



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**MISC.CIVIL APPLICATION NO.150 OF 2012**

**DAVID WACHIRA NDUNG’U .....APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED .....RESPONDENT**

**RULING**

1. The Application before Court is the Notice of Motion dated 12<sup>th</sup> September 2012 in which the Applicant seeks leave to file an Appeal out of time.
2. The main ground in support of application is that the Applicant never had notice of the judgment date of 9<sup>th</sup> August 2012 and that thereafter the Court file went missing until 12<sup>th</sup> September 2012. This Court is also told that the intended Appeal is high meritorious. In the affidavit sworn on 12<sup>th</sup> September 2012, the Applicant avers that the delivery of the judgment by the Trial Court was postponed severally but eventually delivered on 9<sup>th</sup> August 2012. The Applicant further avers that neither he nor his Counsel had notice of the date. That he only came to learn of the judgment on 12<sup>th</sup> September 2012 as the Court file could not be traced in the civil registry.
3. Opposing the application the Respondent filed a Replying Affidavit through Debra Ajwang sworn on 15<sup>th</sup> November 2012. Attached to that affidavit are copies of the proceedings and judgment of the Trial Court.
4. I have to agree with Counsel for the Respondent that, at least from the proceedings, there was no single adjournment or rescheduling of the judgment date. The Court record shows that on 12/9/2012 and in the presence of Counsel of both sides the Learned Magistrate set the date of the delivery of judgment for 9/08/2012 at 2.00p.m. The Court record shows that the judgment was indeed delivered on 9/08/2012 but in the absence of parties. The time is however not indicated. It would seem that the Applicant was not entirely candid about what happened at trial and this Court would up to here be inclined to dismiss the application as it seems premised on falsehood or suppressed truth.
5. But I shall nevertheless allow the application because the Applicant was only 10 days (or thereabouts) late in filing the Appeal and I also consider that the right of a party to challenge a final judgment of the subordinate Court is a statutory right. Let the applicant notwithstanding his dishonesty have his day in Court. Perhaps the path that justice charts may help him realize the folly of trying to mislead those who administer it. For the fact that the Applicant was not forthright he will meet the costs of this application in any event.
- 6) So my orders. The Application of 12<sup>th</sup> September 2012 is allowed. Costs shall in any event be to the Respondent. The Applicant is granted 14 days leave to file and serve his Petition of Appeal.

**F. TUIYOTT**

**J U D G E**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 23<sup>RD</sup> DAY OF JANUARY 2014.**

**IN THE PRESENCE OF:**

.....**COURT CLERK**

.....**FOR APPLICANT**

.....**FOR RESPONDENT**