



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**APPEAL NO. E060 OF 2020**

***(Before Hon. Lady Justice Maureen Onyango)***

**AUDIO VISUAL CONTROL SYSTEMS.....APPELLANT**

**VERSUS**

**NAOMI NEKESA KASUTI.....RESPONDENT**

***(Being an appeal from the judgement of Principal Magistrate Hon. Kagoni E. M.***

***delivered on 6<sup>th</sup> October, 2020 at the Milimani Commercial Court in MC***

***ELRC No. 674 of 2019 – Naomi Nekesa Kasuti v Audio Visual Control Systems)***

**RULING NO. 2**

1. Before me, for determination is the Respondent's Notice of Motion Application dated 14<sup>th</sup> January, 2022. It seeks the following orders THAT:

- a) *This Application herein be certified urgent and heard ex parte in the first instance.*
- b) *This Court be pleased to extend the orders of stay granted on 5<sup>th</sup> November, 2020, by a further 60 days or such other reasonable period of time as the Court may determine to enable the lower Court supply certified copies of proceedings and Judgment to the Appellant*
- c) *This Court be pleased to enlarge time for filing of the complete record of appeal to enable the Appellant/Applicant comply with ruling issued by this Court on 12<sup>th</sup> November, 2021 for filing of record of appeal, by a further 60 days or such other reasonable period of time as the Court may determine.*
- d) *This Court be pleased to order and direct the lower court to expeditiously avail to the Appellant/Applicant the certified copies of proceedings and judgment in MC ELRC 674 of 2019.*
- e) *Costs of this Application be provided for.*

2. The Application is premised on the grounds **THAT**: -

- a) *The Appellant/Applicant obtained a favourable ruling on 12<sup>th</sup> November, 2021 in which this Court directed that Appellant to file its completed record of appeal within 60 days to facilitate hearing of the Appeal.*
- b) *The Appellant/Applicant has made all diligent efforts to obtain certified copies of proceedings from the lower Court and that time within which to lodge the appeal is at the verge of lapsing.*
- c) *The Appellant's failure to comply with the Court's orders has been occasioned by the delay at the lower court and should therefore not be penalized as this are issues beyond its control.*
- d) *It is on this basis that the Appellant/Applicant now seeks the extension of the stay orders granted by this Court on 5<sup>th</sup> November,*

2020 pending hearing and determination of the intended Appeal.

e) *The Appellant has acted in bona fides having complied with this Court's order of 5<sup>th</sup> November, 2020 by depositing the decretal sum in Court pending the hearing and determination of the intended Appeal and should therefore not be unjustly denied the opportunity of filing its complete record of appeal for determination on merit.*

f) *The Respondent will not in any way be prejudiced by the grant of the reliefs sought in the instant Application.*

g) *The Application has been made without undue delay and that it is in the interest of justice that the same be allowed as prayed.*

3. The application is further supported by the Affidavit of **JUDITH OTIENO** sworn on 14<sup>th</sup> January, 2022 in which she reiterates the grounds on the face of the motion.

4. In response to the application, the Respondent filed grounds of opposition dated 24<sup>th</sup> January, 2022, in which it raises the following grounds of opposition:

(1) ***THAT*** *the respondents filed their Notice of Motion dated 12<sup>th</sup> January 2022 and the Appellants filed Notice of Motion dated 14<sup>th</sup> January 2022 on 14<sup>th</sup> January 2022 which is an afterthought and an attempt to salvage an already unsalvageable situation.*

(2) ***THAT*** *the annexures filed in support of the said Application is apparent that attempts to look for proceedings were being done post court proceedings on 12<sup>th</sup> November 2021.*

(3) ***THAT*** *since the Order lapsed on 11<sup>th</sup> January 2022, the Orders cannot be extended.*

(4) ***THAT*** *the appellant Notice of Motion Application dated 14<sup>th</sup> January 2022 is an abuse of the Court process.*

5. Parties argued the application orally on 25<sup>th</sup> January, 2022.

#### **Appellant/Applicant's Submissions**

6. In its submissions, the Appellant/Applicant urged this Court to allow its application dated 14<sup>th</sup> January, 2022. The delay in filing the record of appeal is attributed to the delay in being furnished with certified copies of typed proceedings and judgment by the lower court.

7. To support this assertion the Appellant/Applicant has attached copies of letters and emails sent to the Chief Executive Officer, Milimani Commercial Court seeking for the aforementioned documents.

8. The Applicant further submitted that it would be greatly prejudiced if the orders sought in its application are not allowed as it has already deposited the decretal sum as directed by this Court.

9. In conclusion the Applicant urged this Court to find its application merited and allow it in terms of the prayers sought therein.

#### **Respondent's Submissions**

10. The Respondent on the other hand submitted that the orders of stay sought to be extended cannot be extended the Orders having already lapsed. Further that the provisions of Order 49 do not apply to this Court.

11. The Respondent further submitted that no explanation has been given by the Applicant for the delay in following up the certified copies of the proceedings and judgment despite having filed the Memorandum of Appeal in October 2020.

12. It is on this basis that the Respondent submits that the instant Application is an abuse to the Court process and therefore urged this Court to dismiss the same with costs to the Respondent.

#### **Rejoinder by Applicant**

13. In its brief rejoinder the application attributes the delay to verbal communication from the lower court indicating that the file could not be traced for purposes of getting the certified copies of proceedings and judgment. It further submitted that the Court only informed it in January 2022 that the certified copies of proceedings and certificate of delay were available.

14. The Appellant/Applicant further submitted that it has an arguable appeal and as such should not be denied the right to pursue it.

#### **Analysis and determination**

15. This Court in its ruling delivered on 12<sup>th</sup> November, 2021 directed as follows:

*“I will order that the Appellant do file record of appeal within 60 days failing which the orders of stay granted on 5<sup>th</sup> November 2020 as confirmed on 25<sup>th</sup> November 2020 will lapse.”*

The 60 days lapsed on 11<sup>th</sup> January 2022.

16. The Applicant attached to its application its letters dated 26<sup>th</sup> November, 2021, 11<sup>th</sup> January, 2022 and the emails of 20<sup>th</sup> December, 2021 as proof of efforts to obtain the certified proceedings and judgment from the lower Court.

17. Having considered the above communication I agree with the Applicant that the reasons for delay are excusable and beyond its control.

18. In the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi (1999) 2 EA 231**, the Court stated as follows:

*“It is now well 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.”*

[Emphasis added]

19. I find that the Applicant has made a valid case for the extension of time to file its record of appeal.

20. For the foregoing reasons, this Court allows the application dated 14<sup>th</sup> January, in the following terms:

**(i) The stay orders issued on 5<sup>th</sup> November, 2020 are hereby extended for a further period of 30 days from the date hereof and the time within which the record of appeal is to be filed is therefore extended for a further period of 30 days from the date hereof.**

**(ii) Should the applicant fail to comply the order herein will automatically stand vacated.**

21. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS**

**18<sup>TH</sup> DAY OF MARCH 2022**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**