



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: OMOLO, WAKI AND DEVERELL, JJ.A)**

**CIVIL APPLICATION NO. 188 OF 2004**

**BETWEEN**

**SARAH ACHIENG SALASIA.....APPLICANT**

**AND**

**FRED M.O.....1ST RESPONDENT**

**DAVID M. MUCHIRA.....2ND RESPONDENT**

**JOHN KIPRUTO.....3RD RESPONDENT**

**(An application to strike out a Notice of Appeal in an intended appeal  
from the judgment and decree of the High Court of Kenya at Nairobi**

**(Ransley, C.A) dated 23.10.2002**

**in**

**H.C.C.C. NO. 605 OF 1993)**

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**RULING OF THE COURT**

The application before us is a non-starter. It is a notice of motion taken out by the intended respondent in the main appeal (who was the plaintiff before the superior court) for an order that the notice of appeal filed by the intended appellants (the original defendants) on 01.11.02 be struck out. The filing of the notice of appeal was timeous since the judgment of the superior court was delivered on 23.10.02. It is common ground however, that service of the notice of appeal was made on 11.11.02, which, on the face of it, is 4 days outside the period allowed under **Rule 76(1)** of this Court’s Rules.

The application to strike out the notice of appeal was however filed on 28.07.04 – about 1 year 8 months after the offending notice of appeal was served. The applicant said nothing about the Rule under which this application was taken out and it is not stated on the face of the application. But the court drew the attention of learned counsel for the applicant, Mr. Ombete, to **Rule 80** as amended on 04.07.02, and sought his submissions thereon. The Rule states: -

**“80. A person affected by an appeal may, apply to the Court to strike out the notice of appeal 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 (30) days from the date of service of the record of appeal on the respondent”.** (emphasis supplied)

It was Mr. Ombete’s view, the Rule and the proviso thereto notwithstanding, that the application to strike out can be made at any time since the limitation under the proviso relates to the main appeal only. In the matter before us, he submitted, no appeal has been filed almost 3 years after service of the notice of appeal and it may take yet another long while before the appeal is heard and determined. That is why the applicant has made the application since the delay is prejudicial.

For his part, learned counsel for the respondent Mr. Kiogora, submitted that there was no delay in serving the notice of appeal, reasoning as he did, that weekends, and the day an event happens, are “excluded days” under the provisions of **Rule 3** of the Rules of this Court. The provisions of that Rule relate to computation of time and are extracted word for word from **section 57 of the Interpretation and General Provisions, Act Cap 2**, Laws of Kenya, with only one exception. That is the amendment made to the section by **Act No. 11/93** to include “*all official non-working days*” as part of the excluded period. In neither provision however, is it stated that all weekends are an excluded period and we are in no doubt that Mr. Kiogora placed an erroneous construction to the rules.

The only valid point raised by Mr. Kiogora was that the proviso to **Rule 80** was applicable to both the notice of appeal and the appeal. It plainly must be so from the logic of it, although the wording could have been expressly better put. The starting point is the mischief that the amendment of the rule was intended to address. And that was the practice by parties, either by design, negligence or pure inaction, waiting for days, months or even years until the very minute when the appeal is called out for hearing only to seek the striking out of either the notice of appeal or the appeal or both. Apart from the element of surprise to the appellants, it was disruptive of the court’s time and the calendar for conduct of its core business. The former **Rule 80** gave express sanction for applications of such nature to be made “at any time” by any person on whom a notice of appeal had been served. **Rule 101 (b)** which applies at the hearing of the appeal and which is intended to deter a respondent from objecting to the competence of an appeal on grounds that could have been raised under **Rule 80**, did not seem to address the mischief fully as it leaves the court with a discretion. And so it was, that if a person affected by an appeal chose to seek to strike out the notice of appeal or the appeal or either of them, they were free to do so under the amended rule, but only within 30 days of service. If it was an application in respect of the notice of appeal, then the challenge should be made within 30 days of service thereof. If it was the appeal itself, the same limitation applies. We cannot readily cite specific cases, but we are aware that this Court has rejected many applications similar to the current one on that basis. At all events, the proviso to the rule refers to the notice of appeal and the main appeal as provided for under **Rule 85** of the Rules. We are in no doubt that the intendment of the amended **Rule 80** was to limit the period within which challenges to a record of appeal, including a notice of appeal, may be made and it is clear to us that the application before us is not in compliance with the Rules of this Court. It is for dismissal and we so order. Costs of the application to the respondents.

Dated and delivered at Nairobi this 10th day of June, 2005.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**W.S. DEVERELL**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**