



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 154 OF 2016**

**REPUBLIC.....APPLICANT**

**VERSUS**

**ALEX KYALO MUTUKU.....1<sup>ST</sup> RESPONDENT**

**DIANAH NDUKU MULL.....2<sup>ND</sup> RESPONDENT**

**JUSTUS NZIOKI SUKO.....3<sup>RD</sup> RESPONDENT**

**MARY MUMBUA MUTETI.....4<sup>TH</sup> RESPONDENT**

**MARTIN MUENDO KITAVI.....5<sup>TH</sup> RESPONDENT**

**DANIEL NGUYO MUTUTA.....6<sup>TH</sup> RESPONDENT**

**AUGUSTUS MUSYOKI KITHEKA.....7<sup>TH</sup> RESPONDENT**

**RAEL MUMO MUTHOKA.....8<sup>TH</sup> RESPONDENT**

**RULING**

On 3<sup>rd</sup> September 2014, Hon. L. Mbugua CM (as she then was) delivered a ruling on case to answer in **Chief Magistrates Court EACC Case No 10 of 2015 – Republic vs Alex Kyalo and 7 Others**, and acquitted the accused persons therein, who are the Respondents herein, under section 210 of the Criminal Procedure Code. The 1<sup>st</sup> -8<sup>th</sup> Respondents were all facing one charge of willful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read together with section 48 of the Anti-Corruption and Economic Crimes Act 2003, while the 8<sup>th</sup> Respondent was charged with an additional count of abuse of office contrary to section 46 as read together with section 48 of the Anti-Corruption and Economic Crimes Act 2003.

Joseph Gikonyo, a Senior Assistant Director of Public Prosecutions, thereafter filed an application on behalf of the Applicant herein by way of a Notice of Motion dated 15th December 2016, seeking leave to file an appeal out of time, and which is supported by his supporting affidavit sworn on the same date. Mr. Gikonyo also filed submissions dated 22nd March 2017 in support of the application.

The grounds for the application are that the time to appeal as required by law has expired, and the delay in filing the appeal is not inordinate and was occasioned by the delay by the court in supplying the certified typed proceedings of the trial Court. He averred that his office did request for the certified typed

proceedings by a letter dated 26th October 2016 addressed to the Executive Officer at the Chief Magistrate's Court, a copy of which was attached, However, that the said proceedings had not been supplied as at the date of the application. Further, that the Applicant has a good appeal with overwhelming chances of success, and he relied on a Petition of Appeal he filed in this Court on 15th December 2016 which was also attached.

The Applicant in his submissions stated that the prosecution was supplied with the certified copies of the proceedings and ruling of the trial Court on 17th March 2017, and on 22nd March 2017 was also supplied with a certificate of delay in the matter, which documents were attached to the submissions. It was contended that the application is guided by the provisions of the constitution in Article 159(2)(b) which holds that justice shall be administered without undue regard to procedural technicalities, and that the defence will not be prejudiced in any way by the court allowing for the extension of time to appeal the ruling

The Respondents opposed the application in a Replying Affidavit sworn on 27th January 2017 by their Advocate on record, Mr. Andrew Makundi, who also filed submissions dated 28th March 2017. The deponent stated that the application is an abuse of the court process, as the order sought to be appealed from has not been annexed to the said application, and that the Applicant had failed to disclose to the Court that the ruling they intend to appeal against was ready on the day the application was filed in Court. He annexed a copy of the ruling of the trial Court.

Further, that there was therefore inordinate delay in filing the appeal, and that the letter dated 26th October 2016 annexed by the Applicant did not specify the reason for the request for copies of the proceedings and as such, this application is an afterthought. Lastly it was averred that the Applicant has not demonstrated that it has a good appeal, and allowing the application would be prejudicial to the Respondents as the Applicant would be allowed to continue to abuse the powers of its office.

The Respondents' Advocate in his submissions relied on the decision in **Sila Mutiso v Rose Hellen Wangari Mwangi**, Civil Application No. 255 of 1997 UR. for the guiding principles to guide the court in deciding whether to grant an extension of time which are the length of the delay, the reason for the delay; the possibly the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the Respondent if the application is granted. It was his contention that

I have considered the pleadings and submissions by the Applicant and Respondents. The issue for determination is whether good cause has been shown by the Applicant to grant him leave to file its appeal out of time. This Court is in this respect guided by the provisions of **section 349** of the **Criminal Procedure Code** which set a time limit of fourteen days within which to file an appeal. However, the court is given the powers and discretion to extend the time to file an appeal out of time by the section, if an applicant shows that he was prevented to do so by good cause. *Section 349* provides as follows in this regard:-

***“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.”***

It is to be noted that unlike in civil cases like the one relied on by the Respondents, the only consideration in section 349 of the Criminal Procedure Code for good cause to be shown to admit an appeal out of time, is 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.*

In the present application, the decision which has been appealed against was delivered on 24<sup>th</sup> October 2016, and the Applicant in this respect attached a letter dated 26<sup>th</sup> October 2016 addressed to the Executive Officer at the Chief Magistrates Court in Machakos requesting for the certified copies of

proceedings and judgment. It is thus evident that the Applicant did timeously proceed to procure the orders and proceedings of the trial Court, and has therefore met the threshold set by section 349 of the Criminal Procedure Code for leave to be granted to file an appeal out of time.

In addition the application herein and Petition of Appeal were both filed by the Applicant on 15<sup>th</sup> December 2016, about one and a half months later, which delay in filing the appeal is in my view not inordinate in light of the explanation provided by the Applicant.

The Applicant's application dated 15<sup>th</sup> December 2016 is therefore allowed for the foregoing reasons. The Applicant is accordingly granted leave to file its appeal out of time and the Petition of Appeal filed herein on 15<sup>th</sup> December 2016 is deemed to be properly on record.

Orders accordingly.

**DATED AT MACHAKOS THIS 19<sup>TH</sup> DAY OF JUNE 2017.**

**P. NYAMWEYA**

**JUDGE**