

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPEAL NO.53 OF 1993**

MAJOR JOSEPH MWETERI IGWETA.....APPELLANT

VERSUS

1. MUKIRA M'ETHARA

2. THE ATTORNEY

GENERAL.....RESPONDENTS

(Being an appeal from the ruling of the High Court of

Kenya at Nairobi (Justice Shields) dated 25th

October, 1990

in

H.C.C.A. NO. 269 OF 1989)

O R D E R

This is an application under rule 4 of the Rules of this Court for an extension of time to file a notice of appeal. The appeal No. 53/93 filed by the applicant was on 27th July, 1999 struck out for failure to comply with Rule 85(1)(c) in that primary documents by way of pleadings were not included in the record.

As I set out to exercise my discretion I must at the outset confess that there is no material before me on which I can do so. As was said by Privy Council in *RATNAM V. CUMARASAMY* [1964] 3 ALL E.R. 933 there must be some material before the Court to enable its discretion to be exercised. See also *Balcombe LJ and Mann LJ in SAVILL V. SOUTHEND HEALTH AUTHORITY* 1995 1 WLR 1254 at 1259. I do not know why there was non-compliance with the rules. Mistake or accident or inadvertence which may provide a basis for an extension are not relied upon. If documents can be traced there must be some explanation why they were not traced earlier. There is no explanation. In my judgment, once there is non-compliance the burden is on the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour. This burden unfortunately has not been discharged. The rule is where there is no explanation, there shall be no indulgence.

In the result, I refuse to exercise any discretion to extend time as prayed. Accordingly, the application is dismissed with costs.

Dated and delivered at Nairobi this 9th day of August,

1999.

A.A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR