



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 6th October, 2020 at the Milimani Commercial Court in

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

RULING

1. The application before me for determination is dated 5th November 2020 and seeks the following orders:-

(i) Spent.

(ii) THAT this honourable Court be pleased to grant a stay of execution of the decree and Judgement delivered on the 8th September 2020 in MC. ELRC/674/2019 pending the hearing and determination of the application herein.

(iii) THAT this honourable Court be pleased to grant stay

of execution of the decree and Judgement delivered on the 8th September 2020 pending the hearing and determination of the Applicant's Appeal herein.

(iv) THAT this honourable Court be pleased to allow the Appellant to deposit the decretal sum in Court within 7 days to be held by the Court as security for costs pending hearing and determination of the Appeal.

(v) THAT costs of this application be provided for.

2. The grounds in support of the application are that:

a) THAT the Appellant /Applicant is aggrieved with the Judgement delivered by the Court on the 8th September 2020 in MC ELRC 674 of 2019

b) THAT the Appellant /Applicant have already appealed from the said judgement and filed Memorandum of Appeal in ELRCA/E060/2020 on 9th October 2020 which said appeal raises triable issues for determination and has a good chance of success.

c) THAT stay of execution granted by Court on the judgement date lapsed and the Respondent has now instructed MS BEMAC AUCTIONEERS who have served on the Appellant/Applicant a 7 day proclamation notice and warrant of attachment for execution of the decree on 29th October 2020 and under are under imminent danger of attachment.

d) THAT the Appellant/Applicant is willing to deposit the decretal sum as security for costs within 7 days to be held by the Court

pending hearing and determination of the Appeal.

e) THAT if the judgement is executed without this present application having been heard the Appellant/Applicant stands to suffer irreparably and the Appeal will in all likelihood be rendered nugatory.

f) THAT there has been no undue delay in bringing this application.

g) THAT it is in the interests of justice that this application be allowed

3. The application is further supported by the affidavit of MARIAM ISSA, the Human Resources Manager of the Applicant in which she states that judgment was delivered against the Applicant on the 8th September 2020 in MC ELRC 674/2019 where the Court awarded the sum of Kshs.395,200/= to the Respondent.

4. That it was aggrieved by the judgment and filed the instant appeal.

5. That on 29th October, 2020 M/S. BEMAC Auctioneers served it with a warrant of attachment in respect of a decretal sum of Kshs.487,694/=

6. That it seeks stay of execution and is willing to deposit security and satisfy the conditions the Court may impose in order to grant the orders sought in the application.

7. The Applicant also filed a Memorandum of Appeal on 9th October 2020 raising the following grounds of appeal –

a. THAT the learned Honourable Magistrate erred in law and fact in finding in favour of the Respondent and giving weight to the entire evidence of the Respondent while wholly disregarding the Appellants rebuttal evidence thereby failing to consider that the Respondent by her conduct was liable for termination under section 43(2) of the Employment Act 2007.

b. THAT the learned Honourable Magistrate erred in law and fact in any event in awarding the Respondent 12 months compensation in the sum of Kshs.364,800 when the Respondent did not establish a case to warrant such award as the said award is inordinately and unjustifiably high and excessive in the circumstances of the case.

c. THAT the learned Honorable Magistrate erred in law and fact in awarding the Respondent an award of Kshs.30,400 in lieu of one month notice when the said award was unwarranted, inordinately high and excessive in the circumstances of the case.

d. THAT learned Honorable Magistrate erred in law and fact in finding that the Appellant's Counter-Claim for Kshs.54,442.85 was incompetent for want of company resolution authorizing the Appellants Human Resource Manager to swear the Replying Affidavit in support of the Counter-Claim and for want of company resolution authorizing the representation for defence against the claim by the Appellants advocates on record.

e. THAT the learned Honorable Magistrate erred in law and fact in failing to take judicial notice of Article 159(2)d of the Constitution to provide sufficient opportunity for receipt and consideration of the Appellants written submissions and authorities, delay having been occasioned by the Court registry's operational uncertainty, system downtime and documented implementation challenges of the migration to virtual Court filing and hearing system, as well as the physical restrictions of accessing the registry due to the covid 19 pandemic; before arriving at his judgement.

f. THAT the learned Honourable Magistrate erred in fact in failing to find that the Respondent had already been duly issued with, and had duly accepted, the Certificate of Service before the institution of the Respondent's claim.

g. THAT the learned Honourable Magistrate erred in law and fact in finding for the Respondent which finding was contradictory and against the weight of the evidence tendered.

8. The Applicant/Appellant's application was heard ex parte on 5th November 2020 and orders granted as follows:

(1) Spent.

(2) THAT in the meantime temporary stay of execution is granted in terms of prayer 2 pending inter partes hearing of the application on condition that the Applicant deposits the entire decretal sum in Court within 14 days.

9. On 25th November 2020, the orders were confirmed following the Applicant/Appellant's confirmation to the Court that it had deposited the entire decretal sum in Court. In effect the Applicant/Appellant's application was allowed.

10. The Respondent thereafter filed application dated 19th February 2021 in which it seeks the following orders:

(i) Spent

*(ii) **THAT** the Honourable Court be and is hereby pleased to set aside and vacate all its orders issued on 5th November 2020 for*

failure to file a memorandum of appeal within time as stipulated by **Rule 8(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016** that the appeal shall be filed within 30 days of the date of the decision.

(iii) **THAT** the Honourable Court be and is hereby pleased to set aside and vacate all its orders issued on 5th November, 2020 for failure to file a complete record of appeal within time as stipulated by **Rule 8 (2) of the Employment and Labour Relations Court (Procedure) Rules, 2016** that the appeal shall be filed within 30 days of the date of the decision.

(iv) That the cost of the application be provided

11. The application is supported by the grounds on the face thereof and the affidavit of SETH OJIENDA Esq. counsel for the Respondent in which he reiterates the grounds on the face of the application which are that –

a. On 5th November, 2020 this Honourable Court issued a 'temporary stay order' on the Appellant application dated 5th November, 2020 on condition that the Appellant deposits the entire decretal sum in Court within 14 days.

b. The Court confirmed its orders of 5th November, 2020 on the 24th November, 2020 when the matter came up for hearing of the said application. The Appellant is now enjoying stay orders and has not made any attempts whatsoever to file the complete record of appeal or at least show cause for the delay.

c. The trial Court rendered its judgment on 8th September, 2020 for the sum of Kshs.487,782 plus costs and interests of the suit.

d. It was thus reasonably expected and as further sanctioned by **Rule 8 (2) of the Employment and Labour Relations Court (Procedure) Rules, 2016** that the appeal shall be filed within 30 days of the date of the decision.

e. That the Appellant has only for the record 5 months now from the date of the impugned decision filed only but the memorandum of appeal which is a non-starter, naked and is defective for want of procedure.

f. There have been no efforts to have the record of appeal filed and have the appeal set for hearing. The Respondent has been kept in the dark and knows nothing. The Appellant is occasioning a delay and is thwarting the Respondent's hopes and desire to put the tedious litigation process behind her and enjoy the just fruits of the trial Court's decision that found in her favour.

g. That the application has been brought timely without any unreasonable delay.

12. The Appellant filed grounds of opposition listing the following grounds of objection:-

(a) **THAT** the Respondent /Applicant obtained judgment against the Appellant/Respondent in MC. ELRC 674/2019 on 8th September 2020 together with costs and interest. The Appellant/Applicant being dissatisfied with the aforesaid judgment of Hon. Kagoni EM, Principal Magistrate, duly filed a Memorandum of Appeal case no. ELRC/E060/2020 on 9th October 2020. The Memorandum of Appeal was filed within time stipulated under rule 8(2) of the Employment & Labour Relations Court (Procedure) Rules 2016.

(b) **THAT** despite diligent efforts the Appellant/Respondent has not been able to obtain the certified proceedings from the lower Court to enable it complete the Record of Appeal and set the Appeal for hearing and will seek the Courts direction for enlargement of time. The Appellant/Respondent is obliged under Rule 8(4) of the Employment & Labour Relations Court (Procedure) Rules 2016 to file such pleadings as soon as possible and within reasonable time.

(c) **THAT** the Appellant/Respondent has displayed bona fides in this matter in complying with this Court's orders issued on 5th November 2020 by depositing the full decretal sum of Kshs.487,782.00 in Court pending the hearing and determination of the Appeal and the Appellant/Respondent should not be denied the opportunity of having the Appeal heard and determined.

(d) **THAT** the appeal raises triable issues for determination and stands a good chance of success.

(e) **THAT** the Respondent/Applicant would not suffer any prejudice should the appeal be unsuccessful as the Appellant/Respondent has honoured the order for security for costs by depositing the decretal sum as ordered by Court.

(f) **THAT** the Respondent/Applicant's application should be dismissed and opportunity be granted for the appeal to be heard and fully determined.

13. On 17th May 2021 the Court directed that the application be dispensed with by way of written submissions and fixed the matter of mention on 21st June 2021 for taking a ruling date.

14. Only the Respondent had filed submissions by 21st June 2021. The Appellant was on the said date granted further leave to file submissions with 7 days upon request by Mrs. Otieno, the Appellant's counsel. To the date of writing this ruling there are no submissions filed by the Appellant.

15. The issues for determination are whether the appeal was lodged out of time and if the Court should vacate the orders of 5th November 2020.

16. According to **Rule 8 of the Employment and Labour Relations Court (Procedure) 2016**, it is a requirement that:

8. Appeals

(1) Where any written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified for that appeal under the written law.

(2) Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.

17. The record of appeal has not yet been filed. I agree with the Respondent's submissions that the Appellant has not demonstrated the steps it has taken to follow up the typing of proceedings in the lower Court in order to file the record of Appeal.

18. This notwithstanding, the grounds of appeal set out in the Memorandum of Appeal are not frivolous and raise triable issues.

19. The Respondent, apart from suffering delay in enjoying the fruits of its judgment, will not suffer prejudice should the appeal fail as the decretal sum has been deposited in Court.

20. **Orders 42 Rule 6(2) of the Civil Procedure Rules** provides that:-

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

21. On the Respondent's account that the appeal was filed out of time, **Section 57(a) of the Interpretation and General Provisions Act** provides as follows:

57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

22. Further, **Order 50 Rule 8 of the Civil Procedure Rules** provides:

[Order 50, Rule 8.] Computation of days.

8. In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day.

23. In the instant case, judgment in the lower Court was delivered on 8th September 2020. If we exclude 8th September 2020, thirty (30) days would end on 8th September 2020. The appeal was this filed one (1) day outside the prescribed period.

24. This Court has powers to extend time. I do not think a delay of one day would warrant the Court to strike out an application. As acknowledged by the Respondent, Rules are handmaidens of justice and not mistresses. As was stated by Maraga, J. (as he then was) in the case of **New Look Estate Ltd & Another V Khira Omar Maalim & Another[2013] eKLR –**

7. Procedural rules are the backbone of justice, as was reiterated by Maraga, J in Shashikant C. Patel v Oriental Commercial Bank [2005] eKLR in which he held inter alia;

“...we should never lose sight of the fact that rules of procedure, though they may be followed are the handmaids of justice. They should not be given a pedantic interpretation which at the end of the day denies parties justice.”

This was similar to the position adopted by Muriithi, J in Inland Beach Enterprises Ltd v Sammy Chege & 15 Others [2012] eKLR where he held, inter alia:

“...in my view, with the cardinal principle of procedure that rules are handmaids of justice not mistresses; the rules must serve the justice of the case as the court may determine in the circumstances of the proceedings.”

25. I find no reason to set aside or vacate the orders of 5th November 2020 with the result that this application dated 19th February 2021 is

disallowed.

26. I however agrees with the Respondent that the delay in obtaining typed proceedings and filing record of appeal has not been explained. For this reason, I will order that the Appellant do file record of Appeal within 60 days failing which the orders of stay granted on 5th November 2020 as confirmed on 25th November 2020 will lapse.

27. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF NOVEMBER 2021

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 15th March 2020 and subsequent directions of 21st 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, this 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 this 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