

ON APPEAL  
FROM THE COURT OF APPEAL FOR EASTERN AFRICA AT  
NAIROBI

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

17 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

71043

CASE FOR THE RESPONDENT

- 10 1. This is an appeal from a judgment and Order of the Court of Appeal for Eastern Africa (O'Connor P. Forbes V-P. and Crawshaw J.A.) both given on the 27th day of January 1961 allowing an appeal by the Respondent from the Ruling and Order on Chamber Summons in the Supreme Court of Kenya (Mayers J.) both dated the 17th day of December 1959 dismissing an application by the Respondent that the proceedings be struck out in the case of Dorio L. Vincenzini, Appellant versus The Commissioner of Income Tax, Respondent Civil Appeal No.58 of 1959 in Her Majesty's Supreme Court of Kenya at Nairobi. The Reasons for the said judgment of the Court of Appeal were given on the 8th day of February 1961. P.25 p.36 pp.12-16 p.16 p.9
- 20 2. The matter arises upon an application by the Respondent on a Chamber Summons to strike out proceedings in the case of Dorio L. Vincenzini, Appellant versus The Commissioner of Income Tax, Respondent, Civil Appeal No.58 of 1959 in Her Majesty's Supreme Court of Kenya at Nairobi. In that case the Appellant was appealing against decisions of the Regional Commissioner of Income Tax which confirmed two assessments to Income Tax made upon the Appellant under the East African Income Tax (Management) Act 1952. The said appeals, which were later consolidated, did not comply in certain respects hereinafter set out with the Income Tax (Appeal to the Kenya Supreme Court) Rules 1959 made in the exercise of the powers conferred by Section 117 of the East African Income Tax (Management) Act 1958. The said appeals
- 30 No.8 of 1952 Legal Notice No. 83

in that form were entered by the Registrar. The question arising in this case is whether there was jurisdiction to strike out the proceedings on the application of the Respondent by way of a Chamber Summons in the Supreme Court.

3. The facts of the case appear in detail in the Record and may be summarised as follows:-

(i) Two assessments to income tax were made upon the Appellant, namely No.N.2209 in respect of the Year of Income 1954 and No.N.2784 in respect of the Year of Income 1955. 10

(ii) The Appellant objected to both the said assessments to the Regional Commissioner of Income Tax. By two letters, one in respect of each assessment, both dated the 16th July 1959, the Regional Commissioner refused the Appellant's objections and confirmed both assessments. Each of the letters stated that the Appellant was entitled to appeal against the decision to either the Local Committee or to a judge and set out the procedure to be followed in the latter course as follows :- 20

"As an alternative you are entitled to appeal to a Judge on giving me notice in writing within 45 days of the date of the service of this Notice in which case you must within 75 days from the date of the service of this Notice present a memorandum of appeal to the Registrar of the Supreme Court. Your attention is drawn to the appropriate Rules of Court". 30

2. (i) .....

(ii) Income Tax (Appeal to Kenya Supreme Court) Rules 1959.

(iii) .....

etc. "

(iii) On the 7th October 1959 the Appellant, by his Advocates, filed a memorandum of appeal in respect of each of the said decisions of the Regional Commissioner of Income Tax. Neither memorandum was accompanied by a copy of the notice of appeal or a Statement of Facts as required by Rule 5 of the Income Tax (Appeal to Kenya Supreme Court) Rules 1959. The Registrar purported to enter both the appeals. (It appears from the judgment of the Court of Appeal that these documents may subsequently have been filed 40

pp.1 & 2  
pp.3 & 4

p.27

at some time after the Chamber Summons in this Case had been taken out on the 9th November 1959 by the Respondent, but this was not within the time limits prescribed by the said Rules).

4. (a) The relevant provisions of the East African Income Tax (Management) Act 1958 (hereinafter called "the Act") are contained in Part XIII of the Act and are as follows :-

No.10 of 1958

10 "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 subsection (3) of section 110 may appeal -

Right of appeal from Commissioner's determination of objection

(a) to the local committee appointed for the area in which he resides or, if he is a non-resident person, for the area which includes the capital of the Territory from which any income included in the assessment accrued or was derived; or

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 subsection (3).

(2) .....

(3) .....

(4) .....

x x x x x x

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.

Power to make rules for appeals to the court.

(2) In this section, "the appropriate authority" means -

30 (a) in relation to Kenya, the Rules Committee established under section 81 of the Civil Procedure Ordinance of Kenya;

K.Cap.5.

(b) in relation to Tanganyika, the High Court acting with the approval of the Governor;

(c) in relation to Uganda, the Rules Committee established under section 85 of the Civil Procedure Ordinance of Uganda."

