



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC. CRIMINAL APPLICATION 341 OF 2016.

OFFICE OF THE DIRECTOR

OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

SYLVESTER MOGELA.....1ST RESPONDENT

LAWRENCE WAMBUA KITHEKA.....2ND RESPONDENT

RULING

The Applicant brought this application seeking leave to lodge an appeal out of time as the main prayer. The appeal in question emanated from the judgment in **Makadara Chief Magistrate's Criminal Case 4735 of 2013**. The application is by a Notice of Motion dated 11th September, 2016. It is also prayed that the annexed Petition of Appeal be deemed properly filed and served.

The Applicant set out a number of grounds on which the application is premised. Firstly, that the delay in filing the appeal was not deliberate. Secondly, that the failure to file the appeal was due to a failure to procure typed proceedings within time. Thirdly, that no prejudice would be suffered by the Respondent if the Applicant was allowed to appeal out of time and lastly, that it was in the interest of justice that the application be granted.

A Supporting Affidavit sworn by Naomi Atina, prosecution counsel was annexed to the application. In it she deponed that the Respondents were acquitted of the main and alternative counts in a judgment delivered on 9th October, 2015. She swore that the trial court failed to appreciate the prosecution's evidence which meant that the appeal had a high chance of succeeding. She deponed that in light of the circumstances they wrote a letter requesting typed proceedings which were supplied on 30th May, 2016. She annexed a certificate of delay dated 9th September, 2016 to buttress her point. She swore that the Respondents would not be prejudiced by this application.

A Replying Affidavit was filed by one Kennedy Araka Nyachoti, advocate who has the conduct of the matter on behalf of the Respondents. He recognized that a grant of leave to appeal out of time is purely discretionary. However, the court must consider the circumstances of the case such as the duration of delay, an acceptable account of the delay and the chances that the appeal will be successful. In the present case, he deposed, there was no evidence that an application for proceedings after the judgment was made or filed and copied to the Respondent's advocate as required. In addition, the Applicant had failed to explain the delay in applying for the proceedings immediately after the delivery of the judgment. It took

21 days to apply for the proceedings which was an inordinate delay. Further, the certificate of delay from the executive officer Makadara Chief Magistrate's Court showed that the Applicant was supplied with the proceedings on 30th May, 2016 but that the current application was filed on 29th September, 2016 after a period of about 5 months, a delay which is also unexplained. On the success of the appeal, he deponed that the five grounds of appeal annexed to the application did not demonstrate the likelihood of the success of the appeal. He annexed a copy of the proceedings and a list of authorities in support of his submissions. He therefore urged the court to dismiss the application.

The Applicant in rejoinder filed a Supplementary Affidavit sworn on 1st December, 2016 by Ms. Naomi Atina who deposed that the proceedings were supplied to their office at Makadara on 30th May, 2016 but that they were only received at their headquarters on 27th June, 2016. That after she considered the accompanying certificate of delay she realized that the same was erroneously dated 24th June, 2015 and it indicated that the proceedings were applied for on 27th October, 2015 and supplied on 30th May, 2015. Further that the process of correcting the error on the certificate of delay by the executive officer took inordinately long as they received the amended certificate of delay on 12th September, 2016. She annexed both copies of the certificate of delay to the affidavit. She reiterated that the appeal had a high chance of success and that in the interest of justice the appeal should be admitted.

The oral submissions made before me were a reflection of the contents of the application, the affidavits filed in support of and in opposition to the application. The current application is one premised on a prayer to grant the Applicant leave to file an appeal out of time. The test to be considered in granting such an application is the exercise of the court's discretion. Such discretion must then be exercised judiciously granted the circumstances of the case. See **Fidelis Kitili Kivaya & anor v. Karanja Kabage & anor**[2014] eKLR, that:

“In the exercise of the wide discretion of the court in extending time, the court must take into consideration relevant factors, amongst them the length of the delay, the chances of success of the appeal and the extent of prejudice that may be occasioned to the respondent.”

The same was observed in **African Airlines International Ltd v. Eastern & Southern African Trade & Development Bank(PTA Bank)**[2003] eKLR, in which it was held that;

“In dealing with the application of extension, the learned single judge had to take into account all the relevant matters when approaching the determination of the application before him. In our judgment, all the relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reasons for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended.”

It is clear that the length of delay, the reason for the delay, the strength of the appeal and the extent of prejudice on the defendant are generally agreed upon as criteria that should be considered before an extension of time is granted.

The issue that was heavily contested in this application is that of delay, both in applying for the proceedings and filing the application. The judgment was delivered on 9th October, 2015. The Applicant had a 14 day window within which to lodge an appeal which it did not comply with for want of obtaining the proceedings. A letter from the Executive Officer of the court Ref: No. CM/MAK/4735/2013 was supplied by the Applicant to show that since they applied for the proceedings and judgment on 27th October, 2015 it was only supplied to them on 30th May, 2016. The Applicant further submitted that after they were supplied it was not until 27th June, 2016 that the same was forwarded to the headquarters. It must be noted that the present application was filed on 16th September, 2016. It is therefore clear that the Applicant took more than a month to file the present application. If it was really intent on beating the delay, it ought to have filed the application as soon as it obtained the proceedings. I therefore agree with the Respondent that the Applicant took an inordinate amount of time to apply for the proceedings and file

the instant application.

However, before this court makes its final deliberation it must consider the spirit of Article 159(2) (d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities. With regard to what amounts to undue regard to technicalities I make reference to Lady Justice C.K. Byamugisha's essay on **Administering Justice Without Undue Regard to the Technicalities**, thus:

“In particular administration of justice without undue regard to technicalities was understood to mean that rules of procedure were handmaidens of justice. What this meant in practical terms was that the courts were charged with resolving disputes without being unduly hindered by legal technicalities. In other words rules of procedure are supposed to help the courts expedite court business but are not supposed to be ironclad obstacles to all causes in all circumstances.”

With regard to the discretion that a court must exercise in determining what amounts to undue technicalities, she had this to say;

“In exercising its discretion, the circumstances of each case are very important. However, the right to be heard should always be a relevant consideration and therefore should be considered before such applications are rejected on technical grounds... In any case, our judicial system should never permit a party to be driven from the judgment seat without the court considering his/her/its/ right to be heard except in cases where the cause of the action is obviously and almost uncontestably bad.”

Flowing from the above, I seek solace from the Constitution which sets out the right to appeal under Article 50(2)(q). It is one of the rights to a fair hearing and therefore setting a standard pegged on an arguable case would be tantamount to a limitation of the right. Respectively, I am of the view that the Respondents stand to suffer no undue prejudice if the application is allowed. I say so because our judicial system being adversarial, each party will be accorded an opportunity to ventilate their case during the hearing. The court will only arrive at the verdict based on the weight of the evidence on record. It would therefore be unjust not to allow the appeal to proceed.

In the result, I allow the application. Leave is granted to file the appeal out of time. The appeal shall be filed and served within seven (7) days from the date of this ruling. It is so ordered.

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2017.

G. W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. M/s Nyauncho h/b for M/s Atina for the Applicant
2. K.A Nyachoti for the Respondent