



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 128 OF 2006

BETWEEN

COMMISSIONER OF INCOME TAX APPELLANT

AND

WESTMONT POWER (K) LTD. RESPONDENT

(Appeal from the decision of the High Court of Kenya at Nairobi (Visram, J.) dated 30th January, 2006

in

HIGH COURT OF KENYA INCOME TAX APPEAL NO. 626 OF 2002 (CONSIDERED TOGETHER WITH CIVIL APPEAL NO. 627 OF 2002)

RULING OF THE COURT

The applicant, **WESTMONT POWER (K) LTD.**, through its advocate filed this application by way of notice of motion expressed as having been brought under **Rules 42, 74, 80** and **81** of the Court of Appeal Rules seeking the following orders:-

- “1. The Appeal herein to be struck out;**
- 2. The purported Notice of Appeal dated 7th February, 2006 (appearing on page 2 of the Record of Appeal) be struck out; and**
- 3. The Appellant (Respondent be ordered to pay the Respondent) Applicant the costs of both the Appeal and this motion.”**

The application is brought on the following grounds:-

- “a) The appeal has been filed out of time and is therefore incompetent;**

b) The purported Notice of Appeal dated 7th February, 2006 (appearing on page 2 of the Record of Appeal) is defective;

c) The Certificate of Delay issued on 20th June, 2006 (appearing on page A of the Record of Appeal) is irrelevant and of no consequence).

In addition to the foregoing grounds, the application is supported by the affidavit of one, Robert K. Sutherland who describes himself as the station Manager of Westmont Power (K) Limited. In the said affidavit, Mr. Sutherland depones, inter alia:-

“2. THAT I am advised by the Respondent/Applicant’s Advocate, Miss Rubeena Dar, which advice I verily believe to be true, that the Appeal herein has been filed out of time and is therefore incompetent and ought to be struck out with costs for the reason that the appellant/Respondent sought certified typed copies of the appeal proceedings before the High Court by way of a letter dated 21st February, 2006 (appearing on page 11 of the Record of Appeal) addressed to the Deputy Registrar of the High Court, but a copy of the said letter was not sent to the Respondent/Applicant or its Advocates on record and in the circumstances the appellant/respondent is not allowed, by virtue of the provisions of rule 81(2) of the Court of Appeal Rules to exclude, in computing the time within which the appeal was to be instituted, such time as it took the registrar of the High Court to prepare and deliver the said copies to the Appellant/Respondent.

3. THAT I am further advised by the Respondent/Applicant’s advocate, Miss. Rubeena Dar, which advice I verily believe to be true, that the appellant/respondent’s purported Notice of Appeal dated 7th February, 2006 (appearing on page 2 of the Record of Appeal) is defective and ought to be struck out for the following reasons:

a) Contrary to rule 74(1) of the Court of Appeal Rules, the purported Notice of Appeal does not appear to have been lodged with the Registrar of the High Court as the same neither contains a note by the Registrar to this effect nor bears the stamp usually affixed by the High Court Registry officials at the time of receiving such process.

b) Contrary to rule 74(3) of the Court of Appeal Rules, the purported Notice of Appeal;

(i) Does not indicate whether the appellant/respondent intends to appeal against the whole of or part only of the decision of the High Court;

(ii) Does not state the address for service of the appellant/respondent; and

(iii) Does not state the names and addresses of all persons intended to be served with copies of the notice.

c) Contrary to rule 74(6) of the Court of Appeal Rules, the purported Notice of Appeal has been drafted in an unusual and defective form that is foreign to the rules and procedures of this Honourable Court.

4. THAT I am further advised by the Respondent/Applicant’s advocate, Miss Rubeena Dar, which advice I verily believe to be true, that for the reasons set out in paragraph 2 above, the Certificate of Delay issued on 20th June, 2006 (appearing on page A of the Record of Appeal) is irrelevant and of no consequence to the Appeal herein as rule 81(2) of the Court of Appeal Rules bars the appellant/respondent from relying on it to seek the exclusion of the time certified therein in computing the time within which the appeal should have been instituted.”