U.Cap.5.

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No.83

(b) In the exercise of the powers conferred by Section 117 of the Act the Rules Committee made the Income Tax (Appeal to the Kenya Supreme Court) Rules 1959 (hereinafter called "the Rules").

The provisions of the Rules relevant to this case are as follows :-

Form of  
and time  
for lodging  
appeal

"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 - 10

- (a) the confirming notice; or
- (b) the amending notice; or
- (c) the notice of the decision of the Commissioner; or
- (d) the notice under paragraph (f) of section 112 of the Act of the decision of the local committee,

as the case may be:

Provided that, where a Judge is satisfied that, owing to absence from the Colony, sickness, or other reasonable cause, the appellant was prevented from presenting such memorandum of appeal within such period and that there has been no unreasonable delay on his part, the Judge may extend the period within which such memorandum of appeal shall be presented. 20

4. ....

5. The memorandum of appeal shall be accompanied by -

Statement  
of facts  
of appell-  
ant.

- (a) a copy of the confirming notice, the amending notice, the notice of the decision of the Commissioner, or the notice of the decision of the local committee, as the case may be; and 30
- (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.

Registrat-  
ion of  
memorandum  
of appeal

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) 40

Rules, 1948.

7. ....

8. ....

9. ....

10. ....

10 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.

Dismissal of appeal for appellant's default

(2) Where the appellant appears and the respondent does not appear, the Court may proceed to hear the appeal ex parte.

20 12. Where on the day fixed, or on any 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.

Dismissal of appeal in consequence of appellant's failure to deposit costs.

13. ....

14. ....

15. ....

16. ....

17. ....

30 18. (1) The authority and jurisdiction of the Court under these Rules may be exercised by the Court in Chambers.

Proceedings in Chambers

(2) Ancillary applications 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.

(3) ....

19. ....

20. ....

Extent to which rules on civil procedure apply.

21. The rules determining procedure in civil suits before the Court in so far as such rules relate to recognized agents and advocates, to service, to consolidation, to admissions, to the production, impounding and return of documents, to the summoning and attendance of witnesses, to adjournments, to the examination of witnesses, to affidavits, to judgment and decree, to the execution of decrees, to the attachment of debts, to the death, bankruptcy and marriage of parties, to withdrawal, discontinuance and adjustment, to security for costs, to commissions, to corporations, to trustees, executors and administrators, 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.

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22. ...."

p.9

5. The Respondent took out a Chamber Summons dated 9th November 1959 pursuant to Rule 18(2) of the Rules to strike out proceedings in the Case of Dorio L. Vincenzini versus The Commissioner of Income Tax, Civil Appeal No.58 of 1959 which related to assessment No.N. 2784. The grounds of the application were that the proceedings were not properly before the Court. The application was supported by an affidavit stating inter alia that the Memorandum of Appeal had not been accompanied by a copy of the notice of appeal nor by a statement of facts.

pp.10 & 11

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pp.11 & 12

6. By the consent of both parties an Order Consolidating Appeals was made on the 23rd November whereby the appeal by the Appellant in relation to assessment No.N. 2784, Civil Appeal No.58 of 1959, was consolidated with the appeal by the Appellant in relation to assessment No.N.2209, Civil Appeal No.59 of 1959 and both parties agreed to be bound by the decision in the case of Christo Katsantoni Christie v. The Regional Commissioner of Income Tax, Civil Appeal No.28 of 1959 in respect of the application on the Chamber Summons.

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pp.12-16

p.12  
p.13

7. By a Ruling dated 17th December 1959 the Judge in Chambers (Mayers J.) dismissed the application in the said case of Christo Katsantoni Christie v. The Regional Commissioner of Income Tax. In the course of the Ruling the learned judge said that the Commissioner was seeking an order under Rule 18(2) of the Rules that the appeal lodged by Mr.

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Christie should be dismissed on the grounds that it was out of time and that the memorandum of appeal had not been accompanied at the time of filing by the correct number of copies of the amended notice of assessment and that it had not been accompanied by the notice of appeal and by a statement of facts as required by the Rules. He then referred to the effect of the consolidation Order. He said that the preliminary point taken by Mr. Kean on behalf of the Respondent was that the application was not maintainable. Mr. Kean argued that, although Rule 18(1) of the Rules authorised the jurisdiction of the Court under the Rules to be exercised in Chambers, Rule 18(2) provided for ancillary applications to be made by Summons in Chambers but the present application was not ancillary. Mr. Kean had also argued that the Rules were ultra vires in that Section 117 of the Act conferred no power to make Rules in relation to Appeals.

