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| Case Number: | Civil Appeal 287 of 2004 |
| Date Delivered: | 21 Jul 2006 |
| Case Class: | Civil |
| Court: | Court of Appeal at Mombasa |
| Case Action: | - |
| Judge: | Riaga Samuel Cornelius Omolo, Philip Kiptoo Tunoi, Samuel Elikana Ondari Bosire |
| Citation: | MJAHID SUO & another v JOSEPH KASHURU & another [2006] eKLR |
| Advocates: | Mr. Odongo for the Applicant. |
| Case Summary: | [Ruling] Civil Practice and Procedure - leave to appeal - appeal against a decision of the High Court striking out a plaint - whether such striking out conclusively determined the rights of the parties with regard to the matters in controversy - whether leave of the High Court was needed to appeal against the decision to the Court of Appeal - notice of appeal filed one day out of time without leave of the Court - respondents failing to answer that point - whether the notice of appeal and record of appeal should be struck out - Civil Procedure Rules Order 42 rule 3 |
| Court Division: | - |
| History Magistrates: | - |
| County: | - |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | - |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |

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| Advocates Against: | - |
| Sum Awarded: | - |
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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 23rd of September, 2004

in

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

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 21st December, 2004 and order that the notice of appeal dated and lodged in court on 8th October 2004 and the record of appeal lodged on 2nd December 2004 be and are hereby struck out with costs to the appeal and application applicants.

Dated and delivered at Mombasa this 21st 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

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JUDGE OF APPEAL

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



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