



**Nyongesa v Republic (Miscellaneous Criminal Application
60 of 2016) [2023] KEHC 20492 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20492 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION 60 OF 2016
RN NYAKUNDI, J
JULY 24, 2023**

BETWEEN

DENNIS NYONGESA APPLICANT

AND

REPUBLIC PROSECUTOR

RULING

Coram: Before Hon. Justice R. Nyakundi

Mr. Mugun for the State

1. The applicant's notice of motion is premised under Section 349 and 350 of the [CPC](#) cap 75 Laws of Kenya and Article 48 of the [Constitution of Kenya 2010](#). The application has been converted by way of a supporting affidavit which deposes as follows:

"I Dennis Nyongesa a convict currently serving 7 years imprisonment for the offence of felony at Eldoret Main Prison do hereby make oath and state as follows:

1. That I am a Kenya citizen adult male of sound mind hence competent to swear this affidavit.
2. That I have the conduct on the matter on my behalf and able to swear this oath
3. That I am the accused person in the criminal case file no 853/16 at Eldoret Law Court
4. That I was convicted and sentenced to serve seven years of imprisonment on charge of preparation to commit a felony under section 308 of the penal code judgement was read and delivered on 6/4/2016 at the Eldoret law court



5. That I was induced to plead guilty to the charges not aware of the seriousness of the offence, plus a promise that never was
6. That I was unable to understand the full the full context of the charge and its related account.
7. That I was prevented by sufficient cause from lodging an appeal on time, which I now wish to lodge a mitigation appeal of time
8. That I make this affidavit in support of any application seeking leave to appeal out of time
9. That what is stated herein above is true to the best of my knowledge, information and belief

Determination

2. To determine the present question whether to grant leave to the applicant to file and serve an Appeal out of time I am guided by the provisions of Section 349 of the CPC and the principles developed over time by the courts on the power to grant such a leave for an applicant to access an appeals court. The well-established principles pertaining to and underlying extension of time and the Appeal regime is set out in the case of Salat Nicholas Kiptoo Arap Korir V Independent Electoral and Boundaries Commission & 7 Others Application No 16 of 2014. (2014) eKLR in which the Apex court pronounced itself as follows:
 1. Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court.
 2. A party who sought for extension of time had the burden of laying a basis to the satisfaction of the court
 3. Whether the court should exercise the discretion to extend time, was a consideration to be marked on a case to case basis
 4. Whether there are was a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
 5. Whether where would be any prejudice suffered by the respondents if the extension was granted
 6. Whether the application had been brought without undue delay, and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
3. In the case at bar the court in its exercise of discretion to extend time or grant permission to the intended appellant to file a memorandum of appeal out of time the court is mandated to take into consideration all the facts and circumstances of the case to achieve a just and fair outcome bearing in mind the principle of finality of litigation. Though not expressly stated in Section 349 of the CPC the relevant factors are critical at this interlocutory stage of the proceedings more significantly post-conviction of the intended appellant/applicant: (a) The length of delay (b) the reasons of the delay (c) the intended appellant/applicants chances of success on appeal (d) any factors likely to prejudice any of the parties in the event the extend of time is granted.



4. It is also plausible to remember the timelines in court orders and procedure rules must be complied with and any applicant who misses to meet the deadlines has to discharge the burden of sufficient cause which necessitated the laps of the statutory scheduled timelines to lodge an appeal. The comparative decision in *United Overseas Bank Ltd v Ng Huat Foundations PTE Ltd* (2005) 2 SLR (R 425 at (4) (9) adds an important value from the following extract.

"The quest for justice, therefore, entails a continuous need to balance the procedural with the substantive. More than that, it a continuous attempt to ensure that both are integrated, as far as that is humanly possible. Both interacts with each other. One cannot survive without the other. There must, therefore be-as far as is possible- a fair and just procedure that leads to a fair and just result...."

5. For a better understanding of the Applicants claim is the difficulties he has experienced to access information in the form of typed proceedings held by the Chief Magistrate Court Registry which is necessary at the outset to outline legal basis of the appeal. This is in consonant with Article 35 of the *Constitution* which states as follows:

- "(1) Every citizen has the right of access to
- a. Information held by the state and
 - b. Information held by another person and required for the exercise or protection or any right or fundamental freedom"

6. Similarly, in Article 50 (5) (b) of our *constitution* provides as follows:

"that an accused person has the right to a copy of the record of the proceedings within a reasonable period after they are concluded in return for a reasonable fee as prescribed by law."

The truism of this right is that the corresponding obligations of the judiciary from the outset has not been objectively met. The point is that the extent of protection on access to information of court records for appeal purposes remains within the scope of limitation. The concerns of the intended appellants go much further that a demand of the record for the detrimental effects likely to be suffered violates the general right to a fair trial in Article 50 of the *constitution*. In principle absence of the typed record over a long period of time from various court registries more fundamentally those queued to exercise the right of appeal faces a threat, infringement, or a violation of the right to access courts in Article 48 of the *Constitution*. The reasonableness concept in Article 50 (5) (b) of the *constitution* must also be understood in the context of the Bill of Rights as a whole. There are of course some potential challenges to satisfy the requirement of Article 35 as read in conjunction with Article 50 (5) (b) of the *constitution* but pursuit of administrative options to significantly cutback waiting time is of necessity. Withholding court records of appeal outside the reasonable time clause potentially as far reaching consequences particularly in protecting Rights and Fundamental freedoms covenanted in the Bill of Rights. This Article 35 of a constitution has similar provisions as outlined by Section 32 of the *South African Constitution*. In my view the implication of *Brimmer v Minister for Social Development and Others* (2009) ZACC 21 , 2009 (6) SA 323 (CC) 2009 (11) BCLR 1075 (CC) will be appropriate even in our circumstances. In that case the court said:

" The importance of this right too, in a county which is founded in values of accountability, receptiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed, one of the basic values



and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information.. A part from this, access to information is fundamental to the realization of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of expression which include freedom of the press and other media and freedom to receive or impart information of ideas”.

7. The importance of court records in the administration of justice cannot be gainsaid and the right to access information modeled in Article 35 in this regard is limited to accused persons and other actors in the criminal justice system within the sphere of equality of arms. Reasonable time and efficiency in the judicial organization play an important role in controlling the excessive length of the record at the conclusion of the trial to be supplied to the accused persons. It is fairly a straight forward structure which requires the court to comply with the requirements in accordance with constitution and appropriate policy guidelines on record management.
8. In the present case it is conceivable that the reasonable time may begin to run from the time final judgement is pronounced by the court. Focusing broadly on the notice of motion the applicant has demonstrated existence of sufficient cause for this court to exercise discretion to grant a remedy of extension of time to file an appeal out of time in his favour with no orders as to costs. Therefore, Deputy Registrar of the High Court be in the interest of justice be moved to prioritize the preparation of the record and have is supplied to the intended appellant within 45 days of today’s date.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF JULY 2023.

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R. NYAKUNDI

JUDGE

