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IN THE PRIVY COUNCIL

No. 23 of 1961

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

THE CITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

19 JUN 1964

25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N

DORIO LUCIO VINCENZINI Appellant

- and -

THE REGIONAL COMMISSIONER
OF INCOME TAX Respondent

74042

CASE FOR THE APPELLANT

- | | | |
|----|--|--------------------------------------|
| 10 | 1. This is an appeal from an Order of the Court of Appeal for Eastern Africa (O'Connor, P., Forbes, V.-P., and Crawshaw, J.A.), dated the 27th January, 1961, setting aside a Ruling and Order of the Supreme Court (Mayers, J.) dated the 17th December, 1959. | <u>Record</u> p.36 |
| 20 | 2. The matter arises upon two Memoranda of Appeal, dated the 7th October, 1959, filed on behalf of the Appellant following the service upon him of two Notices, dated the 10th July, 1959, confirming, and refusing to amend, income tax assessments on the Appellant for the years of income 1954 and 1955. respectively. | p.16 pp.5 and 7 pp.1 and 3 |
| 30 | 3. The said Memoranda of Appeal were not accompanied at the time of filing by certain documents referred to in Rule 5 of the Income Tax (Appeal to Kenya Supreme Court) Rules, 1959, namely, by a copy of the Notice of appeal against the said confirmation which had previously been duly served upon the Respondent or by a Statement of Facts, but each Memorandum was nevertheless dated and entered in the Register of Appeals by the Registrar of the Supreme Court of Kenya. | pp.5 and 7 L.N.No. 83 of 1959 |
| 4. | The point at issue, briefly, is whether the learned judge was right in holding that he had no jurisdiction, sitting in Chambers, to entertain an | |

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application by summons by the Respondent to strike out the said appeals.

No.10 of 1958

5. The relevant provisions of the East African Income Tax (Management) Act, 1958 (hereinafter called "the Act"), so far as material, are as follows :-

"110. (1) Where a valid notice of objection has been received, the Commissioner may -

.....

(c) refuse to amend the assessment.

.....

(3) Where the Commissioner -

10

.....

(b) refuses to amend the assessment, he shall cause a notice confirming the assessment to be served, either personally or by registered post, on such person."

"111. (1) Any person who has given a valid notice of objection to an assessment and, consequent thereon, has been served with a notice under sub-section (3) of section 110 may appeal -

20

.....

(b) to a judge

upon giving notice of appeal in writing to the Commissioner within 45 days after the date of service upon him of the notice under such sub-section (3)."

"113. In every appeal to a judge under Section 111 the following provisions shall apply -

(a) every person appealing shall appear before the judge either in person or by advocate on the day and at the time fixed for the hearing of the appeal:

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Provided that if it be proved to the

satisfaction of the judge that owing to absence of the Appellant from the Territories, sickness, or other reasonable cause, he is prevented from attending at the hearing of the appeal on the day and at the time fixed for that purpose, the judge may postpone the hearing of such appeal for such reasonable time as he thinks necessary;

10 (b) the appeal shall be heard in camera unless the judge on the application of the person assessed otherwise directs;

.....

(d) the judge may confirm, reduce, increase or annul the assessment or make such order thereon as he thinks fit;

.....

(h) no appeal shall lie from the decision of a judge except on a question of law or of mixed law and fact."

20 "117. (1) The appropriate authority may, in relation to each territory, make rules governing appeals under this Part (other than appeals to a local committee) and providing for the method of tendering evidence and appointing places for the hearing of such appeals and prescribing the fees to be paid on such appeals."

6. The relevant provisions of The Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959 (hereinafter called "the Rules"), so far as material, are as follows :- L.N. No. 83 of 1959

30 "3. (1) Every appeal to a Judge under the Act shall be preferred in the form of a memorandum of appeal and shall be presented to the Registrar within 75 days after the date of service upon the Appellant of -

(a) the confirming notice;"

.....

"4. The memorandum of appeal shall contain an address for service, shall be signed by the

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appellant or his advocate and shall set forth concisely under distinct heads the grounds of appeal without any argument or narrative; and such grounds shall be numbered consecutively."

"5. The memorandum of appeal shall be accompanied by -

(a) a copy of the confirming notice ... ; and

(b) a copy of the notice of appeal; and

(c) a statement, signed by the appellant or his advocate, setting out the facts upon which the appeal is based and referring to any documentary or other evidence which it is proposed to adduce at the hearing of the appeal." 10

"6. Where a memorandum of appeal and the documents referred to in rule 5 of these Rules are lodged and the filing and service fees in relation thereto paid, the Registrar shall then cause to be endorsed thereon the date of presentation, and the appeal shall be entered in the Register of Appeals in accordance with rule 8 of Order XLI of the Civil Procedure (Revised) Rules, 1948." 20

"11. (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may, subject to paragraph (a) of Section 113 of the Act, make an order that the appeal be dismissed."

