



Roy Parcel Services Limited & 3 others v Abiero & 3 others (Appeal E026 of 2021) [2022] KEELRC 13147 (KLR) (10 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13147 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E026 OF 2021
CN BAARI, J
NOVEMBER 10, 2022**

BETWEEN

ROY PARCEL SERVICES LIMITED APPELLANT

AND

ROY PARCEL SERVICES LIMITED 1ST APPLICANT

ROY PARCEL SERVICES LIMITED 2ND APPLICANT

ROY PARCEL SERVICES LIMITED 3RD APPLICANT

AND

PAUL ONYANGO ABIERO 1ST RESPONDENT

PAUL ONYANGO ABIERO 2ND RESPONDENT

PAUL ONYANGO ABIERO 3RD RESPONDENT

PAUL ONYANGO ABIERO 4TH RESPONDENT

RULING

1. Before court is a notice of motion application dated March 10, 2022 and filed on March 11, 2022, brought pursuant to order 42 rule 6(1) and (2) and order 51 rule 1 of the Civil Procedure Rules, and section 1A, 3, 3A and 63(1) of the Civil Procedure Act and article 159 (2) of the Constitution. The appellant/applicant seeks orders That: -
 - i. Spent
 - ii. This honourable court be pleased to grant the applicant leave to lodge an appeal out of time against the decision delivered on February 10, 2022, by the High Court in Kisumu, ELRC Appeal No E037 of 2021.



- iii. Upon grant of leave to appeal out of time, the Memorandum and record of appeal lodged herein be deemed as duly filed.
 - iv. This honourable court be pleased to grant a stay of execution of the orders granted on February 23, 2022, and September 3, 2021 pending hearing and determination of the appeal.
 - v. The honourable court be pleased to stay execution of the judgment dated May 10, 2021, and the decree therein pending hearing of the appeal.
 - vi. The costs of the application abide the appeal.
2. The application is supported by grounds on the face and the affidavit sworn by Sheila Rashid on March 10, 2022. Ms Sheila Rashid contends that the applicant filed an application dated November 9, 2021, seeking a stay of execution of the judgment date May 10, 2021 and that this court rendered ruling dismissing the application.
 3. The applicant avers that she is aggrieved by the decision and seeks to appeal. It is her averment the time to file the appeal has since run out and that mistake of counsel should not be visited on the applicant/appellant.
 4. It is the applicant's case that the delay in filing the appeal is not inordinate.
 5. The respondent opposed the application *vide* a replying affidavit sworn by George O Anyumba on March 21, 2022. The respondent avers that the application is *res judicata*, the applicant having filed a similar application and which has since been determined *vide* this court's ruling of February 10, 2022.
 6. The respondent avers that the applicant's grounds in support are full of falsehoods as they were all along aware of the judgment of the court having been present in court when the judgment was delivered.
 7. It is the respondent's assertion that the delay in filing the appeal has not been explained.
 8. Parties canvassed the application by way of written submissions.

Determination

9. I have considered the application, the grounds and affidavits in their support, and the submissions of the parties. The issues for determination are:
 - i. Whether the applicant should be granted leave to lodge an appeal out of time against the decision delivered on February 10, 2022, by the High Court in Kisumu, ELRC Appeal No E037 of 2021.
 - ii. Whether the applicant should be granted a stay of execution of the orders granted on February 23, 2022, September 3, 2021 and May 10, 2021, pending hearing and determination of the appeal.
10. On the issue of stay of execution, this court had earlier in a ruling rendered on February 10, 2022, made a determination of the issue, and as correctly submitted by the respondent, the court is *functus officio* in as far as the issue of stay is concerned.
11. The appellant can thus only seek recourse in the Court of Appeal on the issue, this court having substantively addressed the issue in its earlier ruling.



12. The court notes that the application herein was filed by the firm of Rashid & Co Advocates, while the submissions on the same were filed through the Firm of Kenlee & Co Advocates, who are not on record for the appellant.
13. The submissions are thus not properly on record and are hereby expunged.
14. The expunging of the applicant's submissions notwithstanding, I will proceed to analyze the motion and render a decision premised on the grounds and the affidavit in support of the motion.
15. The respondent's assertion is that the application herein is overtaken by events on the basis that the application arises from the judgments in Kisumu Chief Magistrates Court ELRC No 45 and 46 of 2020, whose decretal sum and taxed costs have already been settled.
16. This position was confirmed by Mr Waithaka who was present for the applicant on June 20, 2022, and who further told the court that their only remaining issue was in respect of the counter-claim.
17. The draft memorandum of appeal is not before this court and the court cannot therefore tell whether the counter claim is arguable or not.
18. Section 79G of the Civil Procedure Act, provides as follows on the power of the court to extend time: -

“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.”

19. The reason put forward for failure to file the appeal within the legal time lines, is that the applicant was not aware of the judgment. The respondent has told this court that the applicant's representative was present in court when the judgment was delivered.
20. Extension of time such as prayed in this application, is an equitable remedy and not a right of a litigant. The party that seeks this extension, bears the burden of satisfying the court that her application is worthy of the exercise of this discretionary power. (See Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others, SC Application No 16 of 2014(2014) eKLR).
21. Being that the judgments subject of the appeal is overtaken by events and the fact that the appellant's counter claim is not in the court's record, the court deems the application fatally defective and unworthy of the its exercise of discretion.
22. The application is dismissed with no orders as to costs.
23. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF NOVEMBER, 2022.

CHRISTINE N BAARI

JUDGE.

Appearance:

Ms Adede Present for the appellant/applicant



N/A for the respondent

Ms Christine Omollo-C/A

