



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 300 OF 2006**

**BETWEEN**

**ALLAN STEPHEN REYNOLDS. .... APPLICANT/APPELLANT**

**AND**

**TWIGA CHEMICAL INDUSTRIES LTD..... RESPONDENT**

**(Being an application to strike out the notice and record of appeal from the judgment of the High Court of Kenya at Nairobi (Githinji, J) dated 12th November, 2004**

**In**

**H.C.C.Suit No. 2772 of 1997)**

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**RULING OF THE COURT**

This is the second time **Allan Stephen Reynolds**, the applicant herein, is coming before this Court with an application under **rule 80** for the striking out of one or the other thing regarding the appeal lodged by Twiga Chemical Industries Ltd, the respondent. The first motion to strike out was in respect of the notice of appeal which the respondent had lodged in Court on 19<sup>th</sup> November, 2004, in which the respondent had expressed its intention to appeal against the decision of the superior court made and delivered on 12<sup>th</sup> November, 2004. The motion to strike out the notice of appeal was lodged in the Court on 25<sup>th</sup> April, 2005. It was heard and dismissed by the Court on 8<sup>th</sup> June, 2007 and as at the time of its dismissal Civil Appeal No. 300 of 2006 had been lodged in the Court on 20<sup>th</sup> December, 2006. On 9<sup>th</sup> February, 2007, the applicant once again returned to the Court with another notice of motion seeking not only the striking out of the record of appeal itself (prayer 2) but also the striking out of the notice of appeal to boot (prayer 1) in the motion dated 6<sup>th</sup> February, and lodged in the Court on 9<sup>th</sup> February, 2007. Understandably, Mr. Mugambi, learned counsel for the applicant, did not pursue the claim for striking out the notice of appeal; that prayer would have been frivolous, vexatious and an abuse of the process of the court in view of the Court's order of 8<sup>th</sup> June, 2007 to which we have already referred.

Why does the applicant want us to strike out the record of appeal? It is alleged that some document or documents which were produced as exhibits in the superior court are missing from the record. Mr. Mugambi told us that though he did not act for the applicant in the superior court, he subsequently came to see the alleged missing documents and that they are not in the record. We asked him, indeed, we gave

leave to any of the parties who may be in possession of the alleged missing documents to include them in the record under the new **sections 3A** and **3B** of the Appellate Jurisdiction Act. None of the parties was able to do so, not on the ground that it would be illegal to introduce the documents in the record by way of a supplementary affidavit, but for the simple reason that none of the parties is in possession of the documents alleged to be missing from the record. Mr. Gichuki Kingara, learned counsel for the respondent, acted for the respondent in the superior court. Mr. Kingara told us in his submissions that all the documents which were produced in the superior court are included in the record of appeal. That is supported by the replying affidavit of Hezekiah M. Macharia, the Human Resources Manager of the respondent who swears that:-

***“8 (e) That the document referred to in pages 478 , 502 and 508 of the Record of Appeal is the ‘Defendant’s Further Supplementary List of Documents’ which the trial judge referred to as the ‘second’ Supplementary List of Documents to differentiate it from the first one. This is annexed on page 395 – 398. No primary document has been left out.”***

It would be cruel to deny the respondent the right to be heard on its appeal on the unsubstantiated assertion that documents are missing from the record while the respondent itself asserts that no documents are missing and the applicant himself is not in a position to even show the Court a single copy of the missing document or documents. We are, on the material before us, satisfied that no document produced as an exhibit in the superior court is missing from the record and the applicant appears to us to be clutching at straws in order to prevent the appeal already filed being heard on its merit. We must also point out that these applications are unnecessarily delaying the hearing of the appeal and again unnecessarily increasing the costs of the litigation. Once again, we would order that if the applicant is able to bring on record the alleged missing documents he is at liberty to do so pursuant to the Court’s order made on 7<sup>th</sup> January, 2010. The notice of motion dated 6<sup>th</sup> and lodged in the Court on 9<sup>th</sup> February, 2007, however, fails and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 11<sup>th</sup> day of June, 2010.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**P.N. WAKI**

.....

**JUDGE OF APPEAL**

**D.K.S AGANYANYA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**