



**Teresia Nasimiyu Kaburu t/a Kimilili Agrovet v Sasita (Miscellaneous Application E023 of 2023) [2024] KEELC 367 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 367 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
MISCELLANEOUS APPLICATION E023 OF 2023**

**JM ONYANGO, J  
JANUARY 30, 2024**

**BETWEEN**

**TERESIA NASIMIYU KABURU T/A KIMILILI AGROVET ..... APPLICANT**

**AND**

**PETER WANYONYI SASITA ..... RESPONDENT**

**RULING**

1. The Applicant moved the court vide a Notice of Motion dated 3<sup>rd</sup> May, 2023 seeking the following orders:
  1. Spent
  2. That there be stay of execution of the decree issued in Eldoret ELC Case No. 190 of 2018 between Peter Wanyonyi Sasita v Teresia Nasimiyu Kaburu & Another pending the hearing and determination of this application inter partes.
  3. That leave be granted to the applicant to appeal out of time against the judgment of Hon. E. Kigen delivered on 25<sup>th</sup> November, 2022 in Eldoret ELC case No. 190 of 2018.
  4. That upon grant of prayer 3 above, there be stay of execution of the decree in Eldoret ELC case No. 190 of 2018.
  5. That costs be provided for.
2. The Application is based on the Applicant's Supporting Affidavit sworn on the 3<sup>rd</sup> May, 2023 in which he deposes that his advocate was not notified of the date of delivery of judgment. He deposes even though judgment was delivered on 25<sup>th</sup> November, 2022 he only discovered that the judgment had been delivered on 28<sup>th</sup> February, 2023 when he perused he court file, by which time the 30-day period for filing of an appeal had lapsed. He deposes that he intends to appeal against he said judgment and he prays the he be granted leave



3. The Application is opposed by the Respondent through the Replying affidavit of Ali Juma (2<sup>nd</sup> Respondent ) filed on 21<sup>st</sup> July, 2023. In the said affidavit, he avers that the Applicant has not provided sufficient reasons for the delay in filing the appeal to appeal out of time.
4. The Application was canvassed through written submissions and both parties filed their submissions.
5. The only issue for determination is whether the Applicant should be granted leave to appeal out of time and if so whether execution ought to be stayed.
6. The principles for granting an application for leave to appeal out of time are now well settled. In the case of *Nicholas Kiptoo Arap Salat v IEBC & 7 Others* (2014) eKLR, it was held that:

“ ... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

- a. “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;
  - b. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
  - c. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
  - d. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
  - e. whether there will be any prejudice suffered by the respondents, if extension is granted;
  - f. whether the application has been brought without undue delay;”
7. In an Application for extension of time, the Applicant must explain the delay in filing the appeal to the satisfaction of the court.
  8. In the case of *Odera Obar & Co Advocates v Acquva Agencies Limited* (2021) eKLR where the court held as follows:

“The law does not set out any minimum or maximum period of delay. All it states is that the delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable”

9. In the instant case, the Applicant’s delay of 5 months has not been adequately explained by the Applicant. Even though he avers that his advocate discovered that the judgment was delivered on 28<sup>th</sup> February, 2023 the application was not filed until 3<sup>rd</sup> May, 2023. In the circumstances, I am not persuaded that I should exercise my discretion in favour of the Applicant.



10. Consequently, it is my finding that the application lacks merit and it is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF JANUARY 2024.**

.....

**J.M ONYANGO**

JUDGE

In the presence of;

Miss Chepkwony for the Applicant

No appearance for the Respondent

Court Assistant:

