



**East Global Logistics (K) Limited v Makupa Transit Shade Limited & 2 others
(Civil Suit 76 of 2019) [2023] KEHC 7 (KLR) (3 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 7 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 76 OF 2019
OA SEWE, J
JANUARY 3, 2023**

BETWEEN

EAST GLOBAL LOGISTICS (K) LIMITED PLAINTIFF

AND

MAKUPA TRANSIT SHADE LIMITED 1ST DEFENDANT

DENNIS KEISER 2ND DEFENDANT

ABDIWAHID HAJI YEROW 3RD DEFENDANT

RULING

1. The notice of motion dated February 21, 2022 was filed on behalf of the defendants by M/s Kinyua Muyaa & Company Advocates. It was brought pursuant to articles 25(c), 50(1) and 159 of the Constitution; sections 1A, 1B, 3A and 68 of the Civil Procedure Act, chapter 21 of the laws of Kenya, as well as order 42 rule 6 of the Civil Procedure Rules, for orders that:
 - (a) Spent
 - (b) Spent
 - (c) Further proceedings be stayed pending the filing, hearing and determination of an intended appeal against the whole of the ruling delivered on November 2, 2021.
 - (d) Costs be provided for.
2. The application was predicated on the grounds that the defendants, being dissatisfied with the whole of the ruling of the court delivered on November 2, 2021, have filed a notice of appeal, indicating their intention to file an appeal to the Court of Appeal. It was further the contention of the defendants that, should the intended appeal succeed, any evidence this court will have taken will be discarded. They added that, conversely, no prejudice will be caused to the plaintiff if the orders sought are granted.



3. The grounds aforementioned were explicated in the supporting affidavit sworn by the 3rd defendant, Abdiwahid Haji Yerow, and filed herein on February 22, 2022. He reiterated the defendants' right to fair hearing under article 50(1) of the [Constitution](#) and averred that it is paramount that the ruling of the court be appealed before further evidence can be taken in the matter. He explained that the delay has largely been due to the fact that the court did not supply counsel with a certified copy of the proceedings in time.
4. The plaintiff opposed the application and to that end relied on the grounds of opposition dated March 24, 2022. It thereby contended that:
 - (a) The applicant has failed to demonstrate that the continuation of the proceedings herein will render nugatory any appeal that is ultimately filed and determined;
 - (b) Should the Court of Appeal set aside the ruling delivered on November 2, 2021, then nothing stops the court from issuing such directions as would be appropriate in such circumstances, including but not limited to reopening of any closed case and directing any party to produce primary evidence;
 - (c) The application fits the very definition of an abuse of the court process, granted that the impugned ruling was delivered on November 2, 2021, yet the application was not filed until some three months later on February 22, 2022, and even so, just two days before the scheduled hearing; with the objective of torpedoing the hearing set for February 24, 2022;
 - (d) The reasons provided for not presenting the application earlier lack merit, are in fact mere excuses and the application is simply a delaying tactic meant to embarrass the due process of the court;
 - (e) The application fails to demonstrate that it has met the threshold set out under order 42 rule 6 of the [Civil Procedure Rules](#) under which the same has been presented.
 - (f) The application is therefore not only ill conceived, but is also incompetent, unmeritorious and ought to be dismissed with costs to the plaintiff.
5. The application was urged by way of written submissions, pursuant to the directions given herein on March 17, 2022. Thus, the defendants' written submissions were filed on June 13, 2022 in which the 9 grounds set out on the face of the application were specifically urged. At paragraphs 4 and 7 of those submissions, Mr Kinyua, learned counsel for the defendants, made reference to articles 25(c) and 50(1) of the [Constitution](#) to demonstrate that the intended appeal is arguable. With all due respect to Mr Kinyua, those are arguments that would best be raised in the intended appeal.
6. At paragraphs 5 and 9, counsel made heavy weather of the fact that he made a request for handwritten notes but was not granted the permission to lift photocopies of the same for purposes of aiding the court in expeditious typing of the proceedings; which he gave as the reason for the belated filing of the instant application. Mr Kinyua also responded to the plaintiff's grounds of opposition and reiterated the defendant's stance that substantial injustice will be visited upon them if they go into a hearing without full disclosure. He consequently urged the court to allow the application with an order that the costs thereof be in the cause or the intended appeal.
7. On behalf of the plaintiff, Mr Karega filed his submissions on June 21, 2022. He started off by pointing out that stay of proceedings is a grave judicial action, as it interferes with the right of a litigant to conduct its litigation; and therefore interferes with the right of access to justice and the right to fair trial as envisaged by articles 48 and 50 of the [Constitution](#) of Kenya. He relied on [Kenya Wildlife Service v James Mutembei](#) [2019] eKLR and [Millicent Wamaitha Njogu v Pauline Nyambura Waweru](#)



