



**IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: GICHERU, O'KUBASU & KEIWUA, J.J.A.)  
CIVIL APPLICATION NO. NAI. 13 OF 2002**

**BETWEEN**

**PHILIP WACHIRA MWANIKI..... APPLICANT**

**AND**

**BLUESHIELD INSURANCE CO. LTD .....RESPONDENT**

**(An application to strike out a Notice of Appeal in an  
intended appeal from Judgment of the High Court of Kenya  
at Nairobi (Mr. Justice Mbogholi) dated 6th May, 1999.**

**in  
H.C.C .C. NO. 1799 OF 1991)  
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**RULING OF THE COURT**

In this Notice of Motion which is made under **rule 80 of the Court of Appeal Rules**, hereinafter called **the Rules**, the applicant has sought to have the respondent's Notice of Appeal dated 7th May, 1999 and date-stamped in the superior court on 12th May, 1999 struck out for the reasons that the respondent has since the lodgement of the said Notice of Appeal deliberately failed to institute its intended appeal against the decision of the superior court given on 6th May 1999 with the resultant delay in the conclusion of the litigation between them to his detriment.

According to the respondent, the proceedings and judgment relevant to its intended appeal were collected from the superior court on 8th May, 2001 but without certified copies of some documentary exhibits tendered in evidence in that court which allegedly had subsequently been collected by the then Counsel for the applicant in the superior court, *Mr. F. N. Wamalwa*

Efforts to retrieve these exhibits have not been successful. Hence the respondent's inability to lodge its intended appeal against the decision of the superior court dated 6th May, 1999. This notwithstanding, however, the respondent has not to date applied to a judge or registrar of the superior court for directions as to whether or not the missing documentary exhibits should be excluded from the record of appeal under **rule 85 (3) of the Rules**. This lapse on the part of the respondent is inexcusable and disentitles it from relying on the missing documentary exhibits in the superior court for its inability to lodge its intended appeal within the prescribed period of sixty days of the date when the Notice of Appeal was lodged in the superior court - 12th May, 1999 - a period in excess of two years. In these circumstances, the applicant's application to strike out the said Notice of Appeal is irresistible. The same is therefore granted with the result that the respondent's Notice of Appeal dated 7th May, 1999 and lodged in the superior court on 12th May, 1999 is struck out with costs to the applicant.

**Dated and delivered at Nairobi this 5th day of July, 2002.**

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**E. O'KUBASU**

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**JUDGE OF APPEAL**

**M. Ole KEIWUA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**