



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

MISCELLANEOUS ACEC NO. 8 OF 2018

1. STEPHEN OTIENO ONYANGO

2. CARGO ROLLERS LTD.....APPLICANTS

Versus

REPUBLIC.....RESPONDENT

R U L I N G

1. Stephen Otieno Onyango and Cargo Rollers Limited the applicants herein, filed the chambers summons dated 6th April 2018 under Article 48 of the Constitution and section 349 of the Criminal Procedure Code. They are seeking leave to file appeal out of time. The application is supported by the grounds on its face plus the supporting affidavit of the 1st applicant.

2. The applicants were charged with various counts of offences under the Anti-Corruption & Economic Crimes Act (ACECA) No 3 of 2003. They were convicted on 30th April 2015 and fined a total of close to Kshs 6 million, which was paid. Their main ground in support of the application is that they instructed an advocate a Mr. Mutisya to file an appeal against both convictions and sentence.

3. They much later on realized that no appeal had been filed. Its then that they instructed Mr. Gachuba to file an appeal on their behalf. The new counsel requested for proceedings and Judgment vide a letter dated 29th September 2017, (annexture S003)

4. When this application was placed before the Court on 11th April 2018, directions were given to the effect that it should be served for *inter partes* hearing on 17th April 2018. The affidavit of service dated 16th April 2018 shows that the respondent was served with the application and notice of motion on 13th April 2018.

5. Despite having been served the respondent elected not to file any replying affidavit or grounds of opposition. Instead it filed written submissions which are not grounded on any pleadings and they will not be considered.

6. The judgment in respect of this application was delivered on 30th April 2015.

There is nothing to show that any request for proceedings and judgment was ever made by the applicants or anybody else soon thereafter. The request was only made on 29th March 2017. Section 349 Criminal Procedure Code which deals with time limitations for filing of appeals provides as follows:

An appeal shall be entered within fourteen days of the date of the order or sentence appealed against: Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.

7. Following the late request of 29th September 2017, the proceedings and judgment were typed and certified on 21st March 2018. No certificate of delay in the true sense of the word can be issued, because the request was never made within the 14 days stated in section 349 Criminal Procedure Code. The Applicants cannot therefore blame the delay on the Court. Mr Mutisya the advocate who was allegedly initially instructed would not conveniently come to report himself by admitting that he failed his clients.

8. It must however be admitted that a delay of three (3) years in filing a criminal appeal, is inordinate. At the same time the Court cannot punish the applicants for the omission and/or commissions of their advocate.

9. The applicants are merely seeking to have an opportunity to present their case before the High Court for re- evaluation/re-consideration of the evidence. They already paid the fine and there should really be no prejudice caused to the respondent. To however manage and control any further delays this Court will give stringent timelines which must be complied with.

I therefore allow the application and grant leave to file appeal out of time on the following conditions.

- i. The Petition of appeal should be filed and served within 7 days.
- ii. The respondent to be served with a certified copy of the proceedings and Judgment within 7 days.
- iii. The Petition of Appeal to be placed before this Court for purposes of admission on or before 12th June 2018.
- iv. Mention on 18th June 2018 for directions on the hearing.

Orders accordingly.

Dated, signed and delivered this 30th day of May 2018 in open court at NAIROBI.

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HEDWIG I. ONG'UDI

JUDGE