



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISII**

**Criminal Misc. App. 83 of 2007**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THOMAS AMENYA ONTITA ..... RESPONDENT**

**RULING**

This is an application by the Attorney-General brought by way of Chambers Summons under section 349 of the Criminal Procedure Code seeking leave to file an appeal out of time. The appeal is intended to be filed against the judgment in the Chief magistrate's Court Criminal Case No.627 of 2005 at Kisii. The application is supported by an affidavit sworn by Alloys Otieno Kemo, Senior Principal State Counsel. He deposed that judgment in the aforesaid case was delivered on 10<sup>th</sup> May 2007. He applied for proceedings on 10<sup>th</sup> May 2007 and the same were supplied on 9<sup>th</sup> July 2007. He proceeded to file this application on 24<sup>th</sup> August 2007. A certificate of delay was issued by the Deputy Registrar on 10<sup>th</sup> August 2007. Mr. Kemo averred that the intended appeal had overwhelming chances of success.

The application was opposed by the Respondent. Joseph Momanyi Aunga, the respondent's advocate swore an affidavit and basically stated that the trial before the subordinate court was properly conducted and determined. In his view, the intended appeal no chances of success. Counsel submitted that there was inordinate delay in making the present application. He added that the application was bad in law because it was brought by way of a chamber summons when there was no existing case. He stated that the same should have been brought by way of a Miscellaneous Application.

I have considered the above submissions. I note that the Attorney-General's application was instituted by way of a Miscellaneous Criminal application. I do not think that there was any procedural impropriety in the manner in which the application was commenced.

The Attorney-General obtained a certificate of delay and that absorbs him from any blame in filing the application rather belatedly. The proceedings were availed to him on 9<sup>th</sup> July and by 24<sup>th</sup> of August 2007 the present application was filed. In my view there was no inordinate delay.

I do not wish to say much about the merits or otherwise of the intended appeal. All I need to state at this stage is that the Attorney-General has demonstrated that the intended appeal is arguable. It is in the interest of justice that the Attorney-General be allowed to file the appeal out of time.

Consequently, I allow the application and order that the intended appeal be filed within fourteen days from the date hereof.

DATED, SIGNED and DELIVERED at KISII this 28<sup>th</sup> day of July, 2008.

**D. MUSINGA**

**JUDGE**

Delivered in open court in the presence of:

Mr. Kemo, Senior Principal State Counsel for the Applicant

Mr. Momanyi for the Respondent.

**D. MUSINGA**

**JUDGE**