



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NO. 51 OF 2013**

**ELIUD WAMBUA KIANGI.....APPLICANT**

**VERSUS**

**MARTHA NDUNGE KASINGA.....1<sup>ST</sup> RESPONDENT**

**JANE MUTU KASINGA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 28<sup>th</sup> January, 2013 seeks orders that this Honorable court be pleased to grant leave to the applicants to file an appeal out of time against the decision of the Honorable Nyakweba P. M. in his Kilungu PMC Civil Case No. 39 of 2010 judgment.
2. The failure to file the appeal within time is attributed to the breakdown of communication between the Applicant and his advocate.
3. The application is opposed. According to the replying affidavit, the application herein was not filed within reasonable time and neither has the delay been explained. It is further contended that the Memorandum of Appeal has no chances of success.
4. The application was canvassed by way of written submissions which I have duly considered.
5. The lower court judgment was delivered on 24<sup>th</sup> October, 2012. The Memorandum of Appeal and the application herein were filed on 29<sup>th</sup> January, 2013. Taking into account that time does not run between the period 21<sup>st</sup> December and 13<sup>th</sup> January, the delay was less than two months. The delay was not inordinate.
6. The reason for the delay is given as breakdown of communication between the applicant and his advocate. No details have been given to show why there was breakdown of communication. Be as it may, I take into account that the subject matter is land which is an emotive issue in Kenya.
7. The memorandum of appeal raises grounds of lack of legal capacity to sue and the question of whether the judgment is against the weight of the evidence. These are arguable issues.
8. No prejudice will be suffered by the Respondent that cannot be compensated by way of costs. I am therefore inclined to exercise this court’s discretion in favour of the applicants. I allow the application with costs to the Respondents.

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**B. THURANIRA JADEN**

**Dated and delivered at Machakos this 6<sup>th</sup> day of May, 2015**

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**B. THURANIRA JADEN**

**JUDGE**