REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)1

Civil Appeal Case 283 of 2005

COMMISSIONER OF INCOME TAX……....PLAINTIFF

VERSUS

KENCELL COMMUNICATIONS LIMITED…….RESPONDENT

R U L I N G

This application, by way of Chamber Summons, filed on 10/4/06, seeks the following orders:-

1. Already spent

2. That the order of this court, dated 15/3/06, dismissing the Applicant's Income Tax Appeal No. 283 of 2005, be vacated and/or set aside.

3. That appeal No. 283/05 be re-admitted to proceed on merit due to its importance to both parties and the public interest at large.

4. Costs of the application.

The application is brought under rules and 17 of the Income Tax [Appeals to the High Court] and Section 3A of the Civil Procedure Act, Cap. 21, Laws of Kenya.

The application is on the grounds, **inter alia**, that:

(a) The applicant's appeal was dismissed despite the presence of its written submissions on record propounding the arguments on facts, the law and decided cases.

(b) The applicant's appeal was dealing with a legal question which touches on matters of public importance in taxing mobile service sector which sector is of recent development in the country;

(c) The effect of dismissing the appeal has not fully determined the legal issues affecting the sector especially on the treatment of the initial licence fee to access communication spectrum.

(d) Applicant is now exposed to application for refunds of taxes already paid by taxpayer in the same sector on the licence fee.

(e) The court has inherent power to re-admit this appeal for the ends of justice and to give the correct

interpretation of the Income Tax Act for the parties to follow from now onwards.

(f) The issue for determination involves colossal sums when other players apply for refund which puts Government revenue at risk.

The application is supported by Affidavits by Mr. Okemwa Ontweka and James Ojee, of even date.

In opposition to the application, the Respondent, vide their Replying Affidavit by Ms. Nazima Malik, dated 11/5/06, controvert each and every averment in the application and the Supporting Affidavits thereto.

I have very carefully studied and analysed the pleadings and the submissions by the learned counsel for both sides and I have reached the following findings and conclusions.

Rule 12 of the Income Tax (Appeals to the High Court) Rules, under which the application is brought, provides as follows:

"Where an appeal is dismissed under Rule 11 the appellant may apply to the Court to which the appeal is preferred for the re-admission of the appeal, and where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall readmit the appeal on such terms as to costs or otherwise as it thinks fit."

At this stage, I should observe that whereas the provision talks of **readmission** of the appeal, it is clear to me that the correct terms should be **reinstatement,** rather readmission. But this is a small matter, and the meaning comes out despite the use of an inappropriate term.

Rule 11, which is referred to in Rule 12, above, stipulates as under:

(1) "Where on the day fixed, or on any other day

to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the court may, subject to section 87(2) (a) make an order that the appeal be dismissed."

(2) Where the appellant appears and the Respondent does not appear, the court may proceed to her the appeal EXPARTE"

The full implications of the above provisions must be grasped and kept in mind because of the following reasons. First, the dismissed appeal was scheduled to be heard on 14th and 15th March 2006, but due to pressure of prior matters, the appeal could not be reached or heard on 14/3/06, but was scheduled to be heard on 15/3/06. On the 15/3/06, the appeal was allocated 2.00p.m. as the time for its hearing, in the presence of counsel for both sides. Come 2.00p.m., when the appeal was called on, Counsel for the appellant, Mr. Ontweka, did not appear, and the appeal was dismissed in keeping with Rule 11, **supra**. Mr. Ontweka did not appear in court until after 2.25p.m. by which time, the court had issued its dismissal orders.

The second reason for reproduction of the full provisions of the Rules under which this application is brought, is because both in its grounds of the application and its submissions, the applicant avers that this court has the inherent power to readmit the dismissed appeal for the ends of justice and to give the correct interpretation of the Income Tax Act for the parties to follow from now onwards.

While granting that the court has the power to re-instate (readmit) the dismissed appeal, this court can only do that in terms of the provisions of Rule 12, **supra**, which requires **proof that the appellant was prevented from appearing by sufficient cause.** Put differently, the court's discretion is not unfettered, and is only exercisable upon the above statutory provisions.

The question before me is **whether, the appellant/applicant was prevented from appearing when**

the appeal was called on by sufficient cause.

From the pleadings and submissions before me, I have found and concluded, that the appellant/applicant was not prevented by any sufficient cause from appearing at 2.00p.m. when the appeal was called on for hearing.

From Mr. Ontweka's affidavit, the reason for his not appearing in court at 2p.m. on 15/3/06 was because he "**inadvertently forgot to make arrangements for transport to court and that is why he was unable to arrive in court at 2.00p.m. since he had to walk from the office at Times Tower."**

Whether the above reason is acceptable or not depends on both its credibility and the reasonableness thereof.

It is not the function or role of this court to manage the affairs of the appellant/applicant. It is the duty of the parties to appear in court when the case is called on; How they travel to the court cant seriously be the concern of any court. But even of greater concern is the credibility of the reason advanced.

