



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO.64 Of 2012

TKM MAESTRO LTD.....APPELLANT/RESPONDENT

VERSUS

EQUIPMENT MASTERS E.A. LTD.....RESPONDENT/APPLICANT

RULING

1. The Appellant filed an application dated 1st February, 2012 in Milimani Commercial Courts CMCC No. 4612 of 2011 seeking to set aside default judgment, entered against it and for leave to enter appearance out of time and defend itself in the suit. The Applicant prayed in the alternative for leave to settle the decretal sum of Kshs.1,314,550/90 in monthly instalments of Kshs. 75,000/=. The said application was dismissed by the trial court on 17th February, 2012 provoking the filing of this appeal on 27th February, 2012.

2. Amongst the grounds upon which the appeal was filed was that:-

- i. *that the learned magistrate misdirected herself and erred in law by finding and /or assuming that Value Added Tax does not become due and payable upon issuance of an invoice.*
- ii. *that the learned magistrate erred in law and in fact by choosing to make a final determination on the issue of Value Added Tax raised in the Appellant's draft defence and counter-claim rather than letting the issue be canvassed at the full trial hence denying the Appellant an opportunity to defend a claim to which the Respondent is not entitled to from the Appellant.*

3. Following the service of the Record of Appeal, the Respondent filed a Notice of Motion dated 29th October, 2012 seeking leave to raise an objection to the competence of the appeal and orders that the Memorandum of Appeal dated 24th February, 2012 is incompetent and that it be struck out. The motion is premised on the grounds that the Appellant has failed to comply with the mandatory provision of the appeal process as provided for under the Appellate Jurisdiction Act; that the Respondent has now issued the Appellant with ETR receipts non issuance of which led to this appeal and that the Respondent has to date not been served with a Notice of Appeal.

4. In response thereto Dr. Tony S.N. Monda swore a Replying Affidavit dated 6th November, 2012. He contended that the provisions of the Appellate Jurisdiction Act, Cap 9 and the Judicature Act, Cap 8 are irrelevant in this appeal for the reason that this appeal lies before the High Court and not the Court of Appeal and that the Respondent's complaints are misconceived vis a vis the provisions of the said statutes. He stated that the main substance of the suit before the trial court and this appeal is that the relevant Tax Invoices should have been issued sometime in the year 2010 and not thereafter. He further

stated that the alleged issuance of such receipts by the Respondent in September, 2012 is not only irrelevant, but also sub-judice.

5. I have considered the depositions of the parties. What falls for this court's determination is whether or not the appeal is incompetent for failure to serve a notice of appeal and whether or not issuance of ETR receipts non issuance of which led to the suit in the lower court makes this appeal incompetent.

6. On the effect of failure to serve a notice of appeal, I am in total agreement with the Appellant's position that the provision for service of notice of appeal is applicable in the Court of Appeal under the Appellate Jurisdiction Act, Cap 9 and not the High Court. Appeals in this court are commenced by the filing and service of the Memorandum of Appeal which the Appellant duly did. That ground is dismissed.

7. On the second issue, my view is that the same ought to be heard on merit because for this court to make a proper conclusion to it, it has to inquire on the origin of the dispute which inquiry cannot be properly made in the application but the main appeal. I decline to deal with it at this stage. In the end I find no merit in this application and dismiss it. Costs shall abide the outcome of the appeal.

Dated and Signed at Nairobi this 18th day of June, 2015.

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A. MABEYA

JUDGE

Read, Delivered and Signed at Nairobi this 19th day of June, 2015.

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D A ONYANCHA

JUDGE