



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
OF KISII

Civil Appeal 309 of 2004

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

VERSUS

NAUM OKUMU TAMBO NDIAN ..... RESPONDENT

RULING

On 6/4/09 the Deputy Registrar sent Notice under **Order 41 rule 31(2)** of the **Civil Procedure Rules** for the dismissal in this appeal. The Notice was in response to written request by the respondent for the same. The parties appeared. **Mr. Ochillo** for the respondent urged the court to dismiss the appeal. He submitted that the appellant had since 3/12/09, when the appeal was filed, not taken steps to prosecute. **Mr. Mokaya** for the appellant sought for time to prepare Record of Appeal now that the proceedings are ready and the original file sent to this court. He stated that the delay was occasioned by the delay by the subordinate court to process the proceedings and judgment.

It is clear the lower court file together with typed proceedings and judgment were delivered to this court on 7/2/08, more than one year ago. The fact that this did not prompt the appellant into action is one of the reasons why respondent wants the appeal dismissed.

The Memorandum of Appeal was filed on 3/12/04. It followed judgment delivered on 11/11/04 by the subordinate court in which the appellant was ordered to pay Kshs.76.500/- in general and special damages plus costs. On 14/4/05 the parties agreed to have the decretal sum deposited into a joint account of both advocates as a condition of stay pending the hearing and determination of the appeal. The Memorandum of Appeal was not filed with copy of decree or order appealed from. The appellant was required to file such copy or order with the Memorandum or “**as soon as possible**”. It did not. It did not seek the court’s intervention as to the time of filing such decree or order. Up to now no such decree or order has been filed. There no explanation at all why such decree could not be obtained in the lower court and filed. It is now over 5 years since the appeal was filed and the respondent has been kept away from the realising the fruits of his judgment. If the appellant was waiting for proceedings from the lower court the same have been available since 7/2/2008. This court waited for one year four months, after receipt of the lower court and proceedings, before issuing the notice.

A reading of the provisions of **Order XL1** of the **Civil Procedure Rules** and **Section 79B** of the **Civil Procedure Act** shows that the law places the responsibility to move an appeal on the appellant. **Order XL1 rule 31** of the **Civil Procedure Rules** provides for the dismissal of appeal of want of prosecution, but the rule is applicable to appeals which have already been admitted to hearing under **section 79B** of the **Civil Procedure Act** and directions been given. In this case, the appeal has not been admitted to hearing and directions have not been given. These steps cannot be undertaken because the appellant has, as it were, gone to sleep. Is the court helpless under these circumstances? The court has to prevent injustice or abuse of process. Appeals are filed to be prosecuted and not to deny the successful party his judgment. **Order XL1** and **section 79B** are not exclusive and do not fetter the court’s inherent jurisdiction to do justice and to prevent abuse of its process (**ABDUL AND ANOTHER v. HOME & OVERSEAS INSURANCE CO. LTD [1971] E.A. 564**).

This appeal is dismissed with costs and the stay granted herein is discharged.

Dated, signed and delivered at Kisii this 8<sup>th</sup> day of July, 2009

**A. O. MUCHELULE**

**JUDGE**

**8/7/2009**

Before A. O. Muchelule Judge.

Mongare c/c

Court: Ruling in open court.

**A. O. MUCHELULE**

**JUDGE**