

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELC MISC. APPL NO. E019 OF 2024**

**KENYA FOREST SERVICE.....  
APPLICANT**

**VERSUS**

**ESTHER RUTO.....  
.....RESPONDENT**

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**RULING.**

**Introduction.**

**1.** This ruling is in respect of the Applicant's Notice of Motion application dated 8<sup>th</sup> July, 2024. It is expressed to be brought under **Order 42 Rule 6 & Order 51 Rule 1** of the Civil Procedure Rules, **Sections 1A, 1B, 3A** and **79G** of the Civil Procedure Act.

**2.** The Applicant seeks the following orders;

**a. Spent**

**b. That this Honourable Court be pleased to grant Applicant (sic) leave to lodge an appeal out of time against the ruling and order in Kericho CMCC No. E028 of 2021.**

**c. That the Memorandum of Appeal ELCA E006 of 2024 filed out of time on 14<sup>th</sup> June, 2024 be and is hereby deemed as filed with leave of Court.**

**d. That this Honourable Court be pleased to issue an order of stay of execution of the ruling and order on (sic) 25<sup>th</sup> April, 2024 against the Applicant pending hearing and determination of the intended appeal.**

**e. That costs of this application be provided for.**

- 3.** The application is based on the grounds on its face and the supporting affidavit of one **Evans Kegode** sworn on 8<sup>th</sup> July, 2024.

**Factual Background.**

- 4.** The application under consideration first came up for hearing on 8<sup>th</sup> July, 2024 when the Court directed that it be served upon the Respondent.

5. On 25<sup>th</sup> September, 2024 the Court directed that the application be canvassed by way of written submissions. It was mentioned a few times to confirm filing of submissions and finally reserved for ruling on 29<sup>th</sup> October, 2024.

**The Applicant's Contention.**

6. The affidavit in support of the application is sworn by **Evans Kegode** the head of survey and mapping Kenya Forest Service.
7. He contends that the intended appeal is filed from CM ELC Case No. E028 of 2021 which matter proceeded *ex parte*. He goes on to state that the trial Court delivered its ruling on 22<sup>nd</sup> March, 2023 and an order extracted on 6<sup>th</sup> April, 2023.
8. He also contends that immediately they were notified of the ruling they instructed the office of the Attorney General - Kericho to file an application seeking to set aside the *ex parte* proceedings.

- 9.** He further contends that the Applicant filed the application dated 10<sup>th</sup> May, 2023 which was heard by Hon. Bii SRM who delivered a ruling on 25<sup>th</sup> April, 2024 dismissing it.
- 10.** It is his contention that the Applicant was dissatisfied with the said ruling and made an application for typed proceedings which proceedings were supplied on 5<sup>th</sup> June, 2024. He adds that the Applicant thereafter filed a Memorandum of Appeal on 14<sup>th</sup> June, 2024 which was after the thirty-day period within which to file an appeal had lapsed.
- 11.** It is also his contention that the state counsel on record has prepared a Record of Appeal in addition to filing the Memorandum of Appeal.
- 12.** It is further his contention that he is advised by the Applicant's counsel on record that this Court has power to enlarge time as it deems just upon a party seeking

extension and establishing a basis upon which the Court should exercise its discretion.

**13.** He contends that the delay in filing the appeal was inadvertent

and excusable as the period within which to file the appeal lapsed while Counsel on record was on compassionate leave.

**14.** He also contends that typed proceedings were not ready for collection for the purposes of preparing the appeal until 5<sup>th</sup> June, 2024 and the record of appeal has now been prepared.

**15.** He further contends that the intended appeal is arguable and has overwhelming chances of success.

**16.** It is his contention that the Applicant is a corporate body established under the Forest Conservation and Management Act No. 34 of 2016 with the mandate to conserve, protect and manage all public forests.

- 17.** It is also his contention that land parcel No. **Kericho/Kipkelion/Chepseon Block 11 (Sitian) 17** which is the suit parcel is part of the South Western Mau Forest area and the Respondent has no claim over it.
- 18.** It is further his contention that the Applicant is desirous to protect gazetted public land and urges the Court to exercise its discretion and grant leave to file the appeal out of time.
- 19.** He ends his deposition by urging the Court to allow the Applicant's application as it has been brought in good faith and the Respondent will suffer no prejudice if the application is allowed.

