



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**MISC. CR. APPLICATION NO.77 OF 2015**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**ZADOCK KEYA OMBASO..... RESPONDENT**

**RULING**

By a Notice of motion dated 8<sup>th</sup> December, 2015 brought under *section 349* of the Criminal Procedure Code, (Cap 75), Laws of Kenya, Director of Public Prosecution, (The applicant), moved this court seeking leave to lodge an appeal out of time against the subordinate court's decision in *Criminal Case Number 77 of 2013*. The application is based on two grounds appearing on the face of the motion, namely; that the delay in filing the appeal was not deliberate and that the intended appeal is arguable on points of law and has chances of success. The Notice of motion is also supported by an affidavit by *Patrick Oroni*, Senior Prosecution Counsel, sworn on the same day, 8<sup>th</sup> December, 2015. The deponent says that he received a complaint from one *SALMA AKELO RUMARATI* on 17<sup>th</sup> January 2015 and instructed her to obtain proceedings from the lower court and that proceedings were obtained on 23<sup>rd</sup> November, 2015. The deponent says that having perused the proceedings and judgment from the lower court, he has formed the opinion that the intended appeal is arguable and has high chances of success. He says that the delay in filing an appeal was occasioned by counsel then seized of this matter who had gone for a one week's training at Kisumu and not handing over the matter to anyone by not disclosing the whereabouts of the proceedings. He therefore prays that they be granted leave to enable them file the appeal out of time.

The application is opposed through a replying affidavit by *Zadock Kenya Ombasu*, sworn on 27<sup>th</sup> January 2016. The main ground advanced in opposing the Notice of motion is that the intended appeal has no chances of success. He further says that the intended appeal is an afterthought which is intended to deny him fruits of his judgment. He opposes the motion saying that it is in the interest of justice that it be dismissed.

The application came up for hearing on 27<sup>th</sup> January 2016 and on that day Mr Oroni appeared for the State and *Miss Akinyi* for the respondent. Mr Oroni learned prosecution counsel moved the motion and urged the court to grant the same saying just as he did in the affidavit in support, that the delay was inadvertent. He also prayed that once leave is granted, the attached petition of appeal be deemed to have been duly filed.

Miss Akinyi, on her part, opposed the application arguing that there is no evidence that counsel had attended training and further that someone else could have attended to the matter. She prayed that the Notice of motion be dismissed.

Section 349 of the Criminal Procedure Code on which this motion is premised provides 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 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.”*

The court has powers to extend time to file an appeal out of time if the applicant shows that he was prevented by good cause. The applicant says that they got proceedings on 23<sup>rd</sup> November, 2015 and that counsel who was dealing with this matter left for a training before completing the assignment thus they were unable to file the appeal on time. The applicant does not say when the decision they intend to appeal against was made but a perusal of the record shows that the decision was made on 17<sup>th</sup> November, 2015. The applicant says that they got proceedings on 23<sup>rd</sup> November, 2015 but the person who was to handle the matter attended some official training which made it impossible to file the appeal as required. Proceedings were obtained within time and the applicant would have filed the appeal had the counsel who was handling the matter not attended a training.

The reasons given by the office of the Director of Public Prosecutions why the appeal was not filed in time are not far-fetched. The proceedings were received on 23<sup>rd</sup> November, 2015 while the decision was made on 17<sup>th</sup> November, 2015. The appeal was to be filed within fourteen days from 17<sup>th</sup> November, 2015 which would have been on 2<sup>nd</sup> December, 2015. The present application was filed on 9<sup>th</sup> December, 2015 which is six (6) days short of the time that was allowed to file the appeal. I don't find that six days delay amount to an inordinate delay that would disentitle the applicant's leave to file their appeal out of time.

Moreover, the appellant is seeking to exercise its undoubted statutory right of appeal as provided for under section 348A of the Criminal Procedure Code which provides as follows:-

*“When an accused person has been acquitted on a trial by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be from the acquittal or order on a matter of fact and law.”*

The right of appeal is statutory and as such the applicant has that inalienable right to pursue its case to the highest court that they are allowed to appeal to. As already stated above, the period within which the appeal was to be filed was short by less than seven (7) days and it will cause more prejudice to the applicant to deny them leave to appeal than that which will be caused to the respondent if leave is granted. The applicant, just like the respondent, has a right of access to justice and in this case the applicant has a right to access justice through an appeal to ensure that justice is done to all and the nature of discretion given to this Court by section 349 of the Criminal Procedure Code is unfettered, such that the court has a wide discretion to exercise on an application like the one before it, consideration being that the applicant should show good cause.

For the foregoing reasons, I am satisfied that the applicant was prevented from filing the appeal on time by good cause to warrant this Court exercising its discretion in their favour. Consequently the application dated 8<sup>th</sup> December, 2015 is allowed as follows:-

1. Leave is hereby granted to the applicant to file its appeal out of time against the decision made in *Kakamega Criminal Case No.77 of 2013*.
2. The petition of appeal shall be filed and served within fourteen (14) days from the date of this order.

**Dated and delivered at Kakamega this 16<sup>th</sup> day of February 2016.**

**E.C. MWITA**

**JUDGE**