



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**MISC. CRIMINAL APPLICATION NO. 95 OF 2016**

**REPUBLIC.....INTENDED APPELLANT/APPLICANT**

**VERSUS**

**JOHN THUKU GICHEHA.....1<sup>ST</sup> RESPONDENT**

**BEN MAINA MACHARIA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is an Application by the Director of Public Prosecutions (DPP) seeking for enlargement of time to file a Petition of Appeal from a ruling and orders from Limuru SPM Criminal Case No. 547 of 2016.
2. The ruling was delivered on 28/09/2016. The Learned Trial Magistrate acquitted both Accused Persons in the case under Section 202 of the Criminal Procedure Code over the non-attendance in Court by the Complainant. The Complainant in this case was the Anti-Counterfeit Authority (ACA). The charges respected being in possession, in the course of trade, with counterfeit goods contrary to Section 35(1) of the Anti-Counterfeit Act, 2008. Upon acquittal, the Advocate for the Accused Person made applications for all the seized goods to be released to the Accused Persons (Respondents). The Learned Trial Magistrate obliged and ordered that they be so released.
3. The DPP, who did not oppose either applications in the Court below, now seeks to enlarge time to bring an appeal against both the ruling and order. In their proposed Petition of Appeal, the DPP has enumerated two grounds:
  - a. That the Learned Magistrate erred in law and fact and misdirected himself in acquitting the Accused Person in the absence of the Complainant and against public interest.
  - b. That the Learned Magistrate erred in law and fact and misdirected himself by not appreciating that the Court lacked jurisdiction to order the release of the exhibits.
4. The Application is brought under Sections 349 and 350 of the Criminal Procedure Code (CPC). DPP argues that the ruling and order were given on 28/09/2016 but that several factors led to a delay in filing an appeal. First, the DPP says that proceedings were applied for but were not obtained to date. However, there is evidence that untyped proceedings were made available to the ACA on 29/09/2016.
5. DPP says that in a case of this nature, it is important that proper consultations happen between the ACA and the DPP before the DPP forms an opinion that an appeal is merited. This took a little bit of time

hence the delay.

6. The Respondents have opposed the Application on three grounds.

7. First, the Respondents argue that the delay is inordinate and unexplained. The Respondents say that the ACA had the un-typed proceedings as early as 29/09/2016. It wrote to the DPP on 04/10/2016 detailing the grounds of the intended appeal. And on 07/10/2016, the DPP wrote to the ACA confirming that it will file the appeal. The Respondents complain that no further action was taken until two months later when the present Application was filed. They find this delay to be inordinate and to be unexplained.

8. Second, the Respondents argue that there is no appeal in existence yet the text of Section 349 and 350 of the CPC implies that the proper procedure is for one to file an appeal and then approach the Court for leave to enlarge time. Consequently, the Respondents argue that the Applicant is incompetent and the prayers sought cannot be granted.

9. Lastly, the Respondents argue that the intended appeal is without merit and is totally frivolous and not arguable.

10. I have dealt with the second and third arguments by the Respondents below. I wish to briefly deal with the second argument. Section 349 of the CPC is couched 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 lapsed, 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.

11. I find nowhere in this Section a mandatory provision that an intending appellant who has run out of time should first file the intended appeal and then seek leave of the Court to regularize it afterwards. The section is couched in substantive time: after the expiry of fourteen days, leave of the Court is needed to file an appeal. In my view, it is formalist technicality whether the leave is obtained before the Petition of intended appeal is filed in Court first.

12. It is important to point out that the DPP timely filed an appeal in the matter to wit Kiambu High Court Criminal Appeal No. 146 of 2016. It would appear that only the titling of that appeal is wrong as the grounds of appeal enumerated in the Memorandum of Appeal are exactly the same as those proposed for this appeal. It is, therefore, quite baffling why the DPP elected to bring this application to extend time to file another appeal rather than amend the existing one.