**The Respondent's Response.**

- 20.** In response to the application, the Respondent filed a Replying Affidavit sworn on 17<sup>th</sup> September, 2024.
- 21.** She deposes that the Applicant's application dated 10<sup>th</sup> May, 2023 filed in CM ELC Case No. E028 of 2021 seeking to set

aside judgement delivered on 22<sup>nd</sup> March, 2023 was dismissed. She adds that the application under consideration arises from the said dismissal.

- 22.** She also deposes that CM ELC Case No. E028 of 2021 was set down for hearing on 5<sup>th</sup> December, 2022 when the Applicant failed to appear. The Trial Court was satisfied that the hearing notice had been issued and it proceeded to hear her case where she called two witnesses.
- 23.** She also deposes that she is advised by her Advocates on record that **Order 12 Rule 2(a)** of the **Civil Procedure Rules** allows the Court to proceed *ex parte* if on the date for hearing, only the Plaintiff is in attendance and the Court is satisfied that hearing notice was duly served.
- 24.** She further deposes that the Applicant filed the application dated 10<sup>th</sup> May, 2023 after judgement was delivered where it sought to set aside the decision delivered on 22<sup>nd</sup> March, 2023 which application was dismissed on 25<sup>th</sup> April, 2024.

**25.** It is her deposition that the Applicant had fourteen days to file an appeal against the ruling delivered on 25<sup>th</sup> April, 2024 but it

failed to act within the statutory timelines.

**26.** It is also her deposition that the draft Memorandum of Appeal dated 14<sup>th</sup> June, 2021 (sic) attached to the Applicant's affidavit in support of the application does not raise sufficient grounds to demonstrate an arguable appeal.

**27.** It is further her deposition that as a matter of procedure, default judgements are not issued over land matters as the case is rather set down for hearing even where the Defendant fails to enter appearance or file a defence.

**28.** She deposes that the Applicant has not adduced any evidence to demonstrate that she (Respondent) made a

request for judgement before the Trial Court as stated at paragraph 6 of its affidavit in support of the application.

- 29.** She also deposes that **Order 10 Rule 8** of the **Civil Procedure Rules** is not applicable in the present application as she did not make any request for default judgement and neither was it granted by the trial Court.
- 30.** She further deposes that the Applicant relies on **Order 10 Rule 11** of the Civil Procedure Rules which is the wrong provision of the law as the Applicant intends to set aside an *ex parte* default judgement which does not exist. This was the basis for the dismissal of Applicant's application dated 10<sup>th</sup> May, 2024.
- 31.** It is her deposition that the Applicant has not made any formal request for typed proceedings and neither has any letter been placed before this Court in support of the contents of paragraph 6 of the affidavit in support of the application.

**32.** It is also her deposition that she concurs with the Applicant's averment at paragraph 9 of its affidavit in support of the application to the extent that extension of time should be done within a reasonable period.

**33.** It is further her deposition that the Applicant is guilty of laches as it prepared its application for leave to appeal out of time four months after the delivery of the impugned ruling without giving any sufficient reason as to the inordinate delay.

**34.** She deposes that she is aware that the office of the Attorney General is a public office with sufficient human resource and therefore counsel on record having proceeded on compassionate leave does not render the said office non-operational as averred by the Applicant.

**35.** She also deposes that the Applicant has no *prima facie* case and neither has it demonstrated that it has an arguable

appeal as it has not filed any appeal and therefore the orders of stay of execution of the ruling delivered on 25<sup>th</sup> April, 2024 has been made prematurely as the appeal is yet to be filed.

**36.** She further deposes the Applicant has not provided any evidence to demonstrate irreparable loss that it would incur if the stay orders are not granted pending the hearing and determination of the intended appeal.

**37.** It is her deposition that the prayer for stay orders of the ruling delivered on 25<sup>th</sup> April, 2024 cannot be granted as the orders issued on the said date are negative and they cannot therefore be stayed.

**38.** It is also her deposition that her husband **Jeremiah Kipkirui Ruto** (deceased) was the bonafide purchaser for value of land parcel No. **Kericho/Kipkelion/Chepseon/Chepseon Block 11**

**(Sitian) 17** and was issued with a title deed which is in her custody as the beneficial owner of the suit parcel.

- 39.** It is further her deposition that upon the demise of her husband, she initiated succession proceedings and the grant was confirmed vesting the suit land in her name as the beneficial owner. She adds that the Certificate of Grant was issued to her.
- 40.** She deposes that the Applicant is a trespasser and that judgement was delivered on 22<sup>nd</sup> March, 2023 which confirmed the position that she is entitled to the suit property which decision remains unchallenged.
- 41.** She also deposes that she is informed by her Advocates on record which information she believes to be true that **Article 40** of the Constitution guarantees her rights to ownership of property.

