



**REPUBLIC OF KENYA**

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

**MISCELLANIOUS CRIMINAL APPLICATION NO 12 OF 2013**

**IBRAHIM HASSAN ALI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

By Notice of Motion, brought under certificate of urgency, is dated 15<sup>th</sup> April 2013 and was filed on 16<sup>th</sup> April 2013, the applicant is seeking the following orders:

- i. That the application be certified urgent
- ii. That leave be granted by this court to file appeal out of time
- iii. That the draft Petition of Appeal annexed to the Notice of Motion be deemed duly filed
- iv. That pending the hearing and determination of prayer 2 (sic) this honourable court do grant a temporary order of stay of the destruction order made on 12<sup>th</sup> February 2013 by the subordinate court in Criminal Case No. 172 of 2013 between Republic v. Farah Mohamed Ahmed & Another
- v. That the appeal be heard on priority basis.

The application is brought under Sections 349 (1) and 357 (1) of the Criminal Procedure Code. On 16<sup>th</sup> April 2013 this court certified the application urgent and ordered that it be served on the State Counsel for hearing on 23<sup>rd</sup> April 2013. On 23<sup>rd</sup> April 2013 the Judge was not sitting and the matter was mentioned by the Deputy Registrar. The record of that day shows there was no appearance of the parties. The file was placed before me on 11<sup>th</sup> June 2013 but there was no appearance. It was not clear how the file found its way to court that day and the matter was referred to the Deputy Registrar for another hearing date. It finally came before me on 18<sup>th</sup> September 2013 when this application was canvassed.

The application is supported by the grounds found on the face of the application and also in the affidavit sworn by the applicant on 15<sup>th</sup> April 2013. In summary the applicant is saying that after conviction and sentence by the lower court he wrote to court by the letter dated 27<sup>th</sup> March 2013 asking for copies of certified proceedings to enable him lodge an appeal; that he never received the proceedings until 8<sup>th</sup> April 2013 by which time he was outside the time allowed to lodge the appeal; that his appeal is meritorious and has overwhelming chances of success; that the order of the subordinate court to destroy sugar, the exhibit subject matter of the proceedings in the lower court, is against the law, is unfair and unjust.

The application is opposed. The respondent filed grounds of opposition in which it is stated that there is inordinate delay in bringing this application; that the plea was unequivocal and was supported by admission of facts and mitigation; that the intended appeal has no chances of success; that the order for stay of the destruction order is premature and cannot be granted at this stage and that there is no certificate from the lower court showing the date the record of proceedings were received by counsel for the applicant. The respondent asked the court to dismiss the application.

Both counsel made oral submissions around the grounds they are relying on respectively. Counsel for the applicant submitted that the applicant applied for proceedings of the lower court within the statutory 14 days which has been opposed by the respondent. The respondent's view is that Section 349 of the Criminal Procedure Code relied on by the applicant is only available to an applicant who has acted within 14 days but the proceedings are delayed by the court.

Without going into the merits or lack thereof of the intended appeal, I have carefully considered the application. The record clearly shows that the applicant was convicted and sentenced on 12<sup>th</sup> February 2013. That is the relevant date when time started running. The letter asking for the proceedings was written on 27<sup>th</sup> March 2013 and received by the lower court on 2<sup>nd</sup> April 2013 as per the stamp appearing on that letter. Certified proceedings from the lower court are stamped 5<sup>th</sup> April 2012 three days after the letter requesting for them was received. I would want to believe that this is the date proceedings became available to the applicant. I need not belabor the point that by 27<sup>th</sup> March 2013, the statutory 14 days had elapsed. That letter was written one month too late after the conviction and sentence.

It is not true that the delay to lodge the appeal within 14 days was caused by delay in obtaining proceedings from the lower court. It was caused by the applicant's own action. He slept on his rights. The time lapse before he sought proceedings from the lower court is over a month. The proceedings are 11 pages and cannot have taken two hours to type. This can only mean one thing, that this application is an afterthought. This is amplified by the manner the applicant has handled the application after filing it. For a matter brought under certificate of urgency to take this long before it is prosecuted can only mean that the applicant was not keen to prosecute it. It is also worth noting that the applicant was represented in the lower court although counsel came on record after the conviction and sentence. Nonetheless, he had the benefit of legal counsel and ought to have benefited from this representation by seeking legal advice that he intended to appeal.

The sum total of all this is that the application before me dated 15<sup>th</sup> April 2013 has no merit. It is inexcusable that the applicant took his time then after one month had elapsed he decided to take up the matter on appeal. I have considered all the authorities relied on. They mostly deal with the issues of plea, that whether it was unequivocal or not. These authorities would have been relevant during the hearing of the appeal but do not help much in respect of this application. I think I have said enough to demonstrate that this application is frivolous, vexatious and an abuse of the process of this court. I hereby dismiss the same. I make orders accordingly.

**S. N. MUTUKU**

**JUDGE**

Dated, signed and delivered this 24<sup>th</sup> of September 2013.