



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL MISC. APPLICATION NO. 55 OF 2017
MIRIAM MWONGELI.....1ST APPLICANT
PATRICIA MWANIKI.....2ND APPLICANT
VERSUS
REPUBLIC.....RESPONDENT

RULING OF THE COURT

1. The Applicant has filed an Application dated 26/04/2017 seeking for the following reliefs:-

- (a) Leave be granted to file an appeal out of time.***
- (b) The annexed draft petition of appeal be deemed as duly filed.***
- (c) Any other orders this Honourable court may deem fit to grant.***

2. The Application is supported by an annexed affidavit of Nyabero Bokoo Brasingy the Counsel for the Applicant sworn on even date and further on the following grounds:-

- (a) The Appellants were merely players at a gambling business premise who were charged and convicted by Mavoko law courts.***
- (b) The 14 days period for lodging Appeal has lapsed as Applicants were waiting for supply of proceedings from the trial court.***
- (c) That the legitimate owners of the gaming slot machines sought to approach the trial court without success as it lacked jurisdiction to hear and determine their request.***
- (d) The Applicants counsel could not have filed the Appeal without receipt of all the lower court records.***
- (e) The time within which the Applicant was to file appeal has lapsed.***
- (f) The delay to obtain the requisite proceedings from Mavoko law courts was not deliberate and hence the Applicants be granted leave to appeal out of time.***

3. The Application was opposed by the Respondent. Mr. Machogu learned counsel for the Respondent swore an affidavit dated 24/05/2017 and raised the following grounds of objection:-

(a) That the trial court pronounced itself on 9/11/2016 *whereas the Applicant sought for proceedings four months thereafter which was outside the period allowed to lodge an appeal.*

(b) *That the Applicants have not demonstrated that the delay to lodge their Appeal out of time was not of their own making but was caused by the inability to obtain the court judgement within reasonable time.*

(c) *That the Applicants have not demonstrated any reasonable steps that they undertook to obtain certified proceedings and judgement of the trial court as required under Section 349 of the Criminal Procedure Code.*

(d) *The Applicants have not demonstrated or given urgent reasons why it took them over 4 months from the date of Judgment to request for typed proceedings and subsequently lodge the appeal.*

(e) *The application is frivolous, vexatious, incompetent and improperly before the court and is thus an abuse of the court process.*

4. Parties agreed to canvass the Application by way of oral submissions. However it is only Counsel for the Applicants who made submissions while the Counsel for the Respondents relied on the averments in the replying affidavit. It was submitted for the Applicants that upon their conviction by the trial court it took some time before the legitimate owner of the gambling machines was alerted of the matter. It was submitted that the trial court ordered the gambling machines to be forfeited to the state which action has greatly prejudiced the legitimate owner as it was not given an opportunity to show cause. It was submitted that leave is necessary so as to enable the legitimate owner to access the court for redress. Finally it was submitted for the Applicants that there is an arguable Appeal and that if leave is denied then there is likelihood of prejudice as Applicants will have been denied a right to be heard.

5. I have considered the Applicant's Application and the rival affidavit as well as the oral submissions. The record of the lower court indicates that the Applicants were convicted and sentenced on 9/11/2016. By the clear provisions of Section 349 of the Criminal Procedure Code an Appeal ought to have been lodged within 14 days from the date of delivery of the sentence or order. However, the said provisions allows the Appellate Court to consider a request for lodging an appeal out of time if an Applicant shows that the inability had been caused by late supply of judgement or order appealed against. A letter dated 19/04/2017 by the Applicants Counsel to the Executive Officer Mavoko Law Courts indicates that the proceedings were received on the 19/04/2017. Indeed the Applicants admit that they are late in lodging the Appeal but they are requesting this court to grant them leave to lodge the Appeal out of time. A draft copy of the Petition of Appeal has been annexed to the Application and which raise issues to do with the conviction and sentence and more particularly the forfeiture of the gambling machines to the state. It is noted that the Applicants had pleaded guilty to the charge and were duly convicted and hence no Appeal shall be allowed under Section 348 of the Criminal Procedure Code except to the extent of the legality of the sentence. The Applicants appear to suggest that there had been an order issued by the High Court at Milimani restraining law enforcement agencies from conducting crackdown on premises that possessed gambling machines. Learned counsel for the Applicants has submitted that the forfeiture order has prejudiced the legitimate owners of the gambling machines without them being given a right to be heard. I find the issues raised in the draft petition of Appeal to be arguable. Even though the Applicants were late in lodging the Appeal by about four months, I find the reasons for delay advanced to be excusable.

6. In the result the Applicant's Application dated 3/4/2017 is found to have merit. The same is allowed as prayed. The Applicant is ordered to file and serve record of Appeal within 30 days and to set down the matter for directions on the hearing of the Appeal.

It is so ordered.

Dated and delivered at **Machakos** this **21st** day of **December**, 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Nyabero for the Applicants

Machogu for the Respondent

Kituva - court Assistant