



**Republic v Gethinji (Miscellaneous Criminal Application E116 of 2024)
[2025] KEHC 707 (KLR) (Crim) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 707 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E116 OF 2024
AM MUTETI, J
JANUARY 30, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

JAMES NDUNGU GETHINJI RESPONDENT

(Being an Application seeking to lodge an appeal out of time arising from the ruling meted out by Hon. Dolphina Alego (SPM) in Criminal Case Number E309 of 2021 at the Chief Magistrate Court at Milimani)

RULING

1. The applicant vide a notice of motion dated the 15th April 2024 seeks leave to appeal out of time.
2. The applicant had held out the following grounds on the face of the application:-
 - a. That the delay in filing the Appeal out of time was not deliberate.
 - b. That the Applicant was unable to lodge an Appeal within the prescribed period mainly because the prosecution was unable to obtain the typed proceedings in time to lodge the Appeal within the prescribed timelines.
 - c. That no prejudice will be suffered by the Respondent if the Applicant is granted leave to Appeal out of time.
 - d. That it is in the interest of Justice that leave to Appeal out of time is granted.
 - e. That this Honourable Court has unfettered discretion to grant leave to Appeal out of time.
 - f. That there has not been inordinate delay in bringing the instant application



- g. That the intended Appeal is arguable and has a high chance of Success.
3. Dated, Signed and Delivered Virtually the applicant has also through prosecution counsel Robert Mutuma sworn an affidavit in support of the application.
 4. The ruling that the applicant seeks to challenge was delivered on 5th February 2024 by Hon. Dolemina Alego (SPM) dismissing the prosecution is case at the stage of no case to answer.
 5. The applicant states in paragraph 4 of the affidavit in support of the application that the office of the Director of Public Prosecutions received a request from the complainant on 28th February 2024 to lodge a revision.
 6. It is thus clear from that deposition that the move to seek have to appeal out of time is not at the instance of the office of the Director of Public Prosecutions but is borne out of a request by the complainant.
 7. The averment thus leaves no doubt that the intention to appeal on the part of the applicant was never there until after the complainant moved the applicant to seek a revision.
 8. It is no doubt the complainants right to pursue his matter to the logical end but the applicant is duty bound under Article 154 (10) to act independently without the direction or control of any body or authority including complainants in criminal cases.
 9. The applicant was represented in court on 5th February 2024 when the ruling was delivered.
 10. The deponent of the affidavit has not told this court why the prosecution counsel in court then did not apply for certified copies of proceedings for purposes of appeal.
 11. The prosecution did not apply for the certified proceedings until the 15th April 2024 according to the deponent.
 12. The delay in the making of the application for proceedings even after the prompting by the complainant is unexplained.
 13. The applicant simply states that they were not supplied with proceedings within the time allowed for appeal.
 14. The application is vehemently opposed by the respondent.
 15. The respondent has robustly submitted that what this court is being invited into is to jump into the fray of warring family members who are keen on pursuing each other into the courts over every little thing that each one of them can find against the other.
 16. The complainant and the respondent are said to be brothers who are entangled in a family succession dispute.
 17. According to the respondent the Criminal case was brought against him as part of the scheme to settle scares in relation to the succession.
 18. The respondent has urged this court to find that the delay in presenting this application is inordinate and the same has not been sufficiently explained thus the court should decline the application.
 19. The court has considered the rival submissions of counsel for the state , the complainant and the respondent.



