



**Ekesa v Murunga (Environment and Land Miscellaneous Application
28 of 2022) [2023] KEELC 17582 (KLR) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17582 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 28 OF 2022
DO OHUNGO, J
MAY 29, 2023**

BETWEEN

MARCELINA SIALIRA EKESA APPLICANT

AND

BRUNO PATRICK MURUNGA RESPONDENT

RULING

1. By Notice of Motion dated October 12, 2022, the applicant seeks the following orders:
 1. [Spent]
 2. [Spent]
 3. That pending the hearing and determination of the appeal, there be an order of stay of execution of judgment and decree issued by this honourable court vide in KAK ELC Case No 299 of 2017.
 4. That the granting of stay do operate as grant of leave to appeal out of time.
 5. That costs of this application be provided for.
2. The application is supported by an affidavit sworn by the applicant. She deposed that she sued the respondent in Kakamega ELC Case No 299 of 2017 and that the said case was dismissed on May 23, 2018 for being *res judicata*. She deposed further that the learned judge erred in holding that the suit was *res judicata* and added that the respondent has been invading her home on land parcel number Butso/So/Shikoti/1832 and tormenting her tenants therein. She therefore urged the court to allow her application.
3. The respondent opposed the application through a replying affidavit in which he deposed that the application is an afterthought having been filed 4 years and 5 months after the ruling delivered on



May 23, 2018 and that there has been inordinate and unexplained delay. That execution in respect of respondent's taxed costs already commenced and the applicant committed before the Deputy Registrar to be paying the respondent KShs 5,000 each month which sum she has dutifully paid with the most recent payment being on October 25, 2022. That contrary to the applicant's allegations, it is the applicant who had been interfering with the respondent's quiet possession.

4. The application was canvassed through written submissions which the applicant duly filed. The respondent relied entirely on his replying affidavit. I have duly considered the application, the affidavits, and the submissions. The issues for determination are whether leave to file an appeal out of time should be granted and if so, whether stay should be granted.
5. Pursuant to Section 7 of the [Appellate Jurisdiction Act](#), this court has jurisdiction to enlarge time for filing notice of appeal for purposes of an appeal to the Court of Appeal. The section provides:

"The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired: ..."

6. As to the principles that guide the court while considering an application for extension of time, the Supreme Court identified in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR as follows:

"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; ..."
7. I have had occasion to peruse the file in Kakamega ELC case Number 299 of 2017. The applicant was the plaintiff while the respondent was the defendant in the said case. The case was struck out on May 23, 2018 by N A Matheka J who stated thus in the ruling:

"This suit is a not only *res judicata* but also *subjudice* and an abuse of the court process. I therefore strike it out with costs."

8. The present application was filed on October 12, 2022, over four years and four months later. The applicant has not offered any reason as to why she did not file an appeal within the stipulated period. The record shows that the ruling was delivered in her presence. She has instead focused on why she



thinks the court erred. I find that the delay is both inordinate and unexplained. It is the duty of every litigant who seeks extension of time to lay a basis to the satisfaction of the court. The applicant has completely failed in that regard. She has not laid a basis to warrant exercise of discretion in her favour.

9. In view of the foregoing, I find that the application for extension of time to file notice of appeal in respect of the ruling delivered on May 23, 2018 is not merited. It follows therefore that I need not consider whether stay of execution pending appeal should issue.
10. In the result, notice of motion dated October 12, 2022 is dismissed with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF MAY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The applicant present

The respondent present

Court Assistant: E. Juma

