



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, MAKHANDIA & OUKO, J.J.A.)

CIVIL APPLICATION NO. 254 OF 2016

BETWEEN

PRAVIN VORA t/a VORA CONSTRUCTION.....APPLICANT

AND

SYNRESINS LIMITED.....RESPONDENT

(Being an Application to strike out a Notice of Appeal in an intended appeal from the Judgment and order of the High Court of Kenya at Nairobi (Sergon, J.) dated the 19th February, 2016)

in

Nairobi H.C.C.C No. 1095 of 2003)

RULING OF THE COURT

[1] By a motion on notice dated the 15th November, 2016, **PRAVIN VORA t/a VORA CONSTRUCTION** (the applicant) seeks, *inter alia*, that the notice of appeal lodged by **SYNRESINS LIMITED** (the respondent) be struck out and the security deposited be released forthwith to the applicant with accrued interest.

[2] The respondent, who was the Plaintiff in Nairobi H.C.C.C No. 1095 of 2003, was aggrieved by the judgment of the High Court (*Sergon, J.*) delivered on the 19th February, 2016; the High Court not only dismissed the respondent's suit with costs but also entered judgment for the applicant who had filed a counter claim for the sum of Kshs. 5,000,000/= for breach of contract together with interest and costs.

[3] The applicant's motion before us is brought under **Rule 84** of the **Court of Appeal Rules** and is supported by an affidavit sworn by the applicant's advocate, **Isaiah Mudambi Mandala** on the 15th November, 2016.

[4] In brief, the applicant contends that the respondent lodged a notice of appeal against the judgment of the High Court on the 4th March, 2016. It also applied for an order of stay of execution pending appeal which was granted on condition that the decretal sum be deposited into a joint interest earning account in the names of the advocates of the parties. According to the applicant, the respondent complied with the order but never took any step thereafter to apply and pay for typed proceedings. This non-compliance

offends **Rule 84** of this Court's rules.

[5] In response to the motion, the respondent's advocate, Mr. Muema Kitulu, swore a replying affidavit on the 10th July, 2017. In the affidavit he deposed that his predecessor, Messrs Kithi & Company Advocates, contemporaneously with the filing of the notice of appeal, applied for certified copies of the proceedings vide their letter dated the 22nd February, 2016. He explained that since taking over the matter he had made efforts to expedite the typing of the proceedings but he was informed by his court clerk that the typing pool at the High Court was severely understaffed.

[6] The respondent's advocate went on to state that he had written severally to the Deputy Registrar of the High Court but he was yet to receive any response. The delay in the supply of typed proceedings, according to him, was not attributable to his firm or the respondent. He further stated that the respondent having deposited the decretal amount in a joint interest earning account as security in compliance of the court order, the application was brought in bad faith because the applicant stood to suffer no prejudice if the respondent is allowed to proceed with its intended appeal.

[7] When the matter came up for hearing, learned counsel, Mr. Mandala appeared for the applicant and learned counsel, Ms. Motabori appeared for the respondent. Mr. Mandala submitted that the respondent had not paid to court the deposit to facilitate typing of the proceedings but merely filed the notice of appeal. In counsel's view, this was contrary to **Rules 83** and **84** of this Court's Rules. Learned counsel also contended that the replying affidavit filed by the respondent contravened **Rule 50** of the Court's Rules and prayed that it be struck out. As far as he was concerned the letter dated the 8th December, 2016 by the respondent to the Deputy Registrar was in reaction to the application.

[8] In response, Ms. Motabori clarified that there was an earlier letter dated the 22nd July, 2016 to the Deputy Registrar. She reiterated that the decretal amount having been deposited there was no prejudice to the applicant. She also submitted that there was evidence of payment for the proceedings.

[9] Having considered the application and the respective affidavits by both parties in conjunction with their respective submissions as well as the authorities cited, we are of the view that the only issue for determination is whether the notice of appeal should be struck out.

[10] **Rule 84** of the **Court of Appeal Rules** provides as follows:

"A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be. (Emphasis added).

[11] Based on the foregoing provision, an applicant can seek an order striking out a notice of appeal or the appeal on three grounds. Firstly, that no appeal lies; or secondly, that an essential step in the proceedings has not been taken; or thirdly, that some essential step has not been taken within the prescribed time. However, such an application must be brought within thirty days from the date of service of the notice of appeal or record of appeal

[12] In this case the applicant seeks to strike out the notice of appeal on the ground that the respondent has not taken any action since filing the same. In particular, the respondent had not paid the requisite deposit to facilitate typing of the proceedings at the High Court.

[13] Based on the foregoing, it is clear to us that the applicant has not complied with the proviso to **Rule 84** as its application was not brought within thirty days of service of the notice of appeal. Accordingly,

the application fails and it is hereby dismissed with costs to the respondent.

[14] Having dismissed the application, we are also inclined to make the following further orders:-

i) The respondent shall file and serve the memorandum and record of appeal within the next sixty days of the date of this ruling.

ii) The record of appeal shall be served on the advocates on record for the applicant within seven days of the date of filing the same.

iii) In default of compliance with order (i) above, the notice of appeal lodged on the 7th March, 2016 shall be deemed to have been duly withdrawn under Rule 83 of the Court of Appeal Rules, without any further application, and the respondent shall bear the costs thereof.

iv) In compliance with order (i) above but in default of compliance with order (ii) above, the notice of appeal and the record of appeal shall be duly struck out without further application, and the respondent shall bear the costs thereof.

v) In the event that orders (i) and (ii) above are complied with, the appeal shall be heard and disposed of expeditiously.

Orders accordingly.

Dated and delivered at Nairobi this 17th day of November, 2017.

P. KIHARA KARIUKI, PCA

.....

JUDGE OF APPEAL

ASIKE - MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR