IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 308 OF 2003 (UR 155/03)

KOBIL PETROLEUM LIMITED ……..………………..…………… APPLICANT

AND

CASTROL LIMITED …………………...………………..……. RESPONDENT

(Application to strike out an appeal from the ruling and order of the High Court of Kenya

Nairobi (Ransley, Comm. of Assize) dated 3rd May, 2001

in

H.C. Misc. Application No. 73 of 2001)

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RULING OF THE COURT

The record before us shows that the parties in this notice of motion dated 11th November 2003 entered into a distribution agreement sometimes in 1989. That agreement allegedly had a clause to the effect that all disputes thereunder would be resolved through arbitration. The agreement was renewed for a period of five (5) years with effect from 1st September 1994. It was further renewed after the expiry of the first renewal period but some items of renewal remained for negotiations by the parties. Later, Kobil Petroleum Limited, the plaintiff in the superior court and which is the applicant in this notice of motion, declared a dispute under the said contract and invoked the arbitration clause. However, before the arbitration award, the applicant felt aggrieved by certain actions that the defendant, Castrol Limited, which is the respondent in the notice of motion, was taking in the matter. It filed originating chamber summons dated 22nd February 2001 in the superior court by way of Miscellaneous Civil Case No. 73 of 2001. In that originating summons, the applicant sought, among others, orders that pending the publication of the final award in the arbitration between the parties, the respondent by itself or its nominees or agents or servants or otherwise be restrained by injunction from inducing or procuring third parties including the applicant's customers and suppliers to break their respective contracts with the applicant in its trade and refuse to perform or further perform the same; that the respondent be restrained from committing or continuing to commit breaches of the distribution contract from Castrol branded products renewed or alternatively extended on 1st September 1999 and that the respondent be compelled by a mandatory injunction to perform all its obligations under the same contract. That application was placed before Ransley, Commissioner of Assize (as he then was) for certification of urgency and of course for other interim orders of urgent nature. The learned Commissioner of Assize heard submission from Mr. Oyatsi, the learned counsel for the applicant, and upon that ex-parte hearing the learned Commissioner of Assize made orders as follows:

"Order. The matter is certified as urgent. The application to be heard interpartes on the 6th March 2001 at 9.00 a.m. As a *prima facie* case has been made out to grant a temporary injunction, I will grant prayer (sic) 1, 3, 4 & 5."

Thereafter, the matter later proceeded before the same learned Commissioner of Assize for interpartes hearing on 6th March, 2001. The respondent and its advocates were not present but the learned Commissioner of Assize ruled that they were aware of the hearing date and ordered the hearing to proceed. After hearing the applicant's counsel and after ruling on whether Kenya Shell which was apparently an interested party should have been served or not, the court formally confirmed the orders it made on 22nd February 2001.

The respondent in this application, Castrol Limited, which as we have stated, was the respondent in that miscellaneous application, was not amused. Vide an application by way of chamber summons dated 21st March 2001 filed in the superior court, it sought an order to set aside the order made on 22nd February 2001. Several grounds were cited in support of that application one of which was that no agreement in writing signed by the parties within the powers of **section 4** of the Arbitration Act existed. Other grounds attacked the jurisdiction of the superior court to entertain injunction applications and the validity of the service of the application dated 22nd February 2001 upon the then respondent and further, it attacked the exercise of the Commissioner of Assize's discretionary powers on the matter. That chamber summons dated 21st March, 2001 was certified urgent and was thereafter, as would be expected (it being an application to set aside an order made by Ransley, Commissioner of Assize) placed before Ransley, Commissioner of Assize, for hearing. After what appears to have been a lengthy hearing, the learned Commissioner of Assize, in a ruling dated and delivered on 3rd May 2001, dismissed the application with costs. The respondent still felt aggrieved with that ruling and filed a notice of appeal dated 10th May 2001. That was followed by a record of appeal which was filed on 27th November 2001. It was Civil Appeal No. 303 of 2001. The memorandum of appeal set out fifteen (15) grounds of appeal. For what will later be clear in this ruling, we set down the first seven (7) grounds in that memorandum of appeal. They read as follows:

"1. The Commissioner erred in holding that there was an arbitration agreement in existence.

2. The Commissioner should have held that the fact that the respondent had started arbitration proceedings was irrelevant to whether there was an arbitration agreement since the plea that the arbitrator does not have jurisdiction has to be raised not later than the submission of a statement of defence under the Arbitration Act 1995 section 17(5) and that the stage had not been reached in the arbitration.

3. The Commissioner erred in holding that there was a suit in existence within the meaning of the Civil Procedure Act and Order 39 of the Civil Procedure Rules so as to allow relief to be given under that order.

4. The Commissioner erred in holding that the proceedings were properly served, the appellant being admittedly a company incorporated in England and with no place of business in Kenya and there being no order for service out of the jurisdiction under Civil Procedure Rules Order 5 rule 21 or 21A.

5. The Commissioner erred in holding that service on an advocate who had not received instructions to accept service of proceedings was good service.