20. The counsel watching brief for the complainant strongly urged the court to consider that the office of the Director of Public Prosecutions may have presented the application late out of bureaucratic reasons regarding the handling of complainants in that office.
21. The victims counsel did also submit that the delay is not inordinate and the court should be inclined to grant the leave sought.
22. Counsel for the victim placed reliance on this case of Director of Public Prosecutions Vs. Julius Mugambi 2022 eKLR and sought to persuade this court to adopt the view taken by the learned Judge in that case that an application for leave to appeal out of time should not be denied on the ground of delay alone.
23. The instant application by its nature seeks an equitable relieve. The issue of granting leave to appeal out of time is a matter that is purely discretionary.
24. A court considering an application for leave to appeal out of time must be persuaded that the applicant has come to court with clean hands and is not guilty of laches.
25. The applicant must satisfy the court that he has not been indolent in any way but was prevented from filing the appeal in time for reasons that are prima facie reasonable and justifiable.
26. For instance how can a party who is desirous of appealing a decision fail to make an oral request for certified copies of the proceedings at the time of the delivery of the impugned decision?
27. The applicant in his affidavit is silent at paragraph 3 of the affidavit in support as to whether the state was represented during the delivery of the ruling.
28. The failure to disclose that is material since the matter being criminal in nature the court must have been properly convened thus a prosecutor must have been present.
29. The applicant's silence on that important matter can only be held against them.
30. The party seeking leave to appeal out of time must demonstrate good faith on their part and the conduct of the party in the proceedings must remain above board.
31. The issue as to whether at the time of the ruling the applicant was represented becomes even more critical when one looks at the ruling that is sought to be challenged.
32. The learned Honorable magistrate's had this to say in regard to the case:-

“.....The accused was charged in 2021. To date three years later only two witnesses have testified. Justice is double sworded. Accused still remain innocent until proved otherwise.

Litigation must come to a close albeit the foregoing , the investigation officer either has refused to bring his/her witnesses to court with a continuous application for adjournment focused now on the prosecution conclusively, court herein find that prosecution has not proved their case to warrant accused being put on his defence or otherwise and this court finds that the accused person has no case to answer and accordingly discharged under S. 210 of the CPC unless otherwise held in law.”
33. I have taken the liberty to reproduce the a foregoing just to demonstrate that this court highly doubts the commitment by the prosecution in prosecuting this matter expeditiously since the time the respondent was charged.



34. To grant an equitable remedy the court must also be satisfied that the party seeking the court's favor has acted equitably.
35. In the present case I do not think the applicant can fit the description of a party who has come to equity with clean hands and acted diligently since the decision acquitting the respondent was made by the court. The Supreme court in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR stated as follows;
- “Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.” Section 349 of the Criminal Procedure Code provides that an appeal shall be entered within 14 days of the order or sentence sought to be appealed against provided that the court to which an appeal is made ,may for good cause admit an appeal after a period of 14 days if the court is satisfied that the failure to enter the appealing time has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against within a reasonable time.
36. Having carefully perused the application before me, the supporting affidavit and the annexures thereto I do not find that the applicant acted diligently in seeking to obtain copies of proceedings and judgment from court. The delay in my view is unreasonable and inexcusable.
37. The order sought being in the nature of inequitable relief cannot issue to a party who appears to have indolent in the handling of the intended appeal. Equity assists the vigilant and frowns upon unreasonable delay such as is manifest in the present case.
38. Accordingly, this court is not persuaded that the applicant should be granted leave to appeal out of time for to do so, would be oppressive to the respondent, taking into account the totality of the facts presented before this court. Needless to say, it would appear that the intention to appeal is actuated by extraneous consideration thus to entertain the application would be to perpetuate the abuse of the Criminal Justice System by allowing an appeal to be lodged solely to assuage the feelings of a complainant who believes that the respondent must be prosecuted.
39. In *Mohit v DPP of Mauritius* [2006] UKPC 20 (25 April 2006) the privy counsel held that a complainant has no fundamental right to see somebody else prosecuted thus the DPP must act independently at all times and must not allow his or her decision to be influenced by the feelings of a complainant about the decision made by a court in regard to his matter. The law must always remain the true north for the DPP and nothing else.
40. In the end, the application by the applicant is dismissed for it does not seek to further the interest of justice in accordance with Article 157(11) of the Constitution and the delay has not been sufficiently explained.
41. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JANUARY 2025.

A.M. MUTETI
JUDGE



In the presence of:

Kiptoo: Court Assistant

Chebii for the Applicant

Ms Leah holding brief W. Otieno for Respondent

Manda Watching brief complainant