20 The Commissioner had relied on two cases but the learned judge did not regard them as binding authority since they had been decided before the present Rules had been promulgated.

The learned judge then cited Rule 18. He said that Rule 18(1) made it clear that everything might be done in Chambers which was within the jurisdiction of the Court conferred by the Rules. The only jurisdiction under the Rules to dismiss an Appeal was that conferred by Rules 11 and 12 which related to non-appearance and failure to deposit sums in respect of costs. The Rules did not confer jurisdiction to dismiss an appeal in Chambers on the grounds relied on in the application.

The learned judge referred to the decisions that the Court had power at the hearing to dismiss an appeal for non-compliance with the Rules relating to the filing of a statement of facts. It was not proper for him to express a view whether that jurisdiction was founded on some inherent power of the Court or upon some provision of the Act. He assumed that there would have been jurisdiction to dismiss the appeals on the grounds relied on by the Commissioner but this would not have been derived from the Rules. The learned judge said that he had to consider whether Rule 18(2) authorised the exercise of that jurisdiction in Chambers. Rule 18(2) authorised "ancillary" applications. It did not appear to him that an application which had as its object the final determination of any legal proceeding came within the meaning of "ancillary" as defined in the Oxford English Dictionary. Furthermore applications under Rule 18(2), which must be read as subject to Rule 18(1), were ancillary to the authority and

jurisdiction conferred by the Rules and the Rules conferred no jurisdiction to dismiss an Appeal by reason of the memorandum not being accompanied by the appropriate documents. The application must be dismissed.

pp.16 & 17

8. By an Order on Chamber Summons dated 17th December 1959 the applications made by the Respondent in the Case of Dorio L.Vinzenzini v.The Regional Commissioner of Income Tax, Civil Appeals Nos.58 and 59 of 1959 (Consolidated) were dismissed.

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pp.17 & 18

9. By a Notice of Appeal dated 23rd December 1959 the Respondent appealed to the Court of Appeal against the decision of the learned judge in Chambers. By a Memorandum of Appeal dated 12th February 1960 the grounds of appeal were set out as follows :-

pp.19 & 20

1. That the Kenya (Appeal to the Kenya Supreme Court) Rules 1959, and in particular Rule 18(2) thereof, confer jurisdiction on the Court to dismiss an appeal to a Judge under the said Rules which is not properly before the Court by reason of the memorandum of appeal not being accompanied by the prescribed documents.

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2. That the learned Judge erred in failing to hold that the application made by summons to the Court under the said Rule 18(2) to strike out the proceedings was an ancillary proceeding properly brought within the said Rule 18(2).

3. That the Court has an inherent jurisdiction to strike out proceedings which do not comply with the provisions of the law under which they purport to be preferred.

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p.25

10. The case came on for hearing in the Court of Appeal (O'Connor P.Forbes V.P. and Crawshaw J.A.) on 27th January 1961 and on the same day the Court of Appeal allowed the appeal and set aside the Ruling and Order of the Judge in Chambers.

pp.26-35  
p. 27

The reasons of the Court for the judgment were delivered by O'Connor P. on 8th February 1961. In those reasons the Court first reviewed the facts of the case. The Court commented that the defective appeals should not have been entered by the Registrar under Rule 6 because Rule 6 provided for appeals to be entered "where a memorandum of appeal and the documents referred to in rule 5 of these Rules are lodged". The Court cited the material parts of the relevant provisions of the Act and the Rules. Rules 11 and 12 were the only

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pp.28-30



Rules with express provisions empowering the Court to dismiss an appeal, but striking out an appeal which had been wrongly entered under Rule 6 was quite a different matter from dismissing a properly constituted appeal. The Court then cited from the Ruling of the learned Judge. The Appellant, (who was the Respondent before the Court of Appeal), had supported the Ruling with two arguments. The first was that the right conferred on the taxpayer by Section 113(a) of the Act to appear before the judge at the hearing of the appeal was a fundamental right and that a rule which interfered with that right by permitting the appeal to be struck out before the hearing because it did not comply with the procedural requirements of the Rules would have been ultra vires. The Court thought that that gave insufficient weight to the power conferred by Section 117(1) of the Act to make rules governing appeals and thought that "every person appealing" in Section 113(a) of the Act meant every person appealing in an appeal constituted in accordance with the rules made under Section 117 of the Act. In the opinion of the Court an express rule empowering the Court to strike out an appeal not constituted in accordance with the Rules which had been improperly entered would not have been ultra vires Section 117 of the Act.

pp.31 & 32

The Court summarised the second argument of the Appellant as follows :-

p.33

"(1) The Supreme Court had no inherent jurisdiction to enforce compliance with the Rules, unless the failure to comply amounts to a contempt or abuse of the process of the Court.

"(2) Even if the Court has an inherent jurisdiction to enforce any provision of the Rules, that jurisdiction is not 'an authority or jurisdiction of the Court under these Rules' within sub-rule (1) of Rule 18 and is not therefore exercisable by the Court in Chambers under that sub-rule.

"(3) An application to strike out an appeal is not an ancillary application under sub-rule (2) of rule 18".

In the opinion of the Court the Supreme Court had jurisdiction under the Rules to strike out a purported appeal which was not constituted in accordance with the Rules and which had been entered in breach of Rule 6. Section 111 of the Act created a right of appeal which by virtue of Section 117 was to be governed by rules. The Court had no power to hear an appeal which was not properly before it under the Rules. It had to exercise its appellate jurisdiction in accordance with

the Rules and therefore had implied authority under the Rules to decline to entertain an appeal not properly before it in accordance with the Rules. That was an exercise of authority "under these Rules" within Rule 18(1) and might be exercised by the Court in Chambers. There was no reason why the ordinary way of invoking the authority of the Court by a Summons in Chambers supported by affidavit should not be used in applications for striking out defective appeals.

The Court did not accept the Appellant's argument that an application to strike out must be made at the hearing of the appeal on the analogy of Rules 11 and 12 and Order 50 Rule 1 of the Kenya Civil Procedure (Revised) Rules 1948. Rules 11 and 12 dealt with the very different matters of non-appearance at the hearing and failure to deposit the service fees in properly constituted appeals. Order 50 Rule 1 of the Kenya Civil Procedure Rules was expressly negatived by Rule 21 and no analogy could be drawn from it. 10

The Court said that it was obviously convenient and a saving of expense for the Court and the parties that applications to enforce compliance with the procedural requirements of the Rules and to strike out an appeal for non-compliance should be dealt with in Chambers and as early as possible. It was not to be assumed without very clear words that the intention of the legislature and the Rule-making authority was to produce so unusual, expensive and inconvenient a result as that which would follow from the Appellant's contention. 20

The Court thought that the Supreme Court had authority to strike out an improperly constituted appeal under Rule 18(1) and that that authority might be exercised upon a Summons in Chambers before the date fixed for the hearing. How that authority was exercised in the present case was a matter for the Supreme Court. On the view the Court took of Rule 18(1) it was unnecessary to consider Rule 18(2). 30

p.37

11. An order granting Final Leave to the Appellant to Appeal to Her Majesty in Council was made on the 14th June 1961. 40

12. The Respondent humbly submits that the decision of the Court of Appeal is right and should be affirmed and that this Appeal should be dismissed with costs for the following amongst other

#### R E A S O N S

- (1) BECAUSE Appeals against assessments to income tax in Kenya made under the East African Income Tax (Management) Act 1958 are governed by the Kenya (Appeal to the Supreme

Court) Rules 1959 made pursuant to Section 117 of that Act.

- 10 (2) BECAUSE the Appellant has clearly not presented a valid memorandum of appeal against either Assessment Number N.2209 or against Assessment Number N.2784 since in neither case was the memorandum accompanied by a copy of the notice of appeal or by a statement of facts as required by Rules 3 and 5 of the said Rules.
- (3) BECAUSE the purported appeals of the Appellant were therefore wrongly entered by the Registrar because under Rule 6 of the said Rules he only has power to enter a valid appeal which these were not.
- 20 (4) BECAUSE the Court has inherent jurisdiction to strike out an invalid appeal. If such jurisdiction is not exercised unnecessary delay will arise and costs be incurred in the preparation and argument in Court of an appeal which is essentially invalid.
- (5) BECAUSE, if the Court has such inherent jurisdiction, it is properly exercised in Chambers.
- (6) BECAUSE the judgment of Mr. Justice Mayers is wrong and ought not to be upheld.
- 30 (7) FOR the reasons given in the Judgment of the Court of Appeal.

F.HEYWOOD TALBOT

PHILIP SHELBOURNE

No.23 of 1961

IN THE PRIVY COUNCIL

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ON APPEAL  
FROM THE COURT OF APPEAL FOR EASTERN  
AFRICA AT NAIROBI

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BETWEEN:-

DORIO LUCIO VINCENZINI      Appellant

-and-

THE REGIONAL COMMISSIONER OF INCOME  
TAX                              ...      Respondent

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C   A   S   E

-for-

THE RESPONDENT

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