



**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPLICATION NO. 36 OF 2014**

**BONIFACE MUSEMBI KISOME.....APPLICANT**

**VERSUS**

**JULIUS MUSEE NDAMBUKI.....RESPONDENT**

**RULING**

1. The application dated 25<sup>th</sup> February, 2014 seeks the following orders:
  1. That the applicant/intended appellant be allowed to appeal out of time.
  2. That the costs of this application be provided for.
2. The thrust of the Applicant's case according to the affidavit in support is that the judgment was delivered on 20<sup>th</sup> November, 2013 in the absence of the Applicant who had no notice of the judgment. That by the time the Applicant came to know of the judgment, the time within which to file an appeal had already lapsed. That the Applicant is dissatisfied with the judgment and intends to appeal. It is contended that the appeal has good chances of success.
3. The application is opposed. According to the affidavit in reply, the application lacks any merit and the appeal has no chances of success. That the plaint does not disclose a reasonable cause of action and that the weight of the evidence was against the Applicant.
4. The applicant was heard by way of written submissions which I have duly considered.
5. In an application of this nature, the principles of the law to be considered were set out by the Court of Appeal in the case of **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:

***“the decision whether or not to extend the time for 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 in this case was for a record of about three months. The judgment was delivered on 20<sup>th</sup> November 2013 and the application herein filed on 26<sup>th</sup> February, 2014. 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 not inordinate and has been explained. However, there was a counsel reflected on record for the applicant when the judgment was delivered.

7. The memo of appeal raises serious issues that require to be ventilated. No prejudice will be occasioned to the Respondent that cannot be compensated by way of costs.
8. In the premises, I allow the application with costs to the Respondent.

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**B. THURANIRA JADEN**

**Dated** and delivered at Kitui this 15<sup>th</sup> day of October, **2015**

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**B. THURANIRA JADEN**

**JUDGE**