



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. APPLICATION NO. 8 OF 2016

DOUGLAS LIBESE ALUDIRAAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING OF THE COURT

The application

1. The application before the court is *Ex-parte* Originating Summons dated **18th January, 2016** filed by the applicant pursuant to **Section 349 of the Civil Procedure Rules**. The application prays that leave be granted to the applicant to appeal out of time.
2. The application is premised on the grounds set out therein and is supported by affidavit of **Billy Amendi**, who is the applicant's advocate. The said affidavit is sworn on **18th January, 2016**. The said counsel deponed that he is the advocate having conduct of this suit on behalf of the applicant. By the time counsel came into these proceedings to represent the applicant, the time allowed by the law within which the applicant is required to file appeal had lapsed. Counsel deponed that the delay in filing appeal was caused by the delay in obtaining criminal proceedings and the judgment and the applicant's financial incapacity and these factors should not be impediments to his accessing justice, and that the orders sought herein are in the interests of justice. Counsel submitted that the applicant stands to suffer irreparable loss should leave not be granted by this court to institute appeal out of time.

The response

3. The application is opposed vide a Replying Affidavit sworn by **Cliff O. Machogu**, the State Counsel, on **23rd November, 2016**. The respondent's case is that **Section 349** of the **Criminal Procedure Code** provides for Limitation of time (14 days) to lodge an appeal after the court delivers its decision or sentencing. Counsel submitted that the trial court delivered its decision on the 17th December, 2013 where the applicant was granted fourteen (14) days to appeal if aggrieved by the decision of the trial court, and that certified copies of the proceedings were ready by 12th June, 2014 when the advocate on record was obligated to collect them from the court and to file his appeal. **Mr. Machogu** submitted that the applicant has not demonstrated that the delay to lodge the Appeal out of time was not of his own making, but was caused by the inability to obtain the court judgment within reasonable time. Further, the applicant has not demonstrated any reasonable steps (if any) that he undertook to obtain the judgment as required under **Section 349** of the **Criminal Procedure Code**. Counsel submitted that the applicant has not demonstrated/or given cogent reasons why it took him almost two years from the date of judgment to lodge his appeal.

The Determination

4. I have considered the application, and the oral submissions of the parties. The only issue for determination by this court is whether or not the delay to file the appeal is inordinate as submitted by the State.

5. There appears to be delay which is quite inordinate. However, the wheels of justice should not be stopped if a good explanation is provided for the delay. The applicant states that he was convicted on 17th December, 2013. He had desired to appeal but his then advocates did not comply with his instructions. The applicant, who is charged with Manslaughter, was a Police Officer. During his trial he lost his job, and became penniless hence unable to afford a lawyer who could mount an appeal on his behalf. In the process he lost count of time. After a long time, he managed to secure the services of his current advocates, **Mr. Amendi**, who has sworn the affidavit herein on behalf of the applicant.

6. Although there is evidence of considerable delay, this court recognizes that the right to appeal is a constitutional right, and the court should frown upon any impediments placed on the road towards the realization of the said right. Although **Section 349 of Criminal Procedure Code** requires strict adherence to the timelines provided thereunder, and although this court must emphasize the need to fully comply with those statutory timelines, when a good explanation is provided for delay, the constitutional right to appeal overrides the statutory limitations. In this regard, the court is satisfied that the applicant has made a case for the time to be expanded to enable him mount his appeal.

7. In the exercise of the discretion of this court, I allow the application with costs in the cause, and order the applicant to file the said appeal within fourteen (14) days from the date of this ruling.

Orders accordingly.

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ERIC OGOLA

JUDGE

READ, DATED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 14TH DAY OF DECEMBER, 2016.

.....

PAULINE NYAMWEYA

JUDGE

In the presence of;

No appearance for the applicant

No appearance for the respondent

Court Clerk - Nicholas