IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, JA (IN CHAMBERS)

CIVIL APPLICATION NO. 267 OF 2018

BETWEEN

MULTI MEDIA UNIVERSITY OF KENYA...............APPLICANT

AND

KENYA UNION OF ENTERTAINMENT AND MUSIC INDUSTRY

EMPLOYEES..RESPONDENT

(Being an application for leave to file the notice of appeal out of time and for stay of further proceedings pending hearing and determination of an intended appeal against the Ruling and Orders of the High court of Kenya at Nairobi (Byram Ongaya, J.) dated 30*th* *July 2018* in ELRC No. 759 of 2018)

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RULING

[1] The Notice of Motion before me is an omnibus one seeking orders of stay of proceedings in **Nairobi ERLC NO 759 of 2018** as well as an order of extension of time within which to file the Notice of Appeal out of time. I will only deal with the later prayer as I have no jurisdiction as a single judge to deal with orders of stay of proceedings. ***Rule 4*** of this Court Rules states;-

> **"The Court may, on such terms as it thinks just, by order extend he time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be constructed as a reference to that time as extended"**

[2] A brief synopsis of the matter is that sometimes in May, 2018 the ***Kenya Union of Entertainment and Music Industry Employers*** (respondent) filed suit before the Employment and Labour Relations Court (ELRC) in Nairobi seeking orders *inter alia* that the ***Multi Media University of Kenya*** (applicant) be compelled to pay union dues to the respondent and for orders compelling the appellant to execute a Recognition Agreement. The applicant filed its response to the claim disputing it on the grounds that there was no valid recognition agreement entered into with the respondent and basically there was no written instructions from the members of staff directing their salaries to be deducted and forwarded to the respondent.

[3] The respondent had also filed an application dated 21st May, 2018 seeking interim orders to deduct the monthly dues pending the hearing and determination of the suit. According to the applicant the matter came up in court on the 30th July, 2018 for mention for purposes of confirming that the applicant had filed a further affidavit in regard to the said application. To the utter shock of the applicant the Judge made the following orders;

> "*i.* That effective end of August, 2018 the respondent to deduct and remit union dues with respect to 49 employees recruited as per exhibit 3 on the claim bundle pending further orders or hearing of the matter.
>
> (ii) That respondents to file and serve a further replying affidavit by 15th *August, 2018.*
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> (iii) That parties (sic) encouraged to reach a compromise with a view of recording a consent.

(iv) That hearing of application on 9th *October, 2018* at 9.00am.

(v) That costs in the cause."

[4] The applicant was aggrieved by the aforesaid orders and intended to mount an appeal but they were late in filing a Notice of Appeal and thus filed the present application on 13th September, 2018. The intended appeal will be predicated on the grounds that as an employer, the applicant had not received any notification and/ or instruction from the said 49 employees that their salaries should be deducted and the proceeds be forwarded to the respondents. Moreover there is no valid recognition agreement in place between the applicant and the respondent that would warrant the payment of the monthly dues as ordered by the court; deducting employees' salaries without their consent would open the applicant to litigation; also some of the employees are not permanent as they are hired on need basis, which would present practical difficulties to implement the order as issued.

[5] The application is supported by the affidavit of ***Mumbi Muihurih*** sworn on 13th September, 2018. He reiterates the above grounds and further gives reasons for the delay in filing the Notice of appeal. According to the applicant, when the said orders were issued, the applicant started having talks with the purported members of the union, some of whom were denying knowledge of membership to the respondent union. The applicants wanted to collect cogent evidence from the members of staff but as the talks took longer than anticipated, the period when the Notice of Appeal was to be filed lapsed. Moreover the Vice Chancellor who is the sole instructing authority of the applicant was not in the country and the delay was not deliberate.

[6] The respondent who were represented by Mr. Ouko did not file any replying affidavit in opposition to this motion. He however intimated that there were on-going discussions with the applicant on how the aforesaid orders can be complied with.

[7] I have considered the application, the supporting affidavit and the annexures thereto. A prayer for extension of time call for the exercise of discretion which is generally unfettered. However, exercise of judicial discretion, is always done on reasonable basis; it must be based on facts or law that demonstrate the applicant is deserving of the orders of extension of time. In other words, judicial discretion cannot be exercised out of sympathy, whimsically or capriciously. The parameters that guide the Court are well set out in a long line of authorities. See the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, C. A. Appl. No. Nai. 251/97 (ur)**:

> **"It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay; secondly, the reason for the delay; thirdly, (possibly); the chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the respondent if the application is granted.".**

The above list is of course not exhaustive as held in the case of **Mongira & Another v Mukaria & Another, 2005 2 KLR 103 at page 106-10**7, where the Court again cited ***Leo Sila Mutiso***, (supra), and went on to state:

> **"Those, in general are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words "in general" Rule 4 gives the Judge unfettered discretion is exercised judicially a Judge would be perfectly entitled to consider any other facts outside those listed in the paragraphs we have quoted above. … To limit such issues only to the grounds set out in the above paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way".**

[8] With the above principles in mind, I now deal with the application before me, to answer the question whether the applicant has offered justifiable reasons for the delay in this matter. As aforementioned, the respondent did not file any replying affidavit to demonstrate whether it will suffer any prejudice. The applicant was supposed to lodge the Notice of Appeal within fourteen (14) days from the 30th of July, 2018 but the same was not done. The reasons ascribed to this failure was that the applicant set out to establish the employees who were members of the respondent and since some of them denied, they were trying to get cogent evidence by way of affidavit evidence which exercise took longer than it was anticipated. The other reason advanced was that the Vice Chancellor of the University was not available when the order was issued and he is the only authorized person who could give instructions on the matter.

[9] I find the reasons advanced by the applicant reasonable not to mention that the grounds raised in support thereto, which I am in no doubt will form the subject matter of the intended appeal; they raise some serious issues of law regarding whether the named employees were members of the respondent union, whether they had authorized the deductions of their salaries to be made and paid to the respondents, whether there was a recognition agreement and finally whether far reaching orders as aforementioned can be issued during a mention. I also see no prejudice that will be suffered by the respondent if time is extended within which to file an appeal, on the contrary, allowing the applicant to exercise its right of appeal will enhance the cause of justice.

[10] The above being my findings, the notice of motion dated 13th September, 2018 is hereby allowed in terms of prayer No 4. The applicant is given fourteen 14 days from the date of this ruling within which to file the Notice of Appeal and thirty (30) days after filling the Notice to file the record of appeal. Costs of this application shall abide the outcome of the said appeal.

The respondent shall have the cost of this application in any event**.**

Dated and delivered at Nairobi this 21st day of June, 2019

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR