Privy Council Appeal No. 23 *of* 1961

Dorio Lucio Vincenzini – – – – – – – *Appellant*

v.

The Regional Commissioner of Income Tax – – – – *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JANUARY, 1963

Present at the Hearing:
LORD EVERSHED.
LORD GUEST.
LORD PEARCE.
[*Delivered by* LORD EVERSHED]

This is an appeal from an order of the Court of Appeal for Eastern Africa which reversed the decision of the Supreme Court of Kenya dismissing the application of the present respondent, the Regional Commissioner of Income Tax, asking that the appeal to the Supreme Court of the present appellant against certain assessments for income tax should be struck out. But this brief introductory statement somewhat disguises the real questions which have emerged upon the hearing before their Lordships and which their Lordships have to determine.

The application of the Regional Commissioner to the Supreme Court was, upon its face, an invocation of a particular sub-rule of the *Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959*, namely sub-rule (2) of Rule 18 of those Rules. Mayers, J., in the Supreme Court, held that the application did not properly fall within the scope of that sub-rule and dismissed it accordingly. The Court of Appeal expressed no view upon the effect of sub-rule (2) of Rule 18 but held that the Regional Commissioner's application fell properly within sub-rule (1) of the same Rule and, upon that view, while reversing the decision of Mayers, J., in effect referred the matter back to the Supreme Court to decide, upon the basis which the Court of Appeal had held to be applicable, what order should be made upon the Regional Commissioner's application; though, as will later appear, it appears to their Lordships that one inference to be drawn from the reasoning of the Court of Appeal might encourage the view that the Supreme Court should now accede to the Regional Commissioner's application and strike out the appellant's appeal.

In these circumstances it appeared to their Lordships at an early stage of the hearing that whatever view they might take of the appeal would not greatly advance the final determination of the real issue between the appellant and the Regional Commissioner, namely the former's income tax liability. Whatever in the present case may be the eventual outcome, their Lordships cannot help thinking that as a result of the Regional Commissioner's application (in the form which it took) and the orders of the Supreme Court, the Court of Appeal and the Board thereon, the determination of the appellant's tax liability has been unhappily and unnecessarily postponed.

The true question involved in the present proceedings is that of the appellant's tax liability. The appellant was in the year 1959 assessed for income tax for certain sums in respect of certain tax years. He objected to the assessments, as he was entitled to do by virtue of section 109 of the East

African Income Tax (Management) Act 1958; but the Regional Commissioner before whom the objection came confirmed the assessments and, pursuant to section 110(3)(*b*) of the enactment, sent to the appellant written notice of his confirmation.

It is now necessary to make certain references to other sections of the enactment and to the Rules made thereunder.

By section 111 subsection (1) it is provided that any person who has given a valid notice of objection to an assessment and has been served with a notice by the Commissioner under the previous section may appeal to a judge upon giving notice of appeal in writing to the Commissioner within 45 days after the service upon him of the notice under section 110. Subsection (3) of the same section makes provision for a person who fails to give a notice of appeal within the relevant period to apply to the judge for an extension of time in which to give such notice and the subsection goes on to provide that extension may be granted but, as Mr. Heyworth Talbot pointed out to us, upon somewhat strict terms including in certain cases the requirement that the tax-payer shall deposit with the Commissioner the whole or such part as the Commissioner may require of the assessed tax which is unpaid and in regard to which he wishes to appeal.

Section 113 provides that upon every appeal to a judge under section 111 the appellant shall appear before the judge either in person or by advocate on the day and time fixed for the hearing, subject only to a proviso that if it should 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 so attending, the judge may postpone the hearing of the appeal as he thinks necessary.

It is to be observed that the section does not in terms make any provision for what should happen in the event of the appellant not appearing and the case not being within the proviso. It will, however, be seen that this matter is picked up by the Rules.

It is also to be noted that by another paragraph of section 113 it is provided that the appeal shall be heard in camera unless the judge on the application of the person assessed otherwise directs.

By section 117 the appropriate authority is given power to make Rules governing appeals under this part of the Act (other than appeals to a local committee). Mr. Heyworth Talbot referred also to sections 118 and 119. Their Lordships do not think it necessary to cite from these sections but they are directed to the time within which payment of assessed taxes is to be made. Broadly speaking, the tax is payable in two instalments and upon notice of objection to the assessment the tax-payer is still generally liable to pay the first of the instalments. The point of the reference is that, as Mr. Heyworth Talbot pointed out, a tax-payer who appeals and who is not scrupulous in observing the times limited under the Act and the Rules may in effect successfully postpone for a considerable period the payment of the balance of his assessed tax. Mr. Heyworth Talbot's point was that, since under the Act the pendency of an appeal did have the effect to a substantial extent of postponing the liability to pay the assessed tax, therefore a tax-payer who invoked the procedure for an appeal should not be allowed, by any failure to comply strictly with his obligations in that respect, to postpone unduly the payment of his tax.

Their Lordships now turn to the Rules of 1959 to which their references must inevitably be considerable. As their Lordships have already pointed out the Rules are silent in regard to the requirement in the Act of giving 45 days' notice to the Commissioner. Rule 3 sub-rule (1) so far as relevant provides as follows:—" 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 . . . "

There is a proviso to the sub-rule to the effect that if a judge is satisfied for reasons there stated that the appellant was prevented from presenting the

memorandum within the period named he can extend the period within which such memorandum shall be presented. Rule 4 provides for the character and contents of the memorandum which include numbered grounds for the appeal. Rule 5 is of importance and reads as follows:—

" 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."

Rule 6 provides that where a memorandum of appeal and the documents referred to in Rule 5 are lodged and the filing and service fees paid, the Registrar shall then enter the appeal in accordance with rule 8 of Order XLI of the Civil Procedure (Revised) Rules, 1948. Their Lordships here note that by Order XLI of the Civil Procedure Rules it is provided that " where a memorandum of appeal (sic) is lodged " then the appeal is to be entered in a book called The Register of Appeals.

Rule 9 provides that the Registrar shall give specified notice in writing to the parties of the date and place fixed for the hearing of the appeal. Rule 11 may be said to pick up the provisions of section 113 of the Act requiring that upon the appeal coming on for hearing the appellant must appear: for by that Rule it is provided that if the appellant does not appear on the day originally fixed or the adjourned date then his appeal may be " dismissed ".

Rule 12 is of importance since it is the only other provision in the Rules for the " dismissal " of an appeal.

" 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."

It is to be noted that the penalty of having an appeal dismissed does not arise through mere failure on the appellant's part to send with his memorandum of appeal the other documents referred to in Rule 5 but does arise where he has failed to deposit the necessary fees within the time therein referred to.

Finally, their Lordships set out in full Rule 18.

" 18. (1) The authority and jurisdiction of the Court under these Rules may be exercised by the Court 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) If no appeal is pending, the summons in Chambers shall be intituled in the matter of the intended appeal."

It is only necessary to add that by Rule 21 it is provided that the Civil Procedure Rules in regard to a number of matters there stated including 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. Their Lordships note accordingly that by Order XLIX Rule 5 of the Civil Procedure Rules it is provided that " where a limited time has been fixed for doing an act . . . the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require ".

Mr. Dingle Foot put in the forefront of his argument the submission that if the effect of any of the Income Tax Rules was to derogate from the taxpayer's right of appeal conferred by the Income Tax (Management) Act 1958, such Rules would be *ultra vires;* and he cited authorities in support of his submission. As a matter of general principle their Lordships have no hesitation in accepting this submission. On the other hand their Lordships are equally clearly of opinion that the Rule making power conferred by section 117 of the

Act must authorise the making of rules designed to make effective the statutory provisions in regard to income tax and particularly in regard to appeals from assessment. Mr. Dingle Foot indeed accepted the view that such Rules, if and so far as they went beyond the strict language of the enactment, would be effective as directions designed to regulate appeals; and he also, as their Lordships understood, did not contest the proposition that a taxpayer would not by resort to his rights of appeal be permitted by the Court to abuse the Court's process and render the legislation practically ineffective. Their Lordships therefore accept the proposition put forward by Mr. Heyworth Talbot that continued refusal by a taxpayer to comply with the directions stipulated by the Rules could and ultimately would amount to such an abuse of its process that the Court would be entitled by virtue of its inherent powers to strike out the taxpayer's appeal or dismiss it; and in this connection their Lordships have in mind the point made by Mr. Heyworth Talbot that by virtue of the Kenya Income Tax Act and Rules the pendency of an appeal has or may have the effect of postponing, until determination of the appeal, the taxpayer's obligation to pay a substantial part of his assessed tax which is the subject of the appeal.

Their Lordships now return to the facts of the present case. The Regional Commissioner's notices confirming the appellant's assessments were dated the 16th July, 1959. It is not in doubt that the appellant gave to the Regional Commissioner notice of appeal within the period of 45 days specified by section 111 of the *Income Tax (Management) Act*. It is also not in doubt that the appellant presented to the Registrar his memorandum of appeal within the period of 75 days after service upon him of the notice of confirmation pursuant to Rule 3 of the Income Tax Rules; and that such memorandum in all respects complied with the requirements of Rule 4. (As there was in fact more than one assessment in question, and therefore, strictly, more than one appeal, the appellant presented contemporaneously two memoranda of appeal: but for simplicity their Lordships will treat the case as though there was but one memorandum.) Thereupon it appears that the Registrar (who may have been conscious in this respect of the divergence in language between Rule 6 of the Income Tax Rules and Rule 8 of Order XLI of the Civil Procedure Rules) proceeded to enter the appellant's appeal in the Register of Appeals. But though it also appears that the appellant paid the requisite filing and service fees, there is no doubt that he failed in accordance with Rule 5 of the Income Tax Rule to lodge with his memorandum of appeal either a copy of his notice of appeal or of the statement required by paragraph (*c*) of the last-mentioned Rule.

At this stage their Lordships make two observations. First, as it seems to them, the Registrar having entered the appellant's appeal in the Register of Appeals that appeal became an effective appeal and could not fairly be described, within the meaning of the Rules, as " an intended appeal " only. Second, neither of the two Rules which alone provided for summary dismissal of the appeal has ever been applicable, namely Rule 11 providing for the case of the non-appearance of the appellant on the day fixed for the appeal, nor Rule 12 directed to the case where the absence of service of the memorandum of appeal and the other documents specified in Rule 5 is attributable to the appellant's failure to deposit the necessary service fees.

The next event was the Commissioner's summons dated the 9th November, 1959 (that is, some 33 days after the date of the appellant's memorandum of appeal). The summons bore the heading or title " Rule 18(2) Income Tax (Appeal to the Supreme Court) Rules 1959 " and asked (*simpliciter*) that the appellant's appeal be struck out on the ground that it was not properly before the Court. The summons was supported by affidavit evidence to the effect that the memorandum of appeal was not accompanied by a copy of the notice of appeal and by a statement as respectively required by Rule 5 of the Income Tax Rules. Their Lordships cannot at this point forbear from observing that, as already indicated, the original notice of appeal had, admittedly, been duly served upon the Commissioner; that the appellant's grounds of appeal were stated in his memorandum; and that the Commissioner had himself already adjudicated upon the appellant's objections to his assessments.

The summons came before Mayers, J., sitting in the Supreme Court on the 17th December, 1959. As appears from the record of his ruling, that learned judge felt that, having regard to two East African cases Nos. 51 and 52 (to which their Lordships will later make some reference) he could not properly hold that the Court had no power at the hearing of an appeal to dismiss it on account of non-compliance with the Income Tax Rules; but he proceeded to treat the Commissioner's application as one for " the dismissal " of the appeal under Rule 18(2) of the Rules and decided that the application could not properly be regarded as an "ancillary" application within the meaning of that sub-rule. He accordingly dismissed the application.

Their Lordships feel bound to observe that, at any rate in terms, the Commissioner's application was not an application to " dismiss " the appeal. Had it been so framed, their Lordships would respectfully agree entirely with Mayers, J. that such an application could not properly be called an " ancillary " application according to ordinary sense of that epithet. Their Lordships would, moreover, be of opinion that since the Rules had made express provision for " dismissal " of an appeal on the grounds specified in Rules 11 and 12 (assuming, as their Lordships have not now to decide, that such Rules, and particularly the latter of them, are *intra vires*), it would not be possible to imply into the Rules a third ground for dismissal not expressly provided for.

But the Commissioner's application was not that the appeal should be dismissed; but that it should be struck out. There is, or may be, as their Lordships apprehend, a substantial difference between the effect of " striking out " an appeal and " dismissing " it. Their Lordships were not, however, informed whether, according to the law of Kenya, an appellant whose appeal had been "struck out" (as distinct from "dismissed") would be able to re-litigate his appeal; and it may well be that, having regard to the passage of time, the effect of striking out the appellant's appeal in the present case would not be materially different from the effect of its dismissal. Nevertheless, in considering the true scope of Rule 18(2) their Lordships have thought it necessary to point out—and they return to the matter hereafter—that the Commissioner's application was not in fact for the dismissal of the appellant's appeal but that it should be struck out.

The Commissioner appealed to the Court of Appeal for Eastern Africa against the decision of Mayers, J. and that appeal was allowed on the 27th January, 1961. The reasons for the Court of Appeal's decision were expressed by O'Connor, P. on the 8th February, 1961. It is to be noted that in the course of his reasons the learned President observed that although the appellant had failed when lodging his memorandum of appeal to lodge also the other documents required by Rule 5 of the Income Tax Rules, " these requirements were later fulfilled ". The learned President also expressed the view that, in the circumstances, the Registrar should not have entered the appeal in the Register of Appeals—though this error on the part of the Registrar (if error it was) cannot fairly be laid at the door of the appellant.

After referring to the relevant parts of the Income Tax (Management) Act and the Rules made thereunder the learned President proceeded to express the view that the Supreme Court has an inherent power, which may be invoked under Rule 18(1) of the Income Tax Rules, to strike out an appeal which had not been properly constituted under the Rules. He concluded his reasons as follows:—

> " In our view, the Supreme Court has authority to strike out an improperly constituted appeal under sub-rule (1) of Rule 18, and that authority may be exercised upon a summons in Chambers before the date, if any, fixed for the hearing. Whether, and how, the Court exercises that authority in the present case are matters for the Supreme Court and not for us.
>
> " On the view which we take of sub-rule (1), it is unnecessary to consider sub-rule (2) of rule 18."

It will be observed that the Court of Appeal, in allowing the Commissioner's appeal, based their conclusions upon the view that the Commissioner's application fell properly within the scope of Rule 18(1) and expressed no

view in regard to the scope or effect of Rule 18(2) although the Commissioner's application had, *ex facie*, been an application expressly made under the latter sub-rule.

As they have already observed, their Lordships accept the view intimated by the Court of Appeal that there must be in the Supreme Court of Kenya an inherent power to prevent an abuse of the Court's process on the part of an appellant who, while invoking his statutory right to appeal under the Income Tax (Management) Act, persistently refuses to comply with the directions enunciated by the Rules; though their Lordships for their part would not derive such power from Rule 18(1) of the Rules but from the Court's general inherent jurisdiction. In this respect their Lordships' view is supported by the first of the East African cases earlier mentioned, No. 51 *A.T. v. The Commissioner of Income Tax* before MacDuff, J. in the Supreme Court of Kenya. In that case it is plain that the appellant had resorted to every kind of device to postpone the final determination of his tax liability. None-theless, the Court was of opinion that the appellant's behaviour, however reprehensible, did not amount to such an abuse of the Court's process as would justify the Court in striking out his appeal.

In the second case, No. 52 *A.U. v. The Commissioner of Income Tax (Uganda)*, the learned judge Keatinge, J. had " dismissed " the appellant's appeal. The report is extremely short and the judgment expressed (according to the report) in a single sentence. In the circumstances, it seems to their Lordships that the case was not, in all probability, fully argued; but if the report fairly represents the learned judge's conclusion, their Lordships feel bound to say that they cannot accept it.

As their Lordships have already observed, they fully accept the view that a persistent refusal by an appellant under the Income Tax (Management) Act to observe the procedural Rules may well amount to such an abuse of the Court's process as would justify an order by the Court striking out such an appeal. But in their Lordships' opinion the failure of the present appellant to comply originally with the terms of Rule 5 of the Income Tax Rules falls far short of such an abuse—particularly since (as appears clearly from O'Connor, P.'s reasons for the judgment of the Court of Appeal) such default had since been remedied—and since also, as their Lordships think, the Commissioner in the present case cannot ever have been in serious doubt in regard to the appellant's case as he certainly could not have been embarrassed by any failure to serve a copy of the appellant's notice of appeal. In the circumstances, their Lordships are unable to agree with the Court of Appeal's conclusion that there had been made out on the facts of the present case, either under Rule 18(1) or otherwise, any authority for the Supreme Court to strike out the appellant's appeal. Although therefore their Lordships, as they have already stated, think that Mayers, J. should not have regarded the Commissioner's application as being, in strictness, one to dismiss the appellant's appeal, they think that, upon the facts as they appear to their Lordships, he was justified in dismissing the Commissioner's application and that his order should be restored accordingly.

According to the information given to their Lordships by Mr. Heyworth Talbot as a result of his reference to his clients in Kenya, the Commissioner will, upon allowance of the present appeal, now seek to raise as a preliminary question upon the appeal the appellant's failure properly to comply with the Rules. Their Lordships do not wish in any way to embarrass the Supreme Court upon the hearing of the appellant's appeal; but if, as stated by O'Connor, P., the fact is that the appellant's previous failure to comply with the terms of Rule 5 of the Income Tax Appeal Rules has now been practically made good, their Lordships venture to express the hope that (subject to any order as to costs unnecessarily thrown away) the Supreme Court will now give such directions as will enable the appellant's appeal to be disposed of at the earliest practicable date.

For the reasons stated, their Lordships will in the present case humbly advise Her Majesty that the appeal should be allowed. In the circumstances, their Lordships think that the Commissioner must pay the appellant's costs before the Board and in the Courts below.

(86928) Wt. 8004/82 90 2/63 Hw.

In the Privy Council

DORIO LUCIO VINCENZINI

v.

THE REGIONAL COMMISSIONER OF INCOME TAX

DELIVERED BY

LORD EVERSHED

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