Times Tower, where Mr. Ontweka claims he walked from, is barely 5 minutes walk to this court. As a practical matter, it is faster to walk from Times Tower to this court than to drive. Be that as it may, beauroctratic inefficience cant and does not quality to be called sufficient cause, as anticipated by Rule 12 of the Income Tax [Appeals To the High Court] Rules.

Counsel for the appellant/applicant further avers that he forgot to be in court on time because he was busy researching on certain provisions of the Income Tax Act, as directed by this court. I have perused in the court file and there is no record to that effect. I am not even sure that this court can make such an order or direction. What I remember very well is an off the record remark, to both learned counsels, in the morning of 15/3/06, for them to consider the provisions of the Income Tax Act, referred to in paragraph 8 of Mr. Ontweka's affidavit, before the commencement of the hearing of the application at 2p.m. that day.

Finally on this point, when Mr. Ontweka entered my chambers at 2.25p.m. or thereabouts, I did not see the authorities, annexed to his affidavit, in which he had gotten so involved as to forget the court appointed time. Put differently, Mr. Ontweka was not carrying the results of his purported research into the court- room at the time he appeared. Those materials, attached to his Affidavit, in support this application, must have been prepared either before 12.15p.m. or after he left the court room, at 2.25. But most probably before 12.15 p.m. on 15/3/06.

Of even greater concern is why the other counsel – Ms Malik – did not do any research, if indeed such were the directives of this court? In a nutshell, I do not believe in the excuse given by counsel for the appellant for not being in court at 2p.m. I have found and concluded that, that was a mere fabrication of a ridiculous excuse, which, in any case, falls far below the standard of "**sufficient cause"** as used in Rule 12, **supra.**

In the cause of her submissions, Counsel for the Respondent, Ms. Malik, stated that as a matte of fact, the list of authorities which Mr. Ontweka purported to have been researching on were prepared, and submitted to the court (Registry) by Ms. Wafula, junior counsel appearing with Ontweka for the appellant, well before 12.15p.m. on 15/3/06.

From that submission, which Ms. Wafula agreed with, the averments by Mr. Ontweka were clear falsehoods.

I wish to point out that over and above the pleadings and submissions by both learned counsels in this application, I have looked at the authorities cited and relied upon by both sides, and even though I can't go into any detail for all those authorities, I need to mention that some of them stand out so clearly that they have to be brought aboard, howbeit very briefly.

at Page 332, the court of Appeal for East Africa, defined the bounds within which the court should exercise its discretion, and went on to state that there must be sufficient **reason** for the court to exercise its discretion.

In the case before me, it was submitted by the appellant/applicant that the court has power to reinstate the dismissed appeal, in the interest of justice. But as stated, **supra,** that power is fettered by evidence of sufficient cause or reason. To that end, I would be going beyond my powers to purport to reinstate the appeal in the absence of sufficient cause. I have power to re-instate (readmit), the appeal herein, if sufficient cause is shown, as per Rule 12, **supra** as to why the appellant could not appear at the court appointed time. That has not been shown, and that seals the case.

I now wish to turn to the last ground of this application, and that is the old trodden path of " **a litigant should not be victimized because of the mistakes/omissions or errors of the clients counsel."** This principle was more that belaboured by Ms. Wafula, for the Applicant. Whereas I agree with the principle it has no application in the present case.

My understanding of that principle is that it applies where the counsel is an independent contractor and his performance is not under the directions or control of the master/principa/litigant. It is applicable where the counsel's operations fall outside the purview of master/servant relationship.

In the present case, the Counsel – Mr. Ontweka, is an in-house counsel – employee of the Kenya Revenue Authority/applicant/appellant. The KRA is a corporate body, with power to sue and be sued in its own corporate name. All corporate bodies carry out their mandates through their officers/servants/employees. This is because such bodies have no hands; feet; eyes with which to act or move; no eyes with which to see or brains with which to think. They breathe; think; move and see, and have their being through their officers. They commit mistakes or carry out whatever activities through those officers/employees.

Accordingly, to aver that the mistakes of those in-house lawyers, for those corporations, should not be used to victimize those corporations, is a flawed perception of the principle. To accept such an argument is tantamount to holding that such corporations can never do wrong or commit any mistakes and the acts of their officers impose no liability on the said corporations.

I totally disagree with any efforts in support of the argument that the mistakes of Mr. Ontweka, an employee of the applicant, are not the mistakes of the applicant/appellant itself. Such a proportion is, in my view, absurd and distorts an otherwise noble principle.

For the above reasons, the Chamber Summons herein, filed on 10/4/06, is dismissed with costs to the Respondent, and against the applicant.

DATED and delivered in Nairobi, this 23rd Day of January, 2007.

O.K. MUTUNGI

JUDGE