

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO.431 OF 2016

REPUBLIC.....APPLICANT

VERSUS

SAMUEL KARIUKI CHEGE.....1ST RESPONDENT

FRANCIS KIRIANJA NJOROGE.....2ND RESPONDENT

RULING

The Director of Public Prosecution (the Applicant) was aggrieved by the verdict of the trial magistrate in **Nairobi CMC Criminal Case No.644 of 2012 Republic –vs- Samuel Kariuki Chege and Francis Kirianja Njoroge** (the Respondents) in which the Respondents were acquitted for lack of sufficient evidence. The Applicant has filed the present application seeking the leave of this court to file appeal out of time. The Applicant explains that its failure to file the appeal in time was not deliberate. It was caused by the long time it took for the Applicant to procure typed proceedings from the court. The Applicant is of the view that no prejudice will be suffered by the Respondents if the Applicant is granted leave to file appeal out of time. The Applicant further states that the intended appeal has overwhelming chances of success.

The application was opposed by the Respondents. The 1st Respondent swore a replying affidavit in opposition to the application. The Respondents contend that the decision to file the appeal was not an independent decision of the Director of Public Prosecution but rather was instigated by the complainants who want to pursue a claim in relationship to ownership of land. The Respondents are of the view that the intended appeal to be filed has no merit and the court should not allow the application because to do so would unnecessarily result in further costs to the Respondents. They urged the court to dismiss the application.

During the hearing of the application, this court heard oral rival submission made by Ms. Nyauncho for the Applicant and Mr. Ngugi for the 1st Respondent. This court has carefully considered the said submission. The issue for determination by this court is whether the Applicant made a case for this court to grant it leave to appeal out of time. That the Director of Public Prosecutions has the right to appeal against an acquittal is provided under **Section 348A of the Criminal Procedure Code. Section 349 of the Criminal Procedure Code** grants this court jurisdiction to extend time upon which an appeal can be filed ***“if it is satisfied that the failure to enter the appeal within that period may have been caused by inability of the Appellant or his advocate to obtain a copy of the judgment or order appeal against, and a copy of the record, within a reasonable time of applying to the court therefor.”***

In the present application, the Applicant has explained its failure to lodge the appeal in time. It stated that it was unable to have filed the appeal in time due to the fact that it was waiting for typed copies of the proceedings and judgment from the magistrate’s court. The Respondents are opposed to the application on the grounds that no useful purpose will be served if leave is granted on an account of the fact that the intended appeal to be filed lacks substance. This court is persuaded that the Applicant should be allowed to exercise its undoubted right of appeal. This court is satisfied by the explanation given by the Applicant for its failure to file the appeal in time. The Applicant was unable to procure typed copies of proceedings and judgment to enable it lodge the appeal in time. The fact that the complainant engaged with the Director of Public Prosecution with a view to instituting the appeal, does not in any way affect the Applicant’s right of appeal. In any event, the issues raised by the Respondents in this application will be

ventilated in its proper forum i.e. during the hearing of the appeal.

The upshot of the above reasons is that the application by the Applicant has merit. It is hereby allowed. The Applicant is granted leave to file appeal out of time. The appeal should be filed and served within seven (7) days of today's date. The record of appeal should be filed and served within thirty (30) days of today's date. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF JUNE 2017

L. KIMARU

JUDGE