"12. Where on the day fixed, or on the day to which the hearing may be adjourned, it is found that the memorandum of appeal and the documents referred to in rule 5 of these Rules have not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the same the Court may make an order that the appeal be dismissed." 30

"13. Where an appeal is dismissed under rule 11 or rule 12 of these Rules the appellant may apply to the Court to which such appeal is preferred for the re-admission of the appeal " 40

"16. Should it appear to the Court at the hearing of the appeal that evidence other than that referred to in the statement of facts of the appellant or respondent should be admitted, the Court may admit such evidence, whether documentary or oral".

"18. (1) The authority and jurisdiction of the Court under these Rules may be exercised by the Court in Chambers.

10 (2) Ancillary application to a judge, if not made at the hearing, shall be made by summons in Chambers intituled in the matter of the appeal, supported by affidavit".

20 "21. The rules determining procedure in civil suits before the Court in so far as such rules relate ... to consolidation ... and to the enlargement of time shall, to the extent to which such rules are not inconsistent with the Act or these Rules, apply to an appeal to a judge under the Act as if such appeal were a civil suit but, save as provided in these Rules, the procedure relating to civil suits before the Court shall not apply to any such appeal."

7. The relevant provisions of the Civil Procedure (Revised) Rules, 1948, so far as relevant, are as follows :-

30 Order XLI Rule 8: "Where a memorandum of appeal is lodged the Court to which such appeal is preferred then shall cause to be endorsed thereon the date of presentation, and the appeal shall be entered in a book to be kept for that purpose, to be called the Register of Appeals."

Order XI: "Where two or more suits are pending in the same Court in which the same or similar questions of law or fact are involved the Court may either, upon the application of one of the parties, or of its own motion, at its discretion, and upon such terms as may seem fit -

40 (a) order a consolidation of such suits, and
 (b) direct that further proceedings in any of such suits be stayed until further order."

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Order XLIX Rule 5: "Where a limited time has been fixed for doing an act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require

- L.N.No.83 of 1959
p.10
L.N.No.83 of 1959
p.11
p.7
p.5
p.12
L.N.No.83 of 1959
8. On the 9th November, 1959, the Respondent took out a Chambers summons purporting to be pursuant to Rule 18(2) of the Rules, applying for the proceedings relating to the year of income 1955 (Civil Appeal No. 58 of 1959) to be struck out upon the ground that they were not properly before the Court and stating that the applicant would rely upon the Affidavit of one Ramnikrai Premshanker Acharya, dated the 9th November, 1959. In the said Affidavit it was stated, inter alia, that the Memorandum of Appeal was not accompanied by a copy of the Notice of Appeal or a statement of facts as required by sub-paragraphs 5 (b) and 5 (c) of the Rules. 10
9. On the 23rd November, 1959, Mayers, J., made an Order by consent (1) consolidating Civil Appeal No.58 of 1959 (the Appellant's appeal with regard to the year of income 1955) with Civil Appeal No. 59 of 1959 (the Appellant's appeal with regard to the year of income 1954), (2) consolidating both these appeals with Civil Appeal No. 28 of 1959 in which judgment had already been reserved, and (3) recording the agreement of the parties to be bound, so far as that Court was concerned, by the decision in Civil Appeal No. 28 of 1959. 30
10. On the 17th December, 1959, Mayers J. gave a Ruling in Civil Appeal No. 28 of 1959. In that case, also, the Regional Commissioner of Income Tax had sought an Order under Rule 18(2) of the Income Tax (Appeal to the Kenya Supreme Court) Rules 1959, dismissing an appeal, inter alia, on the ground that when the Memorandum of Appeal was filed it was not accompanied by a copy of the Notice of Appeal or by a Statement of Facts. 40
11. The learned Judge stated that in so far as the preliminary objections taken in Civil Appeal No. 28 were the same as those in Civil Appeals Nos. 58 and 59 of 1959, the applications should be deemed to be consolidated but, in the event of such objections not being upheld, the applications in

the latter appeals should be relisted for argument in relation to other aspects of the matter.

The learned Judge pointed out that the Rules gave jurisdiction to the Court to dismiss appeals on two specified grounds but not on the grounds relied on in the application. He therefore concluded that Rule 18(1) gave him no jurisdiction to accede in Chambers to the application. He further ruled that the Rule 18(2) did not apply, first, because an application having as its object the final determination of a legal proceeding was not an "ancillary" application and, second, because Rule 18(2) must be read as subject to Rule 18(1) and accordingly deals only with applications which are ancillary to the authority and jurisdiction of the Court as conferred by the Rules.

L.N.No.83 of
1959
p.15(13)

p.15(39)

p.15(44)

L.N.No.83 of
1959
p.16(8)
p.16

He accordingly dismissed the applications with costs and made an Order giving effect to his decision and granting leave to appeal to the Court of Appeal.

12. On the 23rd December, 1959, the Respondent gave notice of appeal against the learned Judge's decision. The grounds mentioned in his Memorandum of Appeal dated the 12th February, 1960, were that the learned Judge had jurisdiction under the Rules and, in particular, Rule 18(2) to dismiss an appeal, that the application was an ancillary proceeding and that the Court has inherent jurisdiction to strike out proceedings which do not comply with the provisions of the law under which they purport to be preferred.

p.17

p.19
L.N.No.83 of
1959

13. The consolidated appeals came before the Court of Appeal for Eastern Africa on the 27th January, 1961, and on the same day judgment was given and an Order made allowing the appeals and setting aside the Ruling and Order of the Supreme Court.

pp.25 and 36

pp.12 and 16

14. On the 8th February, 1961, O'Connor, P., delivered the reasons for the Court of Appeal's decision. The learned President stated that the Registrar should not have entered the appeals under Rule 6 in the absence of the documents referred to in Rule 5. The Court considered that "every person appealing" in Section 113(a) of the Act means every person appealing in accordance with the Rules made under Section 117(1), and that it would not have been ultra vires the rule-making authority to make

p.26

p.27(37)

p.33(6)

p.33(18)

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a rule expressly giving the Court power to strike out appeals which did not comply with the Rules.

p.34(7)

Their Lordships were of the opinion that, appeal being a creation of statute, the Court has no power to hear an appeal which does not comply with the Rules and it must therefore have implied power to strike out such an appeal. This power is an exercise of "authority" within Rule 18(1) and is exercisable by the Court in Chambers. It would involve expense and inconvenience if an appeal could only be struck out by motion at the actual hearing of the appeal and very clear words would be required to produce such a result.

p.34(16)

p.35(9)

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The views expressed by the Court with regard to Rule 18(1) made it unnecessary for it to consider Rule 18(2).

15. On the 14th June, 1961, an Order was made granting final leave to Appeal to Her Majesty in Council.

16. The Appellant humbly submits that this appeal should be allowed and that the Judgment and Order of the Court of Appeal for Eastern Africa of the 27th January 1961 should be set aside and judgment entered for the Appellant and that he be awarded costs throughout for the following among other

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R E A S O N S

(1) BECAUSE the Appellant, having given valid notices of objection to the assessments and having been served with notices under Section 110(3) of the Act, obtained by virtue of Section 111(1)(b) of the Act a right to appeal to a judge by having duly given written notice of appeal to the Respondent within 45 days and such right, being conferred by statute, could only be extinguished by a plain statutory provision in that behalf.

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(2) BECAUSE there being in existence appeals to a judge under Section 111 of the Act, the provisions of Section 113 regarding the hearing of the appeals apply and must be duly carried out in the absence of a specific statutory authority for dismissing the appeals.

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(3) BECAUSE Rule 5 (and likewise Rule 4) of the

Rules was intended for the general guidance of appellants and was not intended to form an inflexible code the breach of any provision of which would involve automatic dismissal of the appeal.

- 10 (4) BECAUSE the acceptance and dating of the appeals by the Registrar and their entry in the Register of Appeals cured any defect in form resulting from failure to annex certain documents to the Memorandum of Appeal.
- (5) BECAUSE by bringing proceedings under Civil Appeal No. 58 and by consenting to its consolidation with Civil Appeal No. 59 (rather than seeking rectification of the Register of Appeals) the Respondent waived any want of form in their presentation.
- 20 (6) BECAUSE the omission to annex the documents referred to in paragraphs (b) and (c) of Rule 5 did not prejudice the Respondent in any way since the originals of the former (the notice of appeal) were in his possession, and the Appellant's failure to file the latter (Statements of Facts) would prevent him from relying on any facts otherwise than by leave of the Court.
- (7) BECAUSE the Ruling given by the learned Judge in relation to Civil Appeal No. 28 of 1959 and the Order made in Civil Appeals Nos. 58 and 59 of 1959 were right.
- 30 (8) BECAUSE the Summons was not brought under Rule 18 (1) of the Rules, and BECAUSE, in any case, that sub-Rule only empowers the Court to exercise in Chambers such authority and jurisdiction as is conferred by the Rules and the Rules do not authorise the striking out of proceedings on the grounds put forward by the Respondent.
- 40 (9) BECAUSE Rule 18(2) of the Rules did not give the Court jurisdiction to entertain the Respondent's application since the Summons was not an "ancillary application".
- (10) BECAUSE the Judge had no inherent or implied jurisdiction to accede to the Respondent's application.

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(11) BECAUSE the reasoning of the Court of Appeal
was wrong.

DINGLE FOOT.

PETER ROWLAND.

No. 23 of 1961

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T.L. WILSON & CO.,
6, Westminster Palace Gardens,
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