



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISC CRIMINAL APPLICATION NO. 190 OF 2014

REPUBLIC APPLICANT

versus

JANE SUSAN MBATHA 1ST RESPONDENT

ROBERT WAMBUA KIOKO 2ND DEFENDANT

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RULING

1. By way of Notice of Motion dated 13th October 2014, the applicant seeks to appeal out of time. The application is based on grounds that: the applicant having been aggrieved by the judgement of the Principal Magistrate Court requested for typed proceedings on or about 16th July 2013 and made a reminder on 12th November 2013 but the same were not availed within 14 days to enable it appeal on time; counsel who was in conduct of the matter was transferred and it took long for the matter to be re-allocated to another one and failure to grant the orders sought will occasion a miscarriage of justice for the applicant.
2. The application is supported by a replying affidavit deponed by Tabitha Saoli, a prosecution counsel who states that the complainant requested for typed proceedings in the matter and sent a reminder on 12th November 2013 and obtained certified copies thereof on the 11th February 2014. The delay in preparing the petition of appeal was due to transfer of several prosecution counsels who were handling the matter.
3. In response thereto the respondents through an affidavit deponed by the 2nd respondent stated that the application was not made within reasonable time.
4. Further, they stated that other conditions to be considered would be whether the appeal has a probability of succeeding and no injustice will be suffered by the respondent. The application is intended to frustrate the suit filed in court for malicious prosecution.
5. The application was canvassed by way of written submissions.
6. Mr. Shijenje, learned state counsel submitted that the applicant had demonstrated that it had a good cause that necessitated the appeal being brought after the required 14 days. He called upon the court to consider the provisions of Article 159(2) of the constitution and allow the applicant to exhaust the appeal process as no prejudice will be occasioned to the respondents.

7. The respondent's Counsel, instructed by Muriithi Kireria & associates submitted that the court had to take into consideration the length of delay, the degree of prejudice to the respondent and the application should not have been filed with malice.

8. Limitations for time within which an appeal can be filed in criminal matters is provided for in **section 349** of the Criminal Procedure code which states:

“349. 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 advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.”

9. Judgment in the matter was delivered on the 28th June 2013. On the 16th day of July 2013 the Office of Director of Public Prosecution representing the applicant wrote to the court requesting for typed copies of proceedings and judgment. They expressed their desire to appeal on the 12th November 2013, when they sent a reminder to the court.

It is averred that it was not until 11th February 2011 that they obtained certified copies of the judgement and proceedings.

10. Subsequently, the application was filed on the 13th October 2014. The delay was attributed to transfers in the office of the Director of Public Prosecutions which resulted into the matter not being assigned to an officer to pursue it on time.

11. I have taken note of the fact that the 2nd respondent filed a civil suit against the applicant and others seeking damages. It is however important to note that right at the outset the applicant was aggrieved and it moved the court to provide it with proceedings and judgment that would enable them appeal. I have also looked at the proceedings of the lower court and the fact that changes /transfers in the office of the Director of Public Prosecution that occasioned the delay have not been denied.

12. It is apparent that failure to appeal within the prescribed time was not deliberate. The constitution gives a convict right of petitioning the High Court for a new trial where he/she did not appeal within the time allowed for appeal. (vide article 50(6) of the constitution). This being the case it would be in the interest of justice to have a party exhaust the appeal process.

13. Therefore, I do grant the applicant leave to appeal out of time within fourteen days.

14. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 2ND

day of **JUNE 2015.**

L.N. MUTENDE

JUDGE