The application came up for hearing before us on 21st September, 2010 when Ms. R. Dar appeared for the applicant/respondent, while Mr. P.M. Matuku appeared for the respondent/appellant.

In her brief submission, Ms. Dar told us that she was relying on the affidavit of Mr. Sutherland.

In equally brief reply, Mr. Matuku conceded that a copy of the letter applying for certified copies of proceedings was not sent to the applicant's advocates as provided by the Court of Appeal Rules. Mr. Matuku also appeared to concede that the notice of appeal was not in accordance with this Court's Rules since he submitted that the notice of appeal was given under the Income Tax Act. Finally, Mr. Matuku sought to salvage his client's appeal by relying on sections 3A and 3B of the Appellate Jurisdiction Act which provide:-

“3A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

“3B. (1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

(a) the just determination of the proceedings;

(b) the efficient use of the available judicial and administrative resources;

(c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(d) the use of suitable technology.”

This application is brought on the grounds which we have already reproduced in this ruling and is supported by the affidavit of Mr. Robert K. Sutherland. We have reproduced the salient paragraphs of that affidavit. Those grounds and the highlighted paragraphs set out the reasons why the applicant seeks the striking out of the notice of appeal and the intended appeal. It is the contention of the applicant that the respondent/appellant did not comply with the Rules of this Court in so far as filing of the notice of appeal is concerned. The respondent did not challenge the applicant's contention but sought to rely on sections 3A and 3B of the Appellate Jurisdiction Act which are reproduced hereinabove.

The crux of this application is whether the respondents intended appeal can be salvaged by bringing into play **section 3A** and **3B** of the Appellate Jurisdiction Act.

Rule 74(6) of this Court's Rules provides:-

“A notice of appeal shall be substantially in the form D in the First Schedule hereto and shall be signed by or on behalf of the appellant.”

The respondent's notice of appeal as can be seen at p.2 of the record did not comply with **rule 74(6)** of this Court's Rules. This was indeed conceded by Mr. Matuku; who submitted that the notice of appeal was given as per the Income Tax Act. It was also conceded that the letter applying for certified copies of the proceedings was not copied to the applicant and or its lawyers.

Mr. Matuku asked us to consider the overriding objectives as per sections 3A and 3B of the Appellate Jurisdiction Act. In **CITY CHEMIST (NBI) & 2 OTHERS V. ORIENTAL COMMERCIAL BANK LTD.** – Civil Application No.NAI 302 of 2008 (unreported) this Court referred to the parentage of the “*overriding objective*” in England since 1999 and stated:-

“It was tailored to enabling the court to deal with cases justly which include as far as practicable:

- “(a) ensuring that the parties are on equal footing;***
- (b) saving expenses;***
- (c) dealing with the case in ways that are proportionate***
 - (i) to the amount of money involved*
 - (ii) to the importance of the case*
 - (iii) to the complexity of the issues; and*
 - (iv) to the financial position of each party;*
- (d) ensuring that it is dealt with expeditiously and fairly; and***
- (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”***

Those are not pious aspirations and the court has a duty to give them operational effect. That however, is not to say that the new thinking totally uproots well established principles or precedents in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assist litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”

It is, accordingly, clear to us that the amendment to section 3 of the Appellate Jurisdiction Act, did not, without more, come in to sweep away well known and established principles of law hitherto in place before the said amendment.

We, accordingly, uphold the applicant’s objection that the notice of appeal is incurably defective and that such defect could not in the circumstances we have outlined above, be cured by invocation of sections 3A and 3B of the Appellate Jurisdiction Act. This to our understanding means **sections 3A and 3B** of Cap. 9 cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate appeals to this Court.

In view of the foregoing, we grant this application and order that the notice of appeal and the record of appeal are hereby struck out with costs thereof and of the application to the applicant/respondent.

Dated and delivered at NAIROBI this 22nd day of October, 2010.

E.O. O’KUBASU

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JUDGE OF APPEAL

M. OLE KEIWUA

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR