3/06, 6/4/06, 14/6/06, 17/1/07, 5/3/07, 18/1/08, 20/2/08 and 5/11/08. The record shows that on 7/2/08 the lower court wrote to the appellant's advocates to let them know the original record had been sent to the High Court. It was with typed proceedings. The record was received by this court on same day of the letter above. The advocates were still writing to court for the proceedings when they had been sent to this court with notice to them. There is no indication at all that the appellant paid for the proceedings, or made a deposit in that regard. It is clear all those letters were a usual and routine exercise on the part of the appellant and do not demonstrate any serious effort to process the appeal which was their legal responsibility.

The court is the one that issued notice to the appellant under **Order XL1 rule 31(2)** of the **Civil Procedure Rules**. It was issued on 4/6/09.

It is clear that over one year after the record of the lower court was received in this court the appellant has not taken any action to push the appeal forward. He has not prepared a Record of Appeal. He has not requested for admission of the appeal, and therefore no directions could be given. In all, it is over 5 years and the appeal has not been heard. **Order XL1** of the **Civil Procedure Rules** and **Section 79B** of the **Civil Procedure Act** may be seen to be helping the appellant to say the appeal cannot be dismissed. However, the court is empowered under **section 3A** of the **Civil Procedure Act** to prevent injustice or abuse of its process. The non-prosecution of this appeal is causing injustice to the respondent who cannot access the proceeds of his judgment. The appeal is clogging the administration of justice in this court. Appeals are filed to be prosecuted. The provisions above are not exclusive of the inherent jurisdiction of this court to do justice and to prevent abuse of its process (**Mukisa Biscuit Manufacturing Co. Ltd v.**

West End Disributors Ltd [1969] EA 698, at page 699).

This appeal is hereby dismissed with costs and the stay order discharged.

Dated, signed and delivered at Kisii this 8th day of July, 2009

A. O. MUCHELULE

JUDGE

8/7/2009

Before A. O. Muchelule J.

Mongare c/c

Mr. Ochillo present

Court: Ruling in open court.

A. O. MUCHELULE

JUDGE