

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
CORAM: OWUOR, J.A. (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 233 OF 2000 (KSM. 61/2000)
BETWEEN**

**SOUTH NYANZA SUGAR CO LTD APPLICANT
AND
HESBON ONYURO RESPONDENT**

**(Application for leave to file notice and record of
appeal out of time from a ruling and order of the
High Court of Kenya at Kisumu (Wambilyangah J) dated
11th April, 2000
in
H.C.C.S. NO. 254 OF 1999)**

RULING

This is yet another application under the provision of **rule 4 of the Rules of this Court** by the applicant in its attempt to mount a successful appeal. Two previous applications for extension of time having been previously struck out by this Court. According to counsel however, the last one having been struck out as being incompetent on 23rd of June, 2000, he decided that he would let the period so prescribed for filing the appeal run out and thereafter prosecute the application for extension of time. He had filed a notice of appeal on 13th of April, 2000. He was given the proceedings and judgment on 31st of July, 2000. The time for lodging the appeal was expiring at the very latest on 31st of July, 2000. He therefore saw it fit to let the time expire. He filed this application on 7th of August, 2000 for orders extending time for filing both the Notice of Appeal and Record of Appeal.

Mr Aduda, counsel for the respondent contends that so long as the Notice of Appeal filed by the applicant on 13th of April, 2000, is still on record, this Court cannot grant the extension sought for a fresh Notice to be filed. Mr Kasamani's answer to this is that once the time had run out, **Rule 82 (a)** comes into play and the Notice is deemed to have been withdrawn. In this regard, the notice of withdrawal he sent to the Registrar on 3rd April, 2000 brought that notice of appeal to an end. The Notice has therefore, ceased to exist.

I fully agree with Omolo, J.A. in the interpretation of **Rule 82 (a)** as to what happens after "deeming the Notice to be withdrawn". As clearly put by a full bench of this Court sitting on a reference from Omolo, J.A.'s ruling in **DOLPHIN PALMS LTD VS AL NASIBH TRADING CO & OTHERS Civil Application No. NAI 112/99 (Unreported)**:

"We concede that there is no express provision requiring a party to move the court in this regard, however a careful reading of rule 82 clearly reveals that such an application is necessary"

clearly shows that a court order is necessary and such issues can only be wholly made by a full Bench in an application brought under rule 80 of the Court of Appeal Rules".

In this regard, I fully agree with counsel for the respondent in that so long as the original Notice of Appeal is still on record, I have no jurisdiction to extend time for and yet another Notice of Appeal to be filed. In this regard this application is hereby dismissed with costs to the respondent.

Dated and delivered at Kisumu this 23rd day of March, 2000.

E.

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR