



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISC. CIVIL APPLICATION NO. 45 OF 2013**

**JAMES NGUI NDAMBUKI.....PLAINTIFF**

**VERSUS**

**PHILIS WAYUA WAITA.....DEFENDANT**

**RULING**

1. The application dated 24<sup>th</sup> January, 2013 seeks orders that the Applicant be granted leave to appeal out of time against the judgment made by Hon. Yator on 31<sup>st</sup> October 2012.

2. It is stated in the affidavit in support of the application that the judgment was delivered on 31<sup>st</sup> October, 2012 and that the Applicant managed to obtain proceedings and judgment in January 2013. The Applicant blames the delay in obtaining the judgment on the court. According to the applicant, he visited the court severally before he was supplied with the proceedings and judgment. The applicant's stand is that the appeal has high chances of success and the Respondent will not be prejudiced if this application is allowed.

3. The application is opposed. According to the affidavit in reply, there is no reason given why the Applicant did not attend court when the judgment was delivered. That there is no evidence to show that the applicant applied for a copy of the proceedings and judgment. It is further stated that the appeal has no chances of success.

4. The application was canvassed by way of written submissions which I have duly considered.

5. The principles of the law to be considered on whether or not to allow an application to extend the time within which to appeal are settled. *See for example Barclays Bank of Kenya Ltd vs Martha Karwirwa Antony (2010) eKLR* where the Court of Appeal cited with approval the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No. 225 of 1997* where it was stated as follows:

***“It is now well settled that the decision whether or not to extend the time of appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay, secondly the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted”.***

6. The delay was for about two months. This was not inordinate delay and has been explained. I have looked at the grounds of appeal. The same raises serious issues that need to be ventilated. There is no prejudice that can be suffered by the Respondent that cannot be compensated by way of damages.

7. This court is inclined to exercise its discretion in favour of the Applicant by allowing him to exercise his right of appeal. Consequently, I allow the application with costs to the Respondent.

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**B. THURANIRA JADEN**

**Dated and delivered** at Machakos this 20<sup>th</sup> day of May, 2015

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**JUDGE**