



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 84 of 2007

COMMISSIONER OF INCOME TAX.....APPELLANT

AND

KENCELL COMMUNICATIONS LIMITED.....RESPONDENT

*(Appeal from the judgment/ruling of the High Court of Kenya at Nairobi (Mutungi, J.) dated 23<sup>rd</sup> January, 2007*

in

H. C. INCOME TAX APPEAL NO.283 OF 2005)

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. The facts giving rise to this appeal are not contested and are fairly straight forward. On 29<sup>th</sup> April, 2005 the Commissioner of Income Tax (appellant) filed an Income Tax Appeal before the High Court. It was an appeal from the decision of the Local Committee for Nairobi dated 16<sup>th</sup> March 2005, Assessment No.098520010001/4 year of Income 2001, against **Kencell Communications Ltd** (respondent). The appeal was filed pursuant to Rule 4 of the Income Tax Appeals to the High Court Rules.

2. In the memorandum of appeal that was filed by the appellant in the High Court, they raised the following grounds:

1. ***The Local Committee erred in Law and in fact in holding that a one-off payment for fifteen year licence fee is revenue expenditure deductible.***
2. ***That the Local Committee erred in Law and in fact in failing to take into account that the license fee was for the purchase of a right to access the Kenya Telecommunication market through allocation of a GSM spectrum or a band which is equivalent to the purchase of a right.***
3. ***That Local Committee erred in Law and fact in not examining all the material and evidence presented to it.***

***Pursuant to Rule 5 of the Income Tax (Appeals to the High Court) Rules the Appellant.***

(a) ***A copy of the Notice of the decision of the Local Committee dated 18th March 2005 marked "A".***

(b) *A copy of Notice of Intention to Appeal to the High Court dated 29<sup>th</sup> March 2005 marked “B”.*

(c) *Statement of Facts marked “C”.*

3. The appeal came up for hearing before Mutungi, J. on 15<sup>th</sup> March, 2006. However, in the absence of Mr. Ontweka, the appellant's counsel, the appeal was dismissed for non attendance under Rule 11(1) of the Income Tax Appeals (to the High Court Rules) with costs to the respondent. On the 10<sup>th</sup> April, 2006, Mr. Ontweka filed a chamber summons under Rules 12 and 17 of the Income Tax Appeals (to the High Court Rules) among other provisions of the law. He sought for an order to set aside the order made on 15<sup>th</sup> March, 2006 dismissing the applicant's income Tax Appeal No. 283 of 2005. The application was supported by his affidavit and that of **James Ojee** a Senior Assistant Commissioner in charge of Conduct with the appellant. The reasons deposed to in the two affidavits may be briefly highlighted as: -

Ø *The appeal was dismissed despite the presence of written submissions on record that included all the arguments on facts, law and decided cases.*

Ø *The appeal was dealing with legal questions which touch on matters of public importance in taxation of mobile service sector.*

Ø *The dismissal of the appeal would have an effect on the entire sector especially on the treatment of the initial licence vis-a-vis access communication spectrum.*

Ø *The order dismissing the appeal exposed the appellant to application for refunds of taxes especially paid by tax payers in the same sector on the licence fee.*

Ø *The learned judge had the inherent power to re-admit the appeal for ends of justice and to give the correct interpretation of the Income Tax Act.*

Ø *The appeal had raised issues of significant tax ramifications for the mobile service industry as other players in the industry had already paid taxes.*

Ø *Dismissing the appeal without making a fair determination on merit of the fundamental tax issue affecting the sector specifically with regard to the tax treatment of initial licence fee was to leave the mobile sector without a definitive guide on the matter.*

4. On the part of the respondent, the application for reinstatement of the appeal was opposed. The respondent relied on the affidavit of Ms. Malik, learned counsel for the respondent, and Ms. Alice Kingori their legal officer. Ms. Malik deposes the following from paragraph 4 – 6 of the affidavit which are pertinent to this appeal;-

*“4. That on 15<sup>th</sup> March 2006, Honourable Mr. Justice Mutungi informed us that he would hear the matter at 2.00 p.m. As Mr. Ontweka and I were leaving his chambers, the Honourable Judge told us to consider the Section of the Income Tax Act referred to in paragraph 8 of Mr. Ontweka’s affidavit, however he did not ask us to undertake further research nor did he specify what point he wished to be addressed on.*

*5. That on 15<sup>th</sup> March 2006, Mr. Ontweka walked in, just as we were preparing to leave court after Honourable Mr. Justice Mutungi had dismissed the appeal but I did not see him carrying the bundle of authorities or the list of authorities annexed to his affidavit or annexure “DOO1”*

*6. That the manner in which the applicant has treated this appeal has been very dilatory as it only served us with submissions on 14<sup>th</sup> March, 2006, in court when the appeal was due to come up for hearing. The onus is upon the appellant to file and serve its submissions first however it only filed them after the respondent had filed its submissions.”*

5. Ms. Kingori's dispositions merely reiterated the averments made by Ms. Malik save for the following:

***“That in reply to paragraph 5 of Mr. Ojee’s affidavit, I wish to state that the respondent treated the payment for the licence as revenue expenditure and amortized it over the period of 15 years. I also wish to state that it is internationally accepted that licence fees is revenue expenditure, therefore deductible and the deductions can be imortised over a period of time. The applicant operates in the following countries in Africa and in all these countries the payment for the licence fees has been treated as revenue expenditure and therefore deductible; Uganda, Tanzania, Burkina Faso and Congo Brazzaville, Congo DRC, Madagascar, Sierra Leone, Zambia, Gabon and Niger.”***

6. After hearing the respective counsel, the learned Judge dismissed the application to reinstate the appeal by a ruling delivered on 23<sup>rd</sup> January, 2007 which order has now provoked this appeal. In dismissing the application the learned Judge observed the following in part of his ruling:

***“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 2.00 p.m. when the appeal was called on for hearing...”***

***In the Commissioner of transport v the AG (Uganda) & another [1959] EA 329 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...***

***I now wish to turn to the lost ground of this application, and in the old trodden path of “a litigant should not be victimized because of the mistakes/omissions or errors of the clients’ counsel... Whereas I agree with the principle it has no appreciation 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 central of the Master/Principal/Litigant. It is applicable where the counsel’s operations fall outside the purview of Master/Servant relationship...”***

7. Being aggrieved by that ruling, the appellant appealed and raised a total of 9 grounds of appeal to wit:

1. The learned judge erred in law and in fact in holding that the reasons given by counsel for the appellant for arriving late in court on 15th March, 2006, did not constitute sufficient cause within the meaning of Rule 12 of Income Tax (Appeals to the High Court) Rules.
2. The learned judge gravely misdirected himself when he held that the appellant's counsel did not appear in court for the hearing of the appeal.
3. The learned judge wrongly exercised his discretion when he based his decision on his own personal opinion that it could not take counsel for the appellant more than 5 minutes to walk from Times Tower to the Court.
4. The learned judge failed to take into account the fact that counsel for the appellant arrived in court within two minutes after the commencement of the hearing, well before the order of dismissal was made, and remained in court right up to the end of the proceedings.
5. The learned judge erred in law and in fact in holding that the reason given by counsel for arriving late in court was fabricated and/or incredible.
6. The learned judge misdirected himself in disregarding the public interest element in this matter.
7. The learned judge misunderstood and misconstrued the true meaning and purport of Rules 11 and 12 of the Income Tax (Rules to the High Court) Rules.
8. The learned judge erred in distinguishing the position of an in house counsel as opposed to an external

counsel in considering whether mistake of counsel should be visited upon his client.

9. The learned judge erred in failing to invite counsel for the appellant who was present to address the court and thereby causing a grave miscarriage of justice.

8. Both parties filed very comprehensive written submissions and lists of authorities. When the appeal came up for hearing they also made oral submissions and highlighted those submissions. On the part of the appellant, Mr. Gatonye learned counsel, defended the appellant's right of appeal which stems from the provisions of Section 91 of the Income Tax Act. That Section gives an aggrieved party a right of appeal in respect of an order or decision made on appeal. He referred to the case of **Commissioner of Income Tax v Menon [1985] KLR page 104**. The Court of Appeal was determining an issue of whether an appeal lies to the Court of Appeal after a second appeal to the High Court against the decision of the Local Committee. The Majority decision, Madan and Hancox JJA (as they then were) held the Court of Appeal had jurisdiction to hear an appeal. (See the observations by Madan JA: -

***“I have no hesitation in repeating what I held in Munene. I referred to the following passage in the judgment of Lockhart – Smith JA in Sheikh Nordin Gulmohamed v Sheikh Bros Ltd [1951] 18 EACA 42 at page 48, which SpryVP impliedly seems to accept in Sanga v Baya (supra)***

***“...It must, in my opinion, now be regarded as well settled that once a matter has arrived at an established court by way of appeal, the ordinary legislation dealing with further appeals from that court must be held to apply, unless excluded by special legislation.”***

9. The second issue argued by Mr. Gatonye was that the learned Judge disregarded important matters such as that counsel had not failed to attend court altogether; that he was merely late for about 20 minutes which is excusable. Mr. Ontweka found Ms. Malik for respondent still in court, although the judge had made the order it was still in session. The learned Judge had jurisdiction to exercise his discretion and to set aside the order dismissing the appeal for ends of justice. He ignored essential matters such as that the matter was of general public interest affecting a cross-section of mobile service providers and the government. Further it was argued that it is an overriding objective in the administration of justice that cases should be heard and decided on merit. The learned Judge was also faulted for making a distinction between a counsel employed in-house and one in private practice, and also for failure to consider the written submissions that were on record which could have been used to write a Judgment based on the merit of the appeal instead of resorting to the drastic action of dismissing the appeal.

10. On the part of the respondent, Ms. Malik submitted that no sufficient cause has been shown for the court to interfere with the learned Judge's order dismissing the application to reinstate the appeal. The explanation given by Mr. Ontweka was misleading, as he stated he appeared in court two minutes while the record shows the court waited for 23 minutes before dismissing the appeal and he appeared when the court was rising up. Mr. Ontweka's explanation that he was arranging transport from Times Towers to come to court was treated with the contempt it deserved because it could only have taken him 5 minutes to walk to court. It also turned out he was not late while arranging a list of authorities as they had been filed earlier. Citing the well-known case of **Mbogo & Another v Shah EALR 1968 page 13**, she emphasized the known principle that a Court of Appeal should not interfere with the exercise of the trial Judge's discretion unless it is satisfied that the Judge in exercising his discretion misdirected himself in some matters and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge is clearly wrong in the exercise of his discretion and that as a result there has been mis-justice. Further arguments were that the appeal did not raise any matter of public interest. The issue was whether the income, the subject matter in dispute was capital or expenditure which is a daily fare before the Custom's Tribunal and does not affect the general public. Lastly it was argued that there is no appeal before us as the appellant did not seek leave to appeal as spelt out under Order 42 of the Civil Procedure Act.

11. We have set out albeit briefly the background of this appeal and the summary of the learned counsel's submissions for the parties. What was before Mutungi, J. was essentially an application to set aside the dismissal order and reinstate the appeal for hearing. The first issue for us to determine is

whether there is a valid appeal before us for want of leave to file an appeal. Section 20 of the Income Tax Act Cap. 470 makes provisions of the extent to which the Rules of Civil Procedure apply in respect of the matters covered by the Cap 470. The Civil Procedure Rules apply to appeals made under the Income Tax Act. Order 43 Rule(1) of the Civil Procedure Rules, permits appeals as of right from decisions of the High Court given under Order 14B Rule 8 (currently Order 12 Rule 7) which deals with setting aside judgments as a consequence of non-attendance. Also under Section 75(1) of the Civil Procedure Act, an appeal lies as of right from any order. The order being appealed against is the one seeking to set aside the dismissal order and to reinstate the appeal.

Further, Section 91A of the Income Tax Act applies to appeals from the High Court to the Court of Appeal. We are satisfied that an appeal lies to the Court of Appeal against an order or decision notwithstanding the matter was not heard and determined on merit and the order made by **Mutungi J.** is appealable as a matter of right.

12. The next issue is whether the reasons advanced by Mr. Ontweka, regarding his late appearance in court during the hearing of the appeal constitutes sufficient cause within the provisions of Rule 12 of the Income Tax (Appeals to the High Court) Rules. A Court can dismiss an appeal if the appellant fails to attend Court during the hearing of an appeal. Rule 12 provides for reinstatement of such an appeal on such terms as to costs or otherwise if the appellant can show he was prevented by any sufficient cause from appearing when the appeal was called out.

13. The chronology of the events that happened in court is largely not disputed. Mr. Ontweka counsel for the appellant appeared in court late; about 23 minutes late, and that by that time the appeal had been called out and was dismissed for nonattendance. An application to reinstate it was also dismissed for reasons that sufficient cause was not shown to warrant the exercise of the learned Judge's discretion.

14. We agree with the principles set out in the case of **Shah v Mbogo [1967] EA 116**; that the court's discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from accident, inadvertence or inexcusable mistake or error but not to assist a person who has deliberately sought to obstruct or delay the course of justice. We have considered the reasons that were offered by Mr. Ontweka regarding his lateness in court with anxious minds as we have asked ourselves whether the lateness constituted an excusable mistake, an error of judgment regarding counsel's own time management or was it meant to deliberately delay the cause of justice. Mr. Ontweka did not fail to attend Court all together; he made it to court on the day of the hearing, and made an application to reinstate the appeal without undue delay.

15. In the case of **Belinda Murai & others vs Amos Wainaina [1978] LLR 2782 (CALL) Madan JA** (as he then was) was at his best legal wit when he explained what constitutes a mistake as follows:

***“A mistakable is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...”***

16. That observation helps us also to resolve the issue where the learned Judge made a distinction between counsel in private practice and one who is employed in house as he justified the reasoning that a mistake of an in house lawyer cannot affect his client the same way as a lawyer in private practice. That was obviously misdirection on the part of the learned judge. Counsel working as in-house lawyer or in private practice just like all the parties who come to Courts of law are entitled to equal treatment. A mistake by counsel either in private practice regarding a mistake in time management whether he is an in-house lawyer or in private practice will impact on their clients the same way. In this case the appellant was denied justice on account of its counsel's mistake, a mistake that was based on poor management of

time and was pardonable as the inconvenience and time lost could be compensated with costs.

17. Another central issue that was not considered by the Judge was that counsel for the appellant had filed written submissions which could have assisted the Court to retire and write a judgment and determine the appeal on merit. We appreciate the learned Judge was exercising his discretion to ensure the ends of justice and to protect the court process and rules of procedure from being abused. However in doing so, refusal to hear the appellant on account of counsel's mistakes in our view amounted to an injustice. The right of hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the Court process from abuse that would amount to injustice and at the end of the day there should be proportionality. We are of the view that the learned Judge misapprehended the reasons given for non-attendance which arose as a result of a mistake by counsel.

18. In the case of *Phillip Chemowolo & Another v Augustive Kubede [1982-88] KAR 103 at 1040 Apalo JA* (as he then was) posited as follows:

***“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”***

In this case, the inconvenience caused to the respondents by the delay caused by counsel's lateness can be compensated with costs. After all, nowadays pendulums have swung and the courts have shifted to disregard matters of technicality as they aim to administer substantive justice. The inclusion of the oxygen principles in the law as the overarching objectives in the administration of justice provides some guide.

19. We think we need not belabor the point on whether this was a matter of general public interest or as Ms. Malik puts it, a daily fare over whether the disputed sum was capital or expenditure. Suffice it to say, the dispute involved a colossal sum of money, such that shutting the doors of justice to the appellant and condemning it unheard, would deny it the fundamental right of being heard. In our own appreciation of matters before the learned Judge, the reasons advanced by Mr. Ontweka were plausible and in the interest of justice, the appeal should have been reinstated for hearing. For the aforesaid reasons the learned Judge was clearly wrong in the exercise of his discretion which resulted in an injustice.

20. Accordingly, we allow the appeal, set aside the ruling dated 23<sup>rd</sup> January, 2007. The appeal No. 283 of 2005 to be heard on merit. We however award the costs to the respondent for the application dated 7<sup>th</sup> April, 2006. Costs of this appeal to abide the outcome of the appeal.

**Dated and delivered at Nairobi this 1<sup>st</sup> day of March, 2013.**

**J. W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**