**Salasia v Muchira and others**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 10 June 2005

**Case Number:** 188/04

**Before:** Omolo, Waki and Deverell JJA

**Sourced by:** Lawafrica

*[1] Appeal – Striking out notice of appeal and appeal itself – Application to be made within 30 days of service.*

**JUDGMENT**

**Omollo, Waki and Deverell JJA:** 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 1 November 2002 be struck out. The filing of the notice of appeal was timeous since the judgment of the superior court was delivered on 23 October 2002. It is common ground, however, that service of the notice of appeal was made on 11 November 2002 which, on the face of it, is four 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 July 2004, 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 4 July 2002, 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 days (30) from the date of service of the record of appeal on the respondent” 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 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 Chapter 2, Laws of Kenya, with only one exception; that is the amendment made to the section by Act 11 of 1993 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 (*sic*). 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 appellant, 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 service of the record of appeal which by definition is a reference to both 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. For the appellant:

*Mr Ombete*

For the respondent:

*Mr Kiogora*