



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

MISC. CRIMINAL APPLICATION NO.52 OF 2017

(CONSOLIDATED WITH MISC. CR. APPLIC. NOS.53 – 60 OF 2017)

REPUBLIC.....APPLICANT

VERSUS

JAMES ANYOKO AMENYA.....1ST RESPONDENT

BENEDICT MAURICE OMOLLO OLWENYO...2ND RESPONDENT

DAN ODHIAMBO OTHUONDO.....3RD RESPONDENT

ELEKIA OCHOLA ODARI.....4TH RESPONDENT

FRANCISCA KATILE MULWA ONYANGO.....5TH RESPONDENT

BARNABAS KINYOR AGUI.....6TH RESPONDENT

JOSHUA OPONDO OMUKAYA.....7TH RESPONDENT

COLLINS OMONDI BALA.....8TH RESPONDENT

ALEX OTIENO OYUGA.....9TH RESPONDENT

RULING

1. This is an application filed by **AMMON OLUOCH OJWANG** who practices as an advocate in the Office of the Director of Public Prosecution at Homa Bay County, seeking to be granted leave to appeal out of time.

The basis for this prayer is that the Respondents were charged at the Chief Magistrate's Court, Homa Bay with the following offences:-

- 1) The accused wilful failure to comply with the law relating to management of funds and incurring of expenditures contrary to Section 45 (2) and 48 (1) of the Anti Corruption and Economic Crimes Act 2003;**
- 2) Wilful failure to comply with the law relating to procurement contrary to Section 48 (2) and 48 (1) of the Anti Corruption and Economic Crimes Act 2003;**
- 3) With an alternative charge of engaging in a project without prior planning.**
- 4) The counts of failure to comply with applicable procedures and guidelines relating to procurement and tendering of contract.**

2. They were subsequently acquitted under **Section 215 Criminal Procedure Code** in the lower court on 8th September 2017. The prosecution/applicant was aggrieved with those results and applied for certified copies of proceedings and judgment to enable them filing of an appeal. However it was not until 14/11/2017 that the applicant received a copy of the judgment minus the proceedings which to date are yet to be served.

The delay of filing the appeal was as a result of not having the benefit of the proceedings to enable them file a comprehensive appeal.

3. In his oral submissions, Mr. Oluoch pointed out that having waited for a month after receiving the judgement; he consulted with his client and opted to file this application expeditiously.

4. Mr. Abisai for the respondents opposed the application saying the proceedings were ready on the date of the judgment and the respondents even obtained certified copies which they presented to their employer for reinstatement. The applicant is accused of being indolent and waiting for 3 months to realize its pursuit of the matter yet its apparent there had been no intention to appeal as no notice of appeal has been filed to date. The attempt to file the appeal now is described as inordinate and inexcusable.

5. Certainly there is a conclusive factor in filing of appeal – that is why there is a statutory provision.

However as rightly acknowledged by the respondents' counsel, a party may encounter some delay which hampers its ability to perform the act required in a timely fashion.

6. The applicant has given an account in the further affidavit regarding the numerous visits to the court in an attempt to obtain the record and the information given that the clerks who had been assigned to handle the file was away in Nairobi for a month attending some training. I take judicial notice as an officer of this court aware of the administration assignments that this is a fact.

7. If indeed the applicant obtained certified proceedings on the day judgment was delivered, nothing could have been easier than to annex those proceedings showing the date of receipt. Certainly there were some typed proceedings available – but those were obtained to enable parties make their submissions on a no case to answer – they were not the complete record.

8. The delay in filing appeal was not caused by a lack of interest of the applicant's part and I do not find any suggestion of indolence or lack of diligence – what they eventually got was only a copy of the judgment.

Three months is not an inordinately long period when one takes into account the efforts the applicants had made to obtain the proceedings.

9. I agree that the delay has been caused by the failure of the court to avail the proceedings in a timely factor.

10. I think the other problem is that the Respondents' counsel has imported provisions of Civil Procedure and Elections act and Rules regarding time – which do not fit in with the criminal process – citing the **Raila Odinga case** on time is misplaced as that situation has a constitutional time frame. The requirement to file a notice of appeal applies in Civil Cases and Election Petitions not in criminal matters. I hold to find that the application is merited and is allowed.

The applicants are granted leave to file appeal out of time within 14 days hereof.

(2) The Deputy Registrar Homa Bay is directed to supply the DPP with certified copies of the complete record within 7 days hereof.

Delivered and dated this 21st day of March, 2018 at Homa Bay

H.A. OMONDI

JUDGE