



**Cheruiyot v Republic (Miscellaneous Criminal Application
137 of 2018) [2023] KEHC 24501 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24501 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
MISCELLANEOUS CRIMINAL APPLICATION 137 OF 2018
RN NYAKUNDI, J
OCTOBER 31, 2023**

BETWEEN

ABRAHAM KIPYEGO CHERUIYOT APPLICANT

AND

REPUBLIC RESPONDENT

(MISCELLANEOUS CRIMINAL APPLICATION NO 137 OF 2018)

RULING

1. The applicant approached this court vide an application dated 27th September 2018 seeking leave to file his appeal out of time. The application is premised on the grounds set out therein and the contents of the affidavit in support of the same. He was convicted and sentenced to serve 7 years for the offences of attempted rape and assault.. The applicant contends that he was confused and did not hear when the trial court ordered that he has a right of appeal within 14 days to the High Court.

Analysis and Determination

2. The applicant is acting in person and this explains why the application does not contain the impugned judgement that he wishes to appeal against or the order itself. Nevertheless, the court has the jurisdiction to consider the merits of the application within the requirements of Section 349 of the [Criminal Procedure Code](#) which provides as follows: “ An appeal shall be entered within 14 days of the date of the order or sentenced appealed against provided that the court to which an appeal is made may for good cause admit the appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of appellant or his advocate to obtain a copy of the judgement or order appealed against and a copy of the record, within a reasonable time of applying to the court therefore.
3. The issue here is whether by virtue of Section 349 of the [CPC](#) read as a whole and by the crafted application it can be said that the applicant qualifies for this court to exercise discretion to extend time



within which to file an intended appeal out of time. In this respect the court shall have power for sufficient reason to extend time for an application for leave to appeal out of time. Therefore, there must be a satisfactory basis upon which that crucial time component can be extended for particular acts to be deemed to have been undertaken within the purview of the law.

4. On matters for leave to appeal out of time I find the ordained principles in civil law to be spot on in so far as the established approach on discretionary powers of the court are concerned. The statutory anchorage is infused with the jurisprudence on the question which must be rightly determined for or against the applicant. In this respect the court of Appeal in Paul Wanjohi Mathenge v Duncan Githane Mathenge (2013) addressed itself as follows: “ The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice, I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this court including, but not limited to, the period the period of delay, the reasons for the delay the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues or public importance. In Henry Mukora Mwangi v Charles Gichina Mwangi- Civil Application No Na 26 of 2004 this court held: It has been stated time and again that in an application under rule 4 of the rules the learned single judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi v Kenya Airway Ltd. [2003] KLR 486 in which this court stated: “Over the years, the Court has or course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso v Rose Hellen Wangari Mwangi- Civil Application No Nai. 255 of 1997 (unreported) the court expressed itself thus:“It is now well settled that 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 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.
5. Pausing there I will make the following comments. First according to Section 349 of the [CPC](#) every appeal should be filed within 14 days from the date of the judgement. It is same that avoiding delays hence the objective of it is to dictate a time schedule within which certain steps ought to be taken from the date and time the trial court pronounces itself on the outcome of the proceedings. In essence for any delay to be excused it must be satisfactorily explained by the applicant. There must also be a draft memorandum of appeal to answer to the question that the intended appeal has high chances of success. In the instant application there is no memorandum of appeal, no annexed copy of a judgement save that the applicant pleads that he was confused immediately after the reading of the judgement by the trial court. The nature of the confusion with due respect to the applicant is not crystal clear to warrant invoking the discretionary powers of this court. In the circumstances, this application is dismissed as being incompetent. If costs were to be awarded the respondent would be at liberty to tax costs against the applicant

Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 31ST DAY OF OCTOBER 2023

In the presence of:

.....

R. NYAKUNDI

JUDGE