**42.** She further deposes that the application under consideration is a nonstarter, brought in bad faith, vexatious, frivolous, devoid of merit, a waste of precious judicial time and meant to clog the justice system with the intent to hoodwink the Court to issue orders which the Applicant does not deserve.

**43.** She reiterates that a dismissal is in the nature of a negative order as it is incapable of execution and ends her deposition by stating that the Applicant has not reviewed or filed an appeal from the judgement delivered on 22<sup>nd</sup> March, 2023. She adds that the appeal therefore serves no purpose.

**Applicant's Response to the Respondent's Replying Affidavit.**

**44.** In response to the Respondent's Replying Affidavit, the Applicant filed a Supplementary Affidavit sworn on 24<sup>th</sup> October, 2024 by **Evans Kegode**.

**45.** He reiterates that the matter proceeded *ex parte* on 5<sup>th</sup> December, 2022 and deposes that the Respondent failed to

effect proper service on the Applicant to enable it participate in the hearing.

- 46.** He also deposes that the hearing notice was served via email to [info@ag.go.ke](mailto:info@ag.go.ke) which email had not been presented by counsel for the Applicant. He adds that the service was not sufficient as it was served on Friday 2<sup>nd</sup> December, 2022 in Nairobi and yet the matter was scheduled for hearing on Monday 5<sup>th</sup> December, 2022.
- 47.** He further deposes that **Order 12 Rule (c) (sic)** of the **Civil Procedure Rules** provides that if the Court is satisfied that the notice was not served within sufficient time it can postpone the hearing of a suit. He adds that it in the present case it is evident that the service of the hearing notice was short and it was served through the wrong email address.
- 48.** It is his deposition that he is advised by counsel for the Applicant that **Order 5 Rule 22 B** of the **Civil Procedure Rules** as amended in 2020 provides for electronic mail

service. He adds that the email address in use at the time of service was [cl.kisumu@ag.go.ke](mailto:cl.kisumu@ag.go.ke).

- 49.** It is also his deposition that the Memorandum of Appeal annexed to his affidavit in support of the application is arguable, meritorious and has high chances of success and he therefore seeks that this Court exercises its discretion.
- 50.** It is further his deposition that there has been no inordinate delay in the filing of the instant application and it is in the interest of justice that Appeal No. E006 of 2024 be allowed.
- 51.** He deposes that the Memorandum of Appeal has been filed and the record of appeal can only be filed upon the Court granting leave. He reiterates that the record of appeal is ready and it is only awaiting the grant of leave by the Court for it to be filed.

52. He reiterates that the suit parcel is part of the South Western Mau Forest which is a gazetted forest area and the Respondent cannot lay any claim on it. He adds that the Applicant is desirous to have the primary suit re-opened to enable it provide evidence to that effect.

53. He deposes that it is premature to argue the said issue at this juncture as the Applicant is seeking leave to appeal out of time.

54. He ends his deposition by stating that the Applicant is desirous to protect gazetted public land and urges this Court to exercise

its unfettered discretion in granting the Applicant leave.

**Issues for determination.**

55. The Applicant filed its submissions on 25<sup>th</sup> October, 2024 while the Respondent filed her submissions on 29<sup>th</sup> October, 2024.

56. The Applicant submits on the following issues;

**a. Whether the Court should grant the Applicant leave to lodge the Appeal against the ruling in Kericho CMCC No. E028 of 2021 out of time.**

**b. Whether execution should be stayed.**

57. With regard to the first issue, the Applicant relies on **Sections 79 G & 95** of the Civil Procedure Act, the judicial decision of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi (citation not given)** as was cited in **Absa Bank Kenya PLC (Formerly Barclays Bank of Kenya Limited) v Nyarecha & 2 Others [2023] eKLR** and reiterates that the trial Court delivered a ruling on 25<sup>th</sup> April, 2024 where it dismissed its application which sought to set aside the judgment delivered on 22<sup>nd</sup> March, 2023.

