



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Misc Crim Appli 62 of 2004**

REPUBLIC APPLICANT

V E R S U S

IRMGARED BRUNHILDE BEIG RESPONDENT

R U L I N G

The Attorney General has filed this Notice of Motion seeking extension of time under Section 349 Criminal Procedure Code.

The application was filed on 3.8.2004 the supporting affidavit shows that the respondent Irmgard Brunhilde Beig was charged in a criminal case no. 340/03 in SRM'S court at Kwale and on 17.5.2004 she was acquitted of the charge. It is the complainant (her husband) who was dissatisfied with the acquittal and on 26.5.04 he informed the Attorney General to file an appeal against the sentence of acquittal. Copies of proceedings and ruling were supplied on 15.7.04. The Attorney General has received instructions to appeal against the said acquittal and has filed a petition of Appeal.

In opposition the Respondent swears that the complainant is her estranged husband and there is H.CC. No. 60 of 2003 over ownership and possession of matrimonial home worth USD600.000. And that the complainant is trying to push the respondent out of the home. That there is HCC. No. 102/2004 the respondent has filed against the complainant for libel.

Mr. Ndegwa submitted for respondent that Section 349 only requires two items to be obtained before filing the appeal namely a copy of the judgment or order appealed against and a copy of the record and the court may for good cause admit the appeal out time.

In my view the reading of Section 349 means that the court in which appeal is made may extend time to file appeal beyond the 14 days stated if in its discretion a good cause has been shown and shall extend time if a judgment or proceedings are not obtained within reasonable time of application.

The applicant admits he received proceedings on 27.6.04. It took him to 3.8.2004 a period of about 36 days to file this application. In my view that is inordinate delay considering the Attorney General wants a retrial of the case. The other aspect of this matter is that the Attorney General swears that he received instructions to appeal from the complainant. This is contrary to the provisions of our constitution section 26 (8) which states:-

“In exercise of the functions vested in him by subsection 3 & 4 of this constitution and Section 44 and 55 thereof the Attorney General shall not be subject to the direction or control of any other person or authority”.

The reason that delay was occasioned receiving instruction in such a case is without merit.

On the issue of “**good cause**” I have perused the proceedings produced by the respondent, I have also perused the affidavit sworn by the respondent with its annexures. I am convinced that there is abuse of Criminal Law Process here. There are several civil suits filed between the parties in this very High Court. The PW1 has been husband of the Respondent. Criminal proceedings should not be used to settle civil disputes. The Trial Magistrate was correct in her finding in this respect. She found that the evidence did not agree with the charge and that the prosecution was abusing the process of court in pursuing this prosecution. I have noted that the proposed appeal is meant to nullify the lower court proceedings on the ground that the prosecution was lead in part by an unauthorized prosecutor a Police Constable. However the real intention is to obtain a retrial of the respondent again. Whereas the court may order a retrial it is only on just cause without prejudicing the accused person by taking her through another trial unnecessarily. In the present case the Trial Magistrate notes several defects in the prosecution case. Were a retrial to be ordered this would give the prosecution an opportunity to fill in the gaps to cover such defects.

In my view a new trial would not be ordered in this case. In the circumstances I do not see any good cause to warrant my exercise of discretion in extending time to file the proposed appeal.

The application is dismissed.

Dated this 25th day of October, 2004.

J. KHAMINWA

JUDGE

25.10.04

Khaminwa – Judge

Cege – Court Clerk

Ms. Mwaniki – State

Mr. Gitonga –holding brief for Magolo.

Judgment read in their presence.

J. KHAMINWA

JUDGE