



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT MOMBASA**

**Civil Appeal 287 of 2004**

**MJAHID SUO**

**RICHARD BAYA .....**  
**APPELLANTS**

**AND**

**JOSEPH KASHURU**

**MOHAMED MWENZAGU .....**  
**RESPONDENTS**

*(Appeal from the ruling and order of the High Court of Kenya at Malindi (Ouko J.) dated the  
23<sup>rd</sup> of September, 2004*

**in**

**H.C.C.C. NO.51 OF 2002**

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**RULING OF THE COURT**

We do not agree with Mr. Odongo, learned counsel for the applicant, that the respondents to the motion needed leave of the superior court to enable them appeal to this court. The plaint was struck out and as far as the superior court was concerned, the striking out of the plaint conclusively determined the rights of the parties with regard to all or any of the matters in controversy in the suit – see Order 42 Rule 3, Civil Procedure Rules. So we cannot strike out the appeal on that basis. But Mr. Odongo also relies on the fact that the notice of appeal was itself filed one day late and there was no leave either of the superior court or of this Court to do so. That point is unanswerable and it does not matter that the delay involved was only one day. The respondents to the motion were served with a notice for to-day’s hearing. Neither the respondents nor their counsel is here to contest this point. Accordingly we allow the applicants notice of motion dated and lodged in this Court on 21<sup>st</sup> December, 2004 and order that the notice of appeal dated

and lodged in court on 8<sup>th</sup> October 2004 and the record of appeal lodged on 2<sup>nd</sup> December 2004 be and are hereby struck out with costs to the appeal and application applicants.

**Dated and delivered at Mombasa this 21<sup>st</sup> day of July, 2006.**

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

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