



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**CORAM: NAMBUYE, ASIKE- MAKHANDIA & KANTAL, JJA**

**CIVIL APPLICATION NO. 64 OF 2019**

**BETWEEN**

**HANOS [KENYA] LIMITED.....APPLICANT**

**AND**

**DHIREN MOHALAL SHAH.....RESPONDENT**

*(Being an application for striking out the Appeal against the judgment and decision of the*

***Environment & Land Court at Mombasa (Yano, J.) dated 18<sup>th</sup> October 2018 in Mombasa***

***ELC. NO. 52 OF 2016 (Formerly Misc. Civil Application No. 667 OS of 2009)***

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**RULING OF THE COURT**

Before us is a notice of motion dated 19<sup>th</sup> July 2019 brought under **Rules 84 and 87 (1), (h), (i), (j) and (k)** of the **Court of Appeal Rules**, seeking orders that:

**“1. The respondent’s appeal filed on 20<sup>th</sup> June 2019 be struck out on the grounds that no appeal lies and that the following essential steps as required under the Court of Appeal Rules have not been taken or have not been taken within the prescribed time in that:-**

**(a) The Record of Appeal herein does not contain the following documents:-**

- (i) A duly lodged Notice of Appeal;**
- (ii) A certified copy of the decree;**
- (iii) An order granting leave to appeal.**

**(b) The Appeal as filed is otherwise an abuse of the process of the Court as the same has been filed despite there being a pending notice of motion dated 15<sup>th</sup> November 2018 seeking to strike out the Notice of Appeal dated 22<sup>nd</sup> October 2018 that is still pending hearing.**

The application is supported by grounds on its face, a supporting and supplementary affidavits sworn by **Ushwin Khanna**. The application is opposed through the Replying Affidavit of **Peter Mutuku Mbithi** sworn on 22<sup>nd</sup> October 2020.

We however find no need to go into the merits of the application since Civil Application **No. 110 of 2018 Hanos (K) Ltd v Dhiren Mohalal Shah** referred to as one of the grounds in support of this application has since been heard and determined. This court upon hearing the said application interpartes ordered the striking out of the Notice of Appeal dated 22<sup>nd</sup> October, 2018. It is that notice of appeal that was the foundation of this appeal. The foundation having been removed, the appeal stands on quicksand. It is in fact incompetent and liable to be struck out.

Accordingly the application is allowed with the consequence that the respondent's appeal filed on 20<sup>th</sup> June 2019 be and is hereby struck out with costs to the applicant.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF APRIL, 2021.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**ASIKE- MAKHANDIA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**