



**Republic v Saina (Miscellaneous Criminal Application
E051 of 2023) [2023] KEHC 20777 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20777 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E051 OF 2023
RN NYAKUNDI, J
JULY 24, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

OMAR KIPKOSGEI SAINA APPLICANT

RULING

Coram: Before Hon. Justice R. Nyakundi

Mr. Mugun for the State

- 1 The applicant has filed a notice of motion dated June 30, 2023 seeking the following substantive order: That the Applicant be granted leave to appeal out of time. In support of the application as deposited in the written statement has to do with the delay in being supplied with the court proceedings
- 2 Apparent from the record the applicant was charged of stealing stock contrary to 278 of the *Penal Code* in which he was convicted and sentenced to 4 (four) years imprisonment on September 6, 2022.

Determination

- 3 The limitation of time of Appeal in Criminal cases is provided for under Section 349 of the *Criminal Procedure Code* which provides as follows:- An appeal shall be entered within fourteen days of the date of the order or sentence appealed against. Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocates to obtain a copy of the judgement or order appealed against and a copy of the record within a reasonable time of applying to the court therefore. In addition, Article 48 the Right on Access to Justice is guaranteed in our constitution. This includes the right of an appeal to higher court seeking a review for the orders issued by inferior court upon determination of the justiciable issues. The



exercise of discretion donated to the court is unfettered save that it is to be considered within the scope and approach more pronounced and realm of Civil law. The guidelines in *Ivita V Kyumbu (1984) KLR 441*, And *Communication Courier & Another Vs Telecom (1999) eKLR* are on point as to the applicable test: 'When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away'. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties. The plaintiff, the defendant and any other third or interested party in the suit, lest justice should be placed too far away from the parties.

4. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues: 1) whether the delay has an abuse of the court: 3) whether the delay is inordinate and inexcusable: 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant: and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.
5. Also in the case of *Indar Singh Gill Ltd vs Njoroge Gichana HCCC No 2411 of 1990* GS Pall J as he then was said 'In a discretionary matter like this the court should take into account all the circumstances including the merits of intended appeal.'
6. In the instant application the applicant avers that he was not able to appeal within the time stipulated in the Criminal Procedure Code due to the inordinate delay by the registry to issue him with typed court proceedings. That evidence has not been challenged and at this point having considered the record I find sufficient cause to exercise discretion in favour of the applicant for an extension of time to file his appeal outside the 14day period provided in Section 349 of the Criminal Procedure Code. In this respect the Deputy Registrar of the High Court shall ensure that the typed proceedings of the Lower Court be prepared and issued to the Applicant within 30 days from today's order.

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

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R. NYAKUNDI
JUDGE

