



**Opilio v Opilio (Environment and Land Appeal E016 of 2021)
[2024] KEELC 13645 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13645 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E016 OF 2021
BN OLAO, J
DECEMBER 9, 2024**

BETWEEN

VINCENT OMOIT OPILIO APPELLANT

AND

FLORENSIO OKITUK OPILIO RESPONDENT

RULING

1. The dispute between Vincent Omoit Opilio (the Appellant) and Florensio Okituk Opilio (the Respondent) was heard in the subordinate Court. The Appellant who was the defendant in the subordinate Court was dissatisfied with the judgment of the Chief Magistrate Busia Hon Lucy Ambasi who delivered the judgment dated 10th August 2021 by which it was decreed that the land parcel No South Teso/Apokor/40118 belongs to the Respondent. He lodged an appeal to this Court and by a judgment delivered by Omollo J on 27th September 2022, the appeal was allowed and the judgment of the Chief Magistrate was set aside in favour of the Appellant who was also awarded costs of the appeal which were taxed on 21st March 2023 at Kshs.95,950.
2. By a Notice of Motion dated 5th October 2023, the Respondent moved to this Court seeking the following orders:
 - a. This Court be pleased to extend time for filing and lodging a Notice of Appeal.
 - b. This Court be pleased to issue a stay of execution of the judgment by Omollo J delivered on 27th September 2022 and all consequential orders/decrees pending the hearing and determination of the intended appeal.
 - c. Costs of the application be provided for.



3. Vide a consent order dated 11th January 2024 and which was adopted as an order of this Court on 22nd January 2024, the parties compromised the Notice of Motion dated 5th October 2023 in the following terms:
 1. That there be and is hereby issued an order extending the time for lodging and serving the Notice of Appeal.
 2. That there be and is hereby issued an order granting the Respondent leave to file an appeal out of time against the decisions of this Honourable Court issued on 27th September 2022.
 3. That the Respondent be and is hereby given 7 days from the date of the adoption of this consent as an order of the Court to file and serve a Notice of Appeal.
 4. That the Respondent be and is hereby granted 60 days from the date of service of the Notice of Appeal to file and serve the Appellant with the said appeal.
 5. That there be and is hereby issued an order of stay of execution of the orders issued herein on 27th September 2022 and all consequential decrees/orders emanating therefrom pending the hearing and determination of the intended appeal.
 6. That each party to bear their own costs of the application.
4. The Appellant has now moved to this Court vide his Notice of Motion dated 23rd April 2024 and premised on the provisions of Section 1A of the Civil Procedure Act, Orders 5, 10, 22 and 51 of the Civil Procedure Rules. He seeks the following orders:
 1. Spent
 2. That there be and is hereby issued an order setting aside the orders of this Honourable Court dated 22nd January 2024.
 3. That the costs of this application be in the cause.
5. The application is based on the grounds set out therein and is supported by the Appellant's affidavit of even date.
6. The gravamen of the application is that the Respondent has waited for over 2 years to come to this Court against the decision rendered on 27th September 2022 following a decree issued on 7th December 2022. That although the Respondent was granted 60 days from the date of service of the Notice of Appeal to file and serve the Appellant with the Memorandum of Appeal, that has not been done despite the lapse of the 60 days. It is therefore in the interest of justice that the consent orders dated 22nd January 2024 are vacated and/or set aside. That equity aids the vigilant and not the indolent and this application has been filed without unreasonable delay.
7. In response to the application, the Respondent filed a replying affidavit dated 26th September 2024 in which he has deposed, inter alia, that following the consent order dated 22nd January 2024, he was granted 7 days to file a Notice of Appeal which he filed on 31st January 2024 which was within the said 7 days. That he was also given 60 days to file his appeal which he did by filing at Kisumu Court of Appeal Civil Appeal No E070 of 2024 and he has requested further particulars from the Deputy Registrar of that Court which are yet to be supplied. That other than the fact of service, he has fully complied with the said order and was under the impression that the CTS would prompt him automatically upon the filing of the appeal but that has not been done. In any event, the Appellant will not be prejudiced because other than the dismissal of his case, there are no other orders capable of being implemented.