58. The Applicant also reiterates that it was unable to get the typed proceedings within time to enable it file an appeal and

it therefore filed an appeal twenty-one days after the thirty days statutory period for filing an appeal lapsed.

- 59.** The second reason given for the delay was that Counsel for the Applicant was on compassionate leave during the period within which the appeal ought to have been filed.
- 60.** The Applicant submits that the delay in filing the appeal was inadvertent and excusable. The Applicant relies on the judicial decisions of **Charles N. Ngugi vs ASL Credit Limited [2022]eKLR, Laikera v Kalula [2022] eKLR** in support of its submissions.
- 61.** The Applicant submits that the intended appeal is arguable as the matter before the trial Court proceeded *ex parte* and the Applicant did not get a chance to be heard. It adds that this goes against the rules of natural justice which require that a person directly affected by a decision ought not to be

condemned unless they have been given a chance to prepare their case and rebut the other party's arguments.

- 62.** The Applicant reiterates that the suit parcel is gazetted as a forest area which is a part of South Western Mau and submits that the Respondent will not suffer any prejudice if the orders sought are granted.
- 63.** With regard to the second issue, the Applicant relies on the judicial decision of **Laikera v Kalula (Environment and Land Miscellaneous Application E015 of 2022) [2022] KEELC 13514 (KLR) (5 October 2022)** and submits that it (the Applicant) is a corporate body that is funded through public coffers.
- 64.** The Applicant also submits that in the event the appeal succeeds, public funds will be lost but it is willing to deposit security in Court if ordered to do so.

- 65.** The Applicant relies on the judicial decisions of **Andrew Kiplagat Chamaringo vs Paul Kipkorir Kibet [2018] eKLR, Wanjiru v Korir (Environment and Land Miscellaneous Application 52 of 2022) [2023] eKLR** and urges the Court to exercise its discretion and grant it leave to file the intended appeal out of time.
- 66.** The Respondent submits on whether the Applicant should be granted leave to lodge an appeal out of time.
- 67.** The Respondent relies on **Section 79G** of the Civil Procedure Act, the judicial decision of **Leo Sila Mutiso v Rose Hellen Wangeri Mwangi Civil Appeal 255/1997** as was cited in **Obunga & another v Onsase (Environment and Land Miscellaneous Application 6 of 2023) [2023] KEELC 21826 (KLR) (29 November 2023)** and submits that the Applicant filed its appeal on 14<sup>th</sup> June, 2024 after the period within which to file an appeal had lapsed.

68. The Respondent also submits that the application under consideration was not filed promptly as it was filed seventy-four days after the delivery of the ruling.
69. The Respondent reiterates her averments in her replying affidavit and submits that this Court in considering whether leave to appeal should be granted, must consider the chances of success of the intended appeal.
70. The Respondent relies on **First American Bank of Kenya Ltd vs Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65** and submits that the intended appeal does not raise any arguable issues.
71. The Respondent submits that one of the grounds in the Applicant's Memorandum of Appeal is that the trial Court proceeded *ex parte* without leave contrary to the provisions of **Order 10 Rule 8** of the Civil Procedure Rules.

- 72.** The Respondent relies on **Section 7** of the Forest Conservation and Management Act and submits that the Applicant is an independent Corporate body and is therefore not part of the government.
- 73.** The Respondent also submits that that being the case, the provisions of **Order 10 Rule 8** of the **Civil Procedure Rules** do not apply to it.
- 74.** The Respondent relies on the judicial decision of **Kenya Revenue Authority vs Habimama Sued Hemed & another [2015] eKLR** in support of his submissions.
- 75.** The Respondent further submits that the grounds raised in the Memorandum of Appeal are founded on the judgement delivered on 22<sup>nd</sup> March, 2023 and does not emanate from the ruling delivered on 25<sup>th</sup> April, 2024.
- 76.** It is the Respondent's submissions that the Applicant in its supplementary affidavit is both denying and acknowledging

service. On one hand its states that the suit was served through the wrong email address while on the other hand it states that no sufficient notice was given.

**77.** The Respondent then reiterates that she is the registered owner of the suit parcel.

**78.** With regard to the second issue, the Respondent relies on **Order 42 Rule 6 (1) & (2)** of the Civil Procedure Rules and reiterates that the Trial Court in its ruling delivered on 25<sup>th</sup> April, 2024 dismissed the Applicant's application which is a negative order.

**79.** The Respondent relies on the judicial decisions of **Western College of Arts and Applied Sciences v EP Oranga & 3 Others [1976] eKLR, Catherine Njeri Maranga v Serah Chege & another [2017] eKLR** and urges the Court to dismiss the Applicant's application.

## **Analysis and Determination.**

**80.** I have considered the application, the response thereto and the submissions. It is my view that the following issues arise for determination;

- a. *Whether the Applicant should be granted leave to file an appeal out of time.***
- b. *Whether the Memorandum of Appeal lodged on 14<sup>th</sup> June, 2024 in Kericho ELCA No. E006 of 2024 should be deemed as duly filed.***
- c. *Whether an order of stay of execution of the ruling and order issued in Kericho CMCC No. E028 of 2021 on 25<sup>th</sup> April, 2024 should be granted pending the hearing and determination of the appeal.***
- d. *Who should bear costs of the application.***

- A. Whether the Applicant should be granted leave to file an appeal out of time.**

- 81.** The Applicant is seeking that this Court grants it leave to file an appeal out of time against the ruling delivered on 25<sup>th</sup> April, 2024 in Kericho CMCC No. E028 of 2021.
- 82.** The Applicant contends that after the learned trial Magistrate delivered his ruling, it's Counsel applied for typed proceedings which were supplied after the thirty days within which an appeal could be filed had lapsed.
- 83.** The Applicant also contends that it was unable to file the appeal within the requisite period because its counsel was away on compassionate leave. It is on these two grounds that the Applicant seeks that it be granted leave to file an appeal out of time.
- 84.** In response, Respondent contends that the Applicant has not annexed the letter it wrote requesting for the typed proceedings and secondly, that there are other state Counsel in the Office of the Attorney General who would have filed

the appeal if the other counsel was away on compassionate leave.

**85. Section 79G** of the **Civil Procedure Act** provides as follows;

***“Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***

***Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”***

**86.** According to the provisions of Section **79G** of the **Civil**

**Procedure Act**, the time for filing an appeal from a ruling of a subordinate Court to the High Court and Courts of equal status is thirty days.

**87.** In the present matter, the subordinate Court delivered its ruling on 25<sup>th</sup> April, 2024. It follows that any appeal challenging the said decision ought to have been filed on or before 25<sup>th</sup> May, 2024.

**88.** In the judicial decision of **Stecol Corporation Limited v Susan Awuor Mudemb [2021] eKLR** the Court held as follows;

***“15. In Charles Karanja Kiiru Vs Charles Githinji Muigwa [2017]eKLR where the Respondent had delayed for 41 days before filing an appeal and where the High Court enlarged time to enable the respondent file an appeal out of time, the appellant was aggrieved by the order enlarging time claiming that the learned Judge erred in law and fact by***

***exercising his discretion and extending time for filing an appeal out of time yet no sufficient reason had been offered to justify the same, the Court of Appeal cited this Court's decision in Wanjiru Mwangi & Another [2015]eKLR and APA Insurance Co. Ltd Vs Michael Kinyanjui Muturi[2016]e KLR in dismissing the appeal.***

***16. I will therefore entirely rely on the above binding Court of Appeal decision in determining the merits of this application which is two pronged namely:- whether the prayer for extension of time is merited and whether this Court can validate an appeal which was filed out of time.***

***17. Under Section 79G of the Civil Procedure Act:***

***"Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the***

***preparation and delivery to the appellant of a copy of the decree or order.***

***Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had a good and sufficient cause for not filing the appeal in time.*** [Emphasis added].

**18. The Court of Appeal in the above Case guided that whenever an application for extension of time is before a Court, the Court ought to take into account several factors as observed by Odek JJA in Edith Gichungu Koine Vs Stephen Njagi Thoithi [2014]eKLR thus:**

***“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”***

***19. The Court of Appeal further guided that there is also a duty imposed on Courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.*** [Emphasis mine]

**89.** The Applicant has attached to its affidavit in support of the application, a copy of the Memorandum of Appeal filed in ELCA E006 of 2024 on 14<sup>th</sup> June, 2024. The said Memorandum of Appeal was filed nineteen days after the thirty days within which to appeal had lapsed.

**90.** The Applicant has also attached a copy of a letter dated 27<sup>th</sup> May, 2024 written by **G.K Ngunju** for the Solicitor General to **Florence Chepkemoi** showing that her annual leave had been granted. The leave was to commence on 20<sup>th</sup> May, 2024 and lapse on 27<sup>th</sup> May, 2024. The Applicant relies on this letter to show that its Counsel was on leave at the time the appeal was to be filed.

- 91.** The Applicant has also attached a Certificate of Delay issued in Kericho CM ELC Case No. E028 of 2021 on 8<sup>th</sup> July, 2024. It states that an application for a certified copy of proceedings was made on 25<sup>th</sup> April, 2024 when the ruling was delivered. It also states that the proceedings were ready for collection on 5<sup>th</sup> June, 2024.
- 92.** It is important to note that the Applicant filed the Memorandum of Appeal in Kericho ELCA E006 of 2024 on 14<sup>th</sup> June, 2024 which was nine days after the proceedings were ready for collection.
- 93.** The Court of Appeal in **Kamlesh Mansukhalal Damji Pattni v Director Of Public Prosecutions & 3 others [2015] eKLR** held as follows;
- “40. It must be realized that Courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as***

***we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the Courts and tribunals established by or under this Constitution.” Judicial Officers are also State officers, and consequently are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the***

***best interest of the people whom the law is intended to serve. Such decisions may involve only the rights and obligations of the parties to the litigation inter se (and hence only the parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.***

(Emphasis mine)

**94.** Taking into consideration the foregoing, I find that the Applicant has sufficiently explained the reason for the delay in filing of the appeal. It is in the interest of justice that time

within which to file the appeal is extended. In any case, the Respondent has not demonstrated that she is likely to suffer prejudice if time is extended.

**B. Whether the Memorandum of Appeal lodged on 14th June, 2024 in Kericho ELCA No. E006 of 2024 should be deemed as duly filed.**

**95.** Having found, under issue (A) above, that it is in the interest of justice that time within which to file an appeal is extended, it follows that the Memorandum of Appeal lodged on 14<sup>th</sup> June, 2024 in Kericho ELCA No. E006 of 2024 shall be deemed as duly filed.

**C. Whether an order of stay of execution of the ruling and order issued in Kericho CMCC No. E028 of 2021 on 25<sup>th</sup> April, 2024 should be granted pending the hearing and determination of the appeal.**

**96.** The Applicant is seeking that the Court issues orders of stay of execution of the ruling and order issued on 24<sup>th</sup> April, 2024 in Kericho CM ELC No. E028 of 2021.

**97.** In response, the Respondent contends that the order issued on 24<sup>th</sup> April, 2024 dismissed the Applicant's application and it is therefore a negative order which cannot be stayed.

**98.** The law relating to stay pending Appeal is **Order 42 Rule 6 (2)** of the **Civil Procedure Rules** which provides as follows;

***“(2) No order for stay of execution shall be made under sub rule (1) unless***

***a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***

***b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”***

**99.**The Respondent has annexed to her Replying Affidavit a copy of the ruling delivered on 25<sup>th</sup> April, 2024. In the said ruling, the Learned Trial Magistrate dismissed the Applicant’s application dated 10<sup>th</sup> May, 2023.

**100.**In **Joseph Muthuri & 32 others v Cooperative Bank Limited & 15 others [2018] eKLR** the Court cited with approval the judicial decision of **Raymond M Omboga v Austine Pyan Maranga Kisii HCCA Number 15 of 2010** where the Court expressed itself thus:

***“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay.***

***Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order.”***

**101.** I agree with the Respondent’s submission that the order, by the Trial Court, dismissing the Applicant’s application is in the nature of a negative and it cannot therefore be stayed.

**Disposition.**

**102.** Taking the foregoing into consideration, I find that the application dated 8<sup>th</sup> July, 2024 is merited and it hereby allowed in the following terms:

**a. Leave is hereby granted to the Applicant to lodge an appeal against the ruling and order in Kericho CMCC No. E028 of 2021 out of time.**

**b. That the Memorandum of Appeal filed out of time and without leave of Court i.e ELCA E006 of 2024 shall be deemed duly filed.**

**c. The costs of this application shall abide the outcome of the appeal.**

**103.** It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO  
THIS 27<sup>TH</sup> DAY OF MARCH, 2025.**

**L. A. OMOLLO  
JUDGE.**

**In the presence of: -**

**Miss Chepkemoi for AG for the Applicant.**

**Mr. Kemboi for the Respondent.**

**Court Assistant; Mr. Joseph Makori.**