



REPUBLIC OF KENYA



KENYA LAW
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**Amendi & 2 others v Ombuge (Environment and Land Appeal
E008 of 2023) [2023] KEELC 22071 (KLR) (6 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22071 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E008 OF 2023
DO OHUNGO, J
DECEMBER 6, 2023**

BETWEEN

VINCENT IDAH AMENDI 1ST APPELLANT

LAND REGISTRAR KAKAMEGA COUNTY 2ND APPELLANT

COUNTY SURVEYOR KAKAMEGA COUNTY 3RD APPELLANT

AND

ROWLAND ESIPILA OMBUGE RESPONDENT

*(Being an appeal from the ruling and order of the Senior Principal
Magistrate's Court at Mumias (Hon. G P Omondi, Principal Magistrate)
delivered on 24th January 2023 in Mumias MCELC No. E56 of 2022)*

RULING

1. Dissatisfied with the ruling and order of the Senior Principal Magistrate's Court at Mumias (Hon. G P Omondi, Principal Magistrate) delivered on 24th January 2023 in Mumias MCELC No. E56 of 2022, the First Appellant filed this appeal through Memorandum of Appeal dated 27th February 2023. Although he joined the Second and Third Appellants as named above, counsel for the First Appellant told the court on 19th April 2023 that only the First Appellant is appealing against the said decision. The Memorandum of Appeal needs to be amended to reflect the correct parties.
2. By Notice of Motion dated 8th May 2023, the First Appellant now seeks the following orders:
 1. That the Honourable court be pleased to grant extend (*sic*) time within which the Applicant should file his appeal out of time.
 2. That pending the hearing and determination of the intended appeal that be (*sic*) an order of stay of proceedings in Senior Principal Magistrates Court at Mumias ELC No. 56 of 2022.



3. That costs of the application be borne by the outcome of the intended appeal.
3. The application is supported by an affidavit sworn by the First Appellant. He deposed that following delivery of the ruling, he paid for certified copy of proceedings on time and that the proceedings were certified on 17th February 2023 and collected on 1st March 2023. He added that the delay was not deliberate and that Mumias ELC No. 56 of 2022 had been set down for hearing on 14th June 2023.
4. The Respondent opposed the application through a replying affidavit in which he deposed that although proceedings were certified on 17th February 2023, the First Appellant failed to extract the order he was appealing against and did not also annex a certificate of delay. He added that the First Appellant is only intent on delaying the matter in the Subordinate Court.
5. The application was canvassed through written submissions which the applicant and the respondent duly filed.
6. I have considered the application, the affidavits, and the submissions. The principles that guide the court while considering an application for extension of time are that such an order is discretionary, and the applicant has the burden of laying a basis to the satisfaction of the court. The court considers such factors as whether there is a reasonable explanation for the delay, whether there will be any prejudice suffered by the respondent if the extension is granted and whether the application has been brought without undue delay. See the decision of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR.
7. Pursuant to Section 16A (1) of the *Environment and Land Court Act*, 2011, an appeal from the subordinate court to this court is to be filed within 30 days of delivery of the judgment or ruling. Pursuant to Section 16A (2) of the said statute, this court has jurisdiction to admit an appeal out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing it in time.
8. The ruling and order appealed against was delivered on 24th January 2023. The First Appellant filed this appeal on 2nd March 2023 while the present application was filed on 11th May 2023. The appeal ought to have been filed by 24th February 2023. Consequently, it was filed eight days late. I do not consider a delay of eight days to be inordinate in the circumstances. Further, there is evidence on record that the First Appellant paid for certified proceedings on 27th January 2023, as soon as the ruling was delivered. He seemed to labour under the misconception that he needed certified proceedings to file his Memorandum of Appeal. Certified proceedings are not required at the stage of filing a Memorandum of Appeal. I do not see any prejudice to be suffered by the respondent beyond what can be remedied by an award of costs. I find merit in the prayer for extension of time to file the appeal.
9. Regarding prayer for stay of proceedings, it has to be borne in mind that stay of proceedings is a serious matter, since it brings to a halt, albeit temporarily, the smooth flow of the process of dispensation of justice. Consequently, it is a relief that must be granted sparingly and only in exceptional circumstances. Even more circumspection is required before stay of proceedings pending determination of an appeal is granted since delay in the appeal will only exacerbate the situation in so far as early determination of the matter appealed from is concerned.
10. The decision on whether to grant stay of proceedings is discretionary but must be exercised judiciously and on sound principles, as is shown above. The main consideration is whether it is in the interest of justice to grant such an order. See *Re Global Tours & Travel Ltd* HCWC No.43 of 2000 (Unreported).
11. Applying the above principles to this case, I note that the ruling appealed against was on the question of whether the suit before the Subordinate Court was *res judicata*. The Subordinate Court found that *res judicata* not established and dismissed the objection. If upon hearing this appeal this court finds that



the objection ought to have been upheld, the proceedings before the Subordinate Court will thereby come to an end. Conversely, if this court finds no merit in the appeal, the suit should be heard and determined by the Subordinate Court. Either way, there will be no prejudice to the First Appellant. Stalling the proceedings at this stage through an order of stay of proceedings will on the other hand not serve the interest of justice. I find no merit in the prayer for stay of proceedings.

12. To facilitate early determination of the appeal, I will also grant leave to file and serve an Amended Memorandum of Appeal, with a view to correctly stating the parties in the appeal.
13. In the result, I make the following orders:
 - a. Time within which to appeal against the ruling and order of the Senior Principal Magistrate's Court at Mumias delivered on 24th January 2023 in Mumias MCELC No. E56 of 2022 is hereby extended.
 - b. The Memorandum of Appeal filed on 2nd March 2023 is deemed to have been filed within time.
 - c. The First Appellant to file and serve an Amended Memorandum of Appeal within 14 (fourteen) days from the date of delivery of this ruling, to correctly state the parties in the appeal.
 - d. Costs shall be in the appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF DECEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Otundo for the First Appellant

Mr Nyauma for the Second and Third Appellants

The Respondent present in person

Court Assistant: E. Juma

