



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

*(Coram: Ojwang, J.)*

**MISC. CRIMINAL APPLICATION NO. 406 OF 2007**

**PROPRIETOR-GROWERS CAFÉ .....ACCUSED/APPLICANT**

**-VERSUS-**

**CITY COUNCIL OF NAIROBI.....PROSECUTOR/RESPONDENT**

**RULING**

The applicant, by its Chamber Summons of 7<sup>th</sup> June, 2007 was seeking leave to file an appeal out of time, in respect of an order made on 27<sup>th</sup> February, 2007 in Senior Resident Magistrate’s Court Criminal Case No. 349(A) of 2006. It was the applicant’s prayer that the draft petition of appeal annexed to the application, be deemed duly filed within the stipulated period. The applicant stated that the delay in filing the appeal had been occasioned by the fact that the certified copy of the proceedings and the ruling in Criminal No. 349(A) of 2006 were not supplied on time, and it was contended that the appeal “has high chances of succeeding.”

This application, evidence in support of which was in the affidavit of learned counsel **Mr. William J. Kabaiku**, was contested by learned counsel **Mr. Omotii** on behalf of the respondent.

**Mr. Omotii** submitted that the Court’s discretion to grant leave as requested, is to be exercised depending on whether sufficient cause was shown – and the same would focus on the merits of the intended appeal. Counsel urged that no sufficient cause had been shown for not filing the appeal within time. It was contended that it had not been necessary for the applicant’s advocates, who remain in the service of the applicant up to this stage, to abstain from drafting the petition of appeal until certified copies of proceedings had been availed. It was also contended that no certificate of delay had been annexed to the instant application, to explain the delay; and that there had been a failure to comply with the terms of s.350(2)(iii) of the Criminal Procedure Code (Cap.75) regarding certifications and stampings on the copy of the record of proceedings.

Learned counsel, apart from raising technical objections to the appeal process, submitted that the appeal itself had no merits, and stood no chance of success. He stated as the proposed appellant’s gravamen, the fact that a *cash bail had been forfeited* for non-appearance of an accused person during a mention; but he contended that there had been no reason for the non-attendance.

Learned counsel **Mr. Kabaiku’s** position on the contentions made for the respondent was that these, in effect, *contested an appeal* while this was not the proper forum for entertaining the appeal itself. In his

words, it is “not right to determine the merits of the appeal before it is even filed.”

I have considered the prayers in the Chamber Summons application; the evidentiary material in the supporting affidavit; the respective submissions of counsel. From the submissions in particular, and in view especially of the fact that both counsel could not avoid delving into detailed *issues of merit* in the proposed appeal, I formed the clear impression that the content of the appeal itself is *contentious* and potentially *controversial*. From that impression, I would consider it proper that the Court should desist from appearing to pronounce with finality on the issues of merit. Yet, in the very nature of the judicial process, contentious and controversial issues which have implications for rights of parties, must be fully ventilated on the merits, and just decisions thereon, taken by the Court. This principle, which is inherent in the conduct of judicial work, dictates that I must not close the door on the issues of merit which the applicant may lodge in the proposed appeal.

Being guided by those principles, I hereby **allow** the applicant’s Chamber Summons application of 7<sup>th</sup> June, 2007. Specifically I will order as follows:

- 1. The applicant has leave to file out of time an appeal against the order made by Senior Resident Magistrate Ms. L. Nyambura on 27<sup>th</sup> February, 2007 in Criminal Case No. 349(A) of 2006.**
- 2. The draft petition of appeal annexed and filed with the instant Chamber Summons application, shall be deemed to be a duly-filed appeal, and the file shall be taken through the appeals-admission process on that basis.**
- 3. The Registry shall take appropriate action, in accordance with the orders herein.**

***Orders accordingly.***

**DATED and DELIVERED** at Nairobi this 26<sup>th</sup> day of September, 2007

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J**

**Court Clerk: Tabitha Wanjiku**

**For the Applicant: Mr. Kabaiku**

**For the Respondent: Mr. Omotii**