13. The existence of that appeal belies the argument advanced by the DPP that his office could not file an appeal because it did not have typed proceedings. As the Respondent points out, the ACA had un-typed proceedings one day after the impugned ruling and order were given. The ruling and order is short enough that it is absurdly pre-textual to advance the argument that typed proceedings were needed in order to fashion the appeal.

14. It would have been far better if the DPP had been candid enough to stick with the more probable argument that consultations were on-going between the two agencies: the DPP and the ACA – and that those consultations took time due to inefficiencies, the bureaucratic complexity of the two organizations as well as inadvertence. That certainly appears to be the cause of the delay in filing or perfecting the appeal here.

15. Our jurisprudence gives this Court wide discretion to permit an appeal to be filed out of time where the delay is explained and where that delay is not inordinate. On my part, I read our case law to give the following guidelines on when the Court should exercise its discretion to allow an appeal to be filed out of

time:

- a. The delay must not be inordinate and unreasonable;
- b. The delay must not have been actuated by bad faith or improper reasons;
- c. The proposed appeal must be arguable;
- d. The enlargement of time must not unfairly prejudice the Respondent; and
- e. The dictates of public interest and administration of justice must be taken into account.

16. Looking at these five grounds, I am inclined to grant the sought prayer to enlarge time. As I pointed out above, I am moved, in part, by the fact that there is an existing appeal which was timeously filed. The existence of that appeal even if wrongly intitled demonstrates that the Applicant was desirous of preferring an appeal from an early time and that the proposed appeal is not an afterthought. The delay of two months is also, in context, not inordinate (*See R v Martha Nyaboke Bosire [2015] eKLR*). I note that to date the DPP has not received typed copies of the proceedings, ruling order of the Court.

17. I have also concluded that there has been no bad faith on the part of the Applicant. None has been alleged or demonstrated anyway. This ground can militate against grant of leave to enlarge time when it can be shown that the Applicant is motivated by vindictive or malicious reasons not in keeping with the objectives of the Criminal Justice System.

18. As to whether the appeal is arguable or not, I have noted the strident arguments by the Respondent urging that the appeal is demonstrably hopeless. I am not persuaded that the intended appeal is so hopeless as to attract the conclusion that it deserves no opportunity for it to be ventilated in full. I am unable to say that the grounds of appeal enumerated are in-arguable. An Applicant for extension of time is **not** required to persuade the Appellate court that the intended has a high probability of success. All an Applicant is required to demonstrate is the arguability of the appeal: a demonstration that the Applicant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict.

19. I would say that the principle that Courts should, at all times where reasonably possible try to determine disputes on their merits applies in both criminal and civil cases.

Hence the remarks by the Ugandan Supreme Court in *Banco Arabe Espanol V Bank of Uganda [1999] 2 EA 22* apply to both criminal and civil cases that:

The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuant of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered.

20. However, adhering to this salutary policy in the administration of justice does not **at all** mean that parties will be granted leave for extension of time automatically and in spite of their conduct in the litigation and the effect their inattention to the rules of the game would have on the other party to the suit.

21. In the present case, however, I have formed the opinion that the Respondent will not be unduly prejudiced by an order extending time. I have also noted that the case is of immense public importance given the nature of the criminal case. The allegations in the criminal case were that the Respondents were found in possession of dozens of gas cylinders filled with gas which were suspected to be counterfeit. There is no gainsaying the sensitivity of the case and its importance to public safety. If successful, the Appeal will test the appropriate orders that a trial Court can make respecting goods seized by the ACA on suspicion of being counterfeit goods.

22. Consequently, the Application dated 13/12/2016 is allowed. The Petition of Appeal attached to the Notice of Motion shall be deemed as duly filed.

23. The Applicant shall file and serve the Record of Appeal within thirty (30) days of today.

24. Orders accordingly.

**Dated and delivered at Kiambu this 22nd Day of June, 2017.**

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**JOEL NGUGI**

**JUDGE**