



REPUBLIC OF KENYA



KENYA LAW
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**Rop v Republic (Miscellaneous Application E063 of 2023)
[2023] KEHC 20537 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION E063 OF 2023**

RN NYAKUNDI, J

JULY 24, 2023

BETWEEN

NAHASHON KIMUTAI ROP APPLICANT

AND

REPUBLIC PROSECUTOR

RULING

- 1 The applicant brought this application under section 349 of the *CPC* seeking for orders of this court to exercise discretion to be granted leave to file a reserved a Memorandum of Appeal out of time against the judgement of the trial court in Cr. Case. 355 of 2023. In support of the application is an annexed affidavit sworn by the applicant. The respondent did not oppose the application.

Resolution

- 2 The right to appeal to a higher court is both a creature of the *Constitution* and statute. In accordance to section 349 of the *CPC* it states 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. Further in article 165 (3) (e) of the *Constitution* has jurisdiction in all such appellate matters as prescribed by the *Constitution* and enabling statute. In essence appeals from magistrate’s court shall be lodged in the High Court and in this case within 14 days from the date of judgement of the subordinate court. This being a matter of discretion the court is to be guided by the principles 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 this context the court will accept the reasons provided for in section 349 of the CPC or other reasons why the intended appeal should be allowed to proceed to be heard on the merits by this court. In reference of this application it is necessary to bear in mind that interlocutory applications do not determine the rights of the parties on the merits in *Gilbert v Endean* (1978) 2 ch D 259 at pages 268 -269 as: “ those applications ..which do not decide the rights of parties, but are made for the purpose of keeping thing in status quo till the rights can be decided, or for the purpose of obtaining some directions of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties.”
- 4 Following these principles, the procedural application by the applicant be and is hereby allowed. Against this background the Deputy Registrar is directed to proceed to the Chief Magistrate’s Court to secure the typed proceedings and the same to be served upon the Applicant for purposes of filing the true sense of the Appeal.
- 5 Orders accordingly

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

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J. R. NYAKUNDI
JUDGE

