



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL MISC. APPLICATION NO. 190 OF 1998**  
**ESTHER NZEMBI MUNYASYA ::::::::::::::::::::::::::::::: APPLICANT**  
**VERSUS**  
**DANIEL MWENGEA MUKOLO ::::::::::::::::::::::::::::::: RESPONDENT**

Coram: J.W. Mwera J.  
Kibanga Advocate for Applicant 10  
Mati Advocate for Respondent  
C.C. Muli

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**RULING**

A notice of motion brought under O 50 r. 1 Civil Procedure Rules S.79 Civil Procedure Act and dated 24.12.98 prays for orders that the applicant be granted leave to appeal out of time. The reasons advanced for that prayer were that the appeal had merit (arguable?) and that failure to appeal in time was because the lower court delayed in supplying certified proceedings applied for. That refusal to grant the prayer would work 20 hardship against this applicant. There was an affidavit to support this application which Mr. T. Musyoki argued and Mr. Mati opposed.

The court heard that the decision to be appealed against was delivered on 15.9.98 so the applicant had 30 days until 15.10.98 to appeal. But that when he applied for proceedings orally after the judgement followed by a letter and due deposit, the same were availed on 13.11.98 – some 28 days out of time. It then shows that this application was filed on 24.11.98 – another 11 days later. That the case was for damages arising from a road accident and so appealing out of time could not prejudice the Respondent at all. Mr. Mati had a contrary view. He submitted that even with 11 days elapsing since lower court proceedings were availed and this application filed, it was not diligently prosecuted. It first came to court on 9.2.2000 – one and a half years since filing and it was served on the Respondent on 6.6.2000. That in the meantime costs in lower court were assessed and paid. All this amounted to prejudice to the Respondent.

After hearing both sides, this application is disallowed. First no explanation has been given as to why it took the applicant 11 days to apply for enlargement of time to appeal. Or why it took so long to prosecute let alone serve it on Respondent. It was not denied that costs have since been assessed and paid to Respondent. All in all this application is refused with costs. 20 Orders accordingly.

**Delivered on 1st February 2001.**

**J. W. MWERA**

**JUDGE**