



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 30 of 2006

QUASAR LTD. APPELLANT

AND

KOBIL PETROLEUM LTD. RESPONDENT

(Appeal from the decision and order of the High Court of Kenya at Nairobi Milimani Commercial Court (Kasango, J) dated 27th April, 2005

In

H.C.C.C. No. 412 of 2003)

RULING OF THE COURT

Kobil Petroleum Limited, the Applicant herein, has brought the motion, the subject matter of this Ruling, under **Rules 42(1)** and **80** of the Court of Appeal Rules, praying for orders that the notice of appeal dated 10th May, 2005, and the record of appeal filed pursuant to that notice, i.e. Civil Appeal No. 30 of 2006, be struck out. The notice of appeal and the record of appeal sought to be struck out were filed by Quasar Limited, the respondent to the motion for striking them out. The applicant listed, on the face of its motion, three grounds for striking out the notice of appeal and the record of appeal. These were that:-

(a) the notice of appeal has not been served within the time extended by this Honourable Court;

(b) the appeal has not been filed within the time limited by Rule 81 of the Court’s Rules;

and

(c) that the order on page 701 of the record of appeal, i.e. the order appealed from, does not accord with the Ruling delivered by the superior court on 27th April, 2005.

Mr. Esmail, learned counsel for the Applicant, abandoned the first ground listed herein and we need not concern ourselves with it.

On ground two complaining that the appeal was not filed within the time limited by **Rule 81** of the Court’s Rules, Mr. Esmail argued that under the provisions of **Rule 81**, the respondent’s letter to the Registrar of the High Court asking for proceedings should have been written within thirty days of the

delivery of the ruling appealed against and that a copy of the letter should have been sent to the applicant within a reasonable time. Mr. Otieno, for the respondent, conceded that a copy of the letter was sent to the advocates for the applicant after some eight months. So Mr. Esmail contended that even though the Rules of the Court do not set a time limit within which the copy of the letter is to be sent to a respondent to an intended appeal, yet **section 58** of the Interpretation and General Provisions Act, **Chapter 2** of the Laws of Kenya applied. That section provides:-

“Where no time limit is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises.”

Basing himself on this provision, Mr. Esmail submitted that because the copy of the letter bespeaking the proceedings was not sent to him without unreasonable delay, the notice of appeal and the appeal itself became incurably defective, particularly in view of the fact that the applicant had abandoned its application to extend the time within which to lodge the record of appeal. Mr. Esmail, however, did not provide us with any authority in which an appeal has been held to be incurably defective on the ground that the letter bespeaking the copy of proceedings was not sent to a respondent within a reasonable time. We have absolutely no intention of introducing a new head for striking out appeals; there are already many other grounds for doing so and we see no compelling reason for introducing the one Mr. Esmail is asking us to introduce. We reject it.

On ground three, we were told that there were amendments to the application on which the superior court made the order pursuant to which the appeal is brought and that those amendments which were made by consent are not reflected in the order appealed against. There is no substance in this contention as it is to be noted that before that order was perfected, it was sent to Mr. Esmail to approve. He did not raise the complaints now raised before us, and in our view the order appealed against sufficiently agrees with the orders made by the superior court.

With the greatest respect to Mr. Esmail the motion to strike out the appeal is devoid of any merit and we order that it be and is hereby dismissed.

On costs, the respondent itself took some eight months before sending a copy of the letter in issue to the advocates for the applicant. The respondent offered no valid reason why that was allowed to happen and that inaction must have, in a large measure, provoked the motion which we have dismissed. In those circumstances, the order on costs which commends itself to us and which we make shall be that the costs of the dismissed motion shall be costs in the appeal. Those shall be our orders.

Dated & delivered at Nairobi this 17th day of November, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.