6. The Commissioner should further have held that it could not proceed consequent upon such service by reason of the principle of Order 5 rule 9(2) Civil Procedure Rules.

7. The Commissioner erred in holding that the original application and documents were properly served on the advocates, these having been returned to the respondent's advocates, and not having returned with an indication that the service would be relied upon."

As we have stated, the above are seven out of the fifteen grounds of appeal set out in the memorandum of appeal. We have decided to reproduce them and not all as we feel the purpose of part of this ruling will be served by those grounds although a look at all the grounds would also lead to the same answer.

That record of appeal was served upon the applicant in this application. Ms Malik, the learned counsel for the respondent, says from the bar that it was served in November 2001. Mr. Oyatsi has not disputed that assertion although the exact date is not certain. The fact remains that it was served sometimes before the end of the year 2001. On 13th November 2003, the applicant lodged this application by way of notice of motion dated 11th November 2003 at the registry. The notice of motion is seeking two orders as follows:

"1. That Civil Appeal No. 303 of 2001 be struck out with costs to the applicant.

2. That the costs of this application be provided for."

Only one ground was set out in support of the application. It was that:

"The said appeal does not lie as this Honourable Court has no jurisdiction to hear the appeal."

There is an affidavit in support of the application sworn by Mr. George Njoroge Mwangi, the Assistant Managing Director of the applicant.

We have perused and considered that application. In his submission before us in support of the application, Mr. Oyatsi stated, if we understood him well, that under **section 39** of the Arbitration Act, this Court has jurisdiction to entertain an appeal, subject to the provisions of that section, on matters of law only. He stated that in the application that was before Commissioner Ransely, which is the subject of Civil Appeal No. 303 of 2001, the only matter of law that arose was whether there was an arbitration agreement between the parties so as to give the applicant the right to invoke arbitration under the contract. He contended that that matter of law had been decided upon by the arbitrator and was thereafter decided upon by Commissioner Ransley. In his view, under the provisions of **section 17(1),** that decision by the superior court was final on that issue and as all other matters were on the discretion of the learned Commissioner of Assize as they were matters of fact, there is no more appeal for this Court to decide upon and thus it has no jurisdiction and hence this application to strike out the appeal.

In response, Ms Malik raised two points in opposition to the application. First, she submitted that the application was incompetent for failure to comply with the requirements of the proviso to **rule 80** of the Court of Appeal Rules as the record of appeal was served upon the applicant sometimes in the year 2001 – presumably in November 2001 and in any case before the end of the year 2001 but the application before us was filed on 13th November 2003, well after the expiry of thirty (30) days from the date of service of the record of appeal upon the applicant which is the respondent in the appeal. Her second point is that the appeal raises not only the question of whether or not there was a valid arbitral agreement in existence but also other matters such as whether it was a proper exercise of discretion for the Commissioner to hear the application that was before him ex-parte whereas there was no evidence of a valid service upon the other relevant party and other matters which she felt raised matters of law which clearly showed this Court had jurisdiction to entertain the appeal.

In response to the first point raised i.e. whether this application is competent, it having been filed after the expiry of thirty days after service of the record of appeal upon the applicant, Mr. Oyatsi, while not disputing Ms Malik's assertion that the application was filed long after the expiry of the thirty days provided by the proviso to **rule 80** of this Court's Rules, maintained that that rule does not apply to application such as is before the Court. He did not give any reasons for that stand.

We have considered the application, the grounds for it, the affidavit in support of it, the submissions by both learned counsel and the law. We have no doubt in our mind that the application by way of the notice of motion dated 11th November 2003 is incompetent. **Rule 80** together with the proviso to it is clear. It

states:

"80. A person affected by an appeal may, apply to the Court to strike out the notice of appeal, or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty (30) days from the date of service of the record of appeal on the respondent."

As we have stated, Ms Malik has told the court that the record of appeal was served upon the applicant towards the end of the year 2001. That statement has not been denied by Mr. Oyatsi who in his reply merely stated that the proviso to **rule 80** does not apply to the matter before us but did not state why it does not apply to this notice of motion. He, in effect, conceded that the record of appeal was served upon the applicant's advocates before the end of the year 2001. This application was filed on 13th November 2003, well over one year after the service of the record upon the applicant. The only ground for the application is that no appeal lies as this Court has no jurisdiction to hear it. That falls squarely within **rule 80** of this Court's Rules as set out above. On that ground alone, this application should have been struck out. We note, however, from the memorandum of appeal, part of which we have reproduced above, and we agree with Ms Malik, that the issue of existence or non existence of a valid arbitral agreement which could be invoked to take the matter to arbitration was only one issue in the appeal. There were other issues which, in our view, are matters of law such as the principles guiding the application of discretion by courts and the principles upon which this court would interfere on such application on appeal. These are, in our view, matters of law and were raised in the appeal.

In the result, this application lacks merit. It is dismissed with costs to the respondent in the application which is the appellant in Civil Appeal No. 303 of 2001.

Dated and delivered at Nairobi this 15th day of February, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

…………………………

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

………………………….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR