



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, ONYANGO OTIENO & VISRAM, J.J.A)**

**CIVIL APPEAL (APPLICATION) NO. 68 OF 2007**

**BETWEEN**

**WESTMONT POWER (KENYA) LTD .....RESPONDENT/APPLICANT**

**AND**

**SEBHAN ENTERPRISES LTD .....APPELLANT/RESPONDENT**

*(An application to strike out a notice of appeal from the ruling and decree of the High Court of Kenya at Nairobi (Azangalala J.) dated 13<sup>th</sup> March, 2006*

**in**

**H.C.C.C. NO. 239 OF 2005)**

**\*\*\*\*\***

**RULING OF THE COURT**

On 13<sup>th</sup> March 2006, the superior court (Azangalala, J.) delivered a ruling in HCCC No. 239 of 2005 (O.S) in which the learned Judge upheld a preliminary objection that was raised by the respondent/defendant and struck out the originating summons dated 6<sup>th</sup> May, 2005 with costs to the respondent/defendant – *Westmont Power (Kenya) Limited*. The appellant *Sebhan Enterprises Limited* felt aggrieved by that order. It filed notice of appeal timeously on 27<sup>th</sup> March 2006 and vide a letter dated 22<sup>nd</sup> March 2006 received at the Court Registry on 27<sup>th</sup> March 2006, addressed to the Deputy Registrar of the High Court, it sought certified copies of ruling and proceedings. After several letters between the appellant on that issue of the supply of the certified copies of rulings and proceedings, the certificate of delay issued by the Deputy Registrar and dated 13<sup>th</sup> March 2007, shows that the certified copies of the proceedings were collected by the appellant on 15<sup>th</sup> February 2007. This Court has stated on several occasions that it is not necessary for a party to obtain certified copies of the proceedings for purposes of mounting an appeal. Be that as it may, having received the certified copies of the proceedings on 15<sup>th</sup> February 2007, the appellant filed Civil Appeal No. 68 of 2007 on 20<sup>th</sup> April 2007. The respondent in the appeal was thereafter served with the record of appeal. On being served with the record of appeal, the respondent through its advocate, Messrs. A. R. Kapila & Company, filed notice of motion, now before us, dated 18<sup>th</sup> May 2007 and filed on 21<sup>st</sup> May 2007. It was filed within 30 days of the date of service of the

record upon them. The notice of motion is filed pursuant to **rules 42 (1)** and **80** of the Court of Appeal Rules and seeks:-

***“That the notice of appeal herein dated 27<sup>th</sup> March 2006 and the record of appeal filed on 20<sup>th</sup> April 2007 be struck out and the costs of and incidental to this application be paid by the respondent to the applicant.”***

The grounds upon which the application was made are that:-

***“1. The appeal has been lodged without leave outside the period of time limited under rule 81 (1) of the Court of Appeal Rules made under section 5 of the Appellate Jurisdiction Act and therefore is incompetent.***

***2. The decree has not been extracted in accordance with Order XX, Rule 7 of the Civil Procedure Rules and is therefore invalid and renders the appeal incompetent.”***

The application is supported by a lengthy affidavit sworn by Sheetal Kapila, part of which we do not find necessary. There is no reply to the affidavit and when the matter was called out before us for hearing on 14<sup>th</sup> July 2010, the appellant/respondents advocate did not appear before us although the hearing date was taken by consent of both parties. Miss Nagi, the learned counsel for the respondent/applicant in her submission, took us through the exhibits and urged us to strike out the appeal, contending that even if it was conceded that the appellant/respondent collected the copies of the proceedings on 15<sup>th</sup> February 2007 as stated in the certificate of delay, still the appeal was filed out of time and without leave of the court. She stated further that the decree, though proper, was not extracted in compliance with the requirements of **Order XX, Rule 7** of the Civil Procedure Rules as the advocates for the respondent/applicant were not involved as required by the provisions of that Rule.

We have anxiously considered the notice of motion, the grounds upon which it is based, the affidavit in support of it, the submissions of Miss Nagi and the law. As Miss Nagi confirms that the decree in the record of appeal reflects the ruling of the superior court, we shall not take any precipitate action based on the allegation that the respondent’s advocates were not involved in its extraction, much as we deplore that omission. We feel, those are the matters that can be cured by the application of the overriding objectives spelt out by the incorporation of **section 3A** and **3B** into the Appellate Jurisdiction Act. We will leave that aspect at rest.

However, as to the question of whether the appeal was filed out of time and without the leave of the court, we are of the view that the respondent/applicant’s counsel cannot be faulted in her submission. We need not go into all the various correspondence that ensued between the Deputy Registrar and the appellant’s/respondent’s advocates as to when the certified copies of proceedings were ready for collection. Certified or uncertified, the position as demonstrated by the Certificate of Delay which has not been challenged, is that the copies of the proceedings were collected on 15<sup>th</sup> February 2007. The record of appeal was filed on 20<sup>th</sup> April 2007. That was 63 days after receipt of the copies of proceedings. **Rule 81 (1)** states that an appeal shall be instituted by lodging in the appropriate Registry within sixty days of the date when the notice of appeal was lodged. The record was thus filed over sixty days after the copies of the proceedings were received. Further and in any event, the copies of the proceedings were ready for certification on payment of only Ksh.60/= by 29<sup>th</sup> September 2006 according to a letter dated 29<sup>th</sup> September 2006 addressed to the appellant’s/respondent’s advocates, but no action was taken till 22<sup>nd</sup> January 2007. Lastly, most of the delay was caused by the appellants bespeaking certified copies of the proceedings which, as we have stated above, were not necessary for mounting a successful appeal. The appellant/respondent cannot under those circumstances take any advantage of the proviso to **rule 81 (1)** of this Court’s Rules.

In the event, Civil Appeal No. 68 of 2007 is incompetent. It is struck out with costs to the respondent which is the applicant in this notice of motion.

*Dated and delivered at Nairobi this 30<sup>th</sup> day of July, 2010.*

**P. N. WAKI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**