That the Appellant has on several occasions threatened him with execution of costs and is also using the orders of this Court to conduct a survey on the suit land. He urged this Court to dismiss the application.

8. Annexed to the replying affidavit are:
 1. Copy of Notice of Appeal lodged herein on 31st January 2024.
 2. Copy of Memorandum of Appeal dated 26th February 2024.
 3. Copy of Tracking number 7VZX2024.
 4. Copy of Letter from Okeyo Ochiel Advocates dated 19th September 2024 and addressed to the Deputy Registrar Court of Appeal Kisumu requesting for particulars on appeal case NO E070 of 2024.
 5. Copy of Decree dated 29th September 2022.
 6. Copy of Proclamation issued by Eshikhoni Auctioneers against the Respondent.
9. When the application was placed before me for directions, I directed that the same be canvassed by way of written submissions. However, only Mr Ouma counsel for the Appellant/Applicant filed his submissions. Mr Okeyo counsel for the Respondent informed the Court that he would be relying on the Respondent's replying affidavit.
10. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by Mr Ouma.
11. The substantive remedy sought by the Appellant/Applicant that the consent order dated 22nd January 2024 be set aside principally that although the Respondent was granted 7 days to file and serve the Notice of Appeal and 60 days to file the appeal, he has not done so and whereas the Notice of Appeal was filed, the appeal has not been filed 2 years down the line. This is what Mr Ouma has submitted in the penultimate and last paragraphs of his submissions dated 6th June 2024.

“In the instant case, the Respondent after 2 years of delivery of judgment of this Court in 2022, he came to Court in January 2024 and he was granted an order to file and serve the appeal within 60 days, he has not done so despite the Court order and no explanation has been given for failure to observe and obey the Court order of 22nd January 2024.

We submit that this Court find the Respondent to have not obeyed and or observed the Court orders of 22nd January 2024 as such the orders be vacated so that the applicant is allowed to enjoy fruits of his judgment.”

My understanding of the consent orders issued by this Court following the consent of both parties is that there was to be a stay of execution of the judgment herein on condition that the Notice of Appeal was to be filed and served within 7 days from the 22nd January 2024 when the consent was adopted and the appeal was to be filed and served within 60 days from the same date.

12. It is clear from the record that the Notice of Appeal was filed on 31st January 2024. It ought to have been filed and served within 7 days from 22nd January 2024 when the consent order was adopted as an order of this Court. Those 7 days lapsed on 29th January 2024. The Respondent's counsel has submitted that the Notice of Appeal was served on 9th February 2024. The Appellant has not deposed in his replying affidavit as to when the Notice of Appeal was served and this Court must conclude that indeed it was served on 9th February 2024 again long after the 7 days period.



13. With regard to the filing of the appeal, it was filed on 21st March 2024 as deposed in the replying affidavit and which has not been rebutted. It cannot be correct therefore, for the Respondent to allege that it has not been filed 2 years down the line.
14. It is clear therefore that the Appellant did not comply with the order of filing and serving the Notice of Appeal within 7 days from 22nd January 2024 when the consent order was adopted as an order of this Court. Ordinarily and considering the circumstances of each case, Courts may excuse lapses where appropriate. In this appeal there is no dispute that there is already an appeal filed at the Court of Appeal Registry in Kisumu being Civil Appeal No 070 of 2024. In principal, save for the lapse in filing and serving the Notice of Appeal, the parties had agreed to have the execution of the judgment herein stayed pending the hearing and determination of the appeal. I think an order for costs will suffice to ameliorate any prejudice which the Appellant may have suffered so that the parties can proceed to prosecute the appeal in the Court of Appeal.
15. The up-shot of the above is that this Court issues the following orders in respect to the Notice of Motion dated 23rd April 2024.
 1. The Notice of Motion dated 23rd April 2024 is dismissed.
 2. The Appellant/applicant will pay the Respondent thrown away costs of Kshs.10,000 within 7 days of the delivery of this ruling.

BOAZ N. OLAO

JUDGE

9TH DECEMBER 2024

RULING DATED, SIGNED AND DELIVERED ON THIS 9TH DAY OF DECEMBER 2024 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO PARTIES.

BOAZ N. OLAO

JUDGE

9TH DECEMBER 2024