- [2022] eKLR to underscore the proposition that the test for stay of proceedings, as opposed to stay of execution, is more stringent, given the possibility of infringement of the aforementioned constitutional rights as well as the broader public policy on expeditious disposal of cases.
8. Accordingly, Mr Karega proposed the following two issues for consideration:
 - (a) The timing of the application, and whether it was filed in good faith; and,
 - (b) Whether any prejudice will be caused to the defendants if the proceedings are not stayed.
 9. On whether the application was timeously brought, Mr Karega urged the court to note that the ruling in question was delivered on November 2, 2021, the notice of appeal was filed on November 11, 2021 but the application seeking to stay proceedings was not filed until February 22, 2022 with the knowledge that the hearing was fixed for February 24, 2022. He submitted that no sound explanation was given as to why the application was not filed earlier; and urged the court to conclude that it was not filed in good faith; but for the purpose of securing an adjournment.
 10. In the same vein, counsel urged the court to disregard the averments about unavailability of the typed proceedings or photocopies thereof as mere excuses; as there is no legal nexus between the delay in filing the application and the availability of the proceedings. He pointed out that the Court of Appeal does not insist on typed proceedings in interlocutory appeals, by dint of paragraph 2(c)(iv) of the [Court of Appeal Practice Directions \(Civil Appeals and Applications\) 2015](#) issued pursuant to sections 3A and 3B of the [Appellate Jurisdiction Act](#), with a view of enhancing compliance with the provisions of the [Court of Appeal Rules](#). In Mr Karega's view, the lack of typed proceedings is not a valid reason for granting an order for stay of proceedings.
 11. On whether any prejudice will be caused to the defendant, Mr Karega reiterated his posturing that, should the intended appeal be allowed, nothing stops the court from issuing such directions as would be appropriate in such circumstances, including reopening of any closed case and directing any party to produce primary evidence. He concluded his submissions by restating that the applicant has failed to demonstrate that the continuation of the proceedings herein will render nugatory any appeal that may ultimately be filed and determined. Accordingly, Mr Karega urged the Court to dismiss the application for stay of proceedings dated February 21, 2022 with costs to the plaintiff.
 12. The parties were given an opportunity to highlight their written submissions on June 23, 2022. Ms Muyaa highlighted the provisions of section 68 of the [Civil Procedure Act](#) and urged the viewpoint that the impugned ruling amounts to a preliminary decree and is therefore appealable. She reiterated the posturing that no prejudice will be visited on the plaintiff should the orders sought be granted and urged the court to bear in mind that the defendants' constitutional rights under articles 48 and 50 of the [Constitution](#) are at stake.
 13. Mr Karega took a similar approach and stressed their posturing that there was inordinate delay in filing the instant application; that the explanation given by the defendants for the delay is not honest; and that interlocutory appeals ought to be discouraged. Mr Gikandi was in agreement with and adopted Mr Karega's submissions and likewise urged for the dismissal of the application.
 14. The application was principally brought under order 42 rule 6 of the [Civil Procedure Rules](#). Sub-rule 1 thereof provides that:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court



appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."

15. Accordingly, although the court has the discretion to grant stay of proceedings on terms, the interests of justice require that the discretion be exercised judiciously and within the laid down parameters. The rationale for this has been aptly captured in *Halsbury's Laws of England*, 4th Edition, Vol 37 at pages 330 and 332 thus:

"Stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation toward the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized ought to be exercised very sparingly, and only in exceptional cases.

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for stay on this ground must show not merely that the plaintiff might not, or probably would not succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

16. That being the case, in determining what the interests of justice require in the instant application, it is imperative to balance the competing interests of the parties; and in this respect, I find instructive the expressions of Ringera, J in *Global Tours & Travels Limited* WC No 43 of 2000, that:

"...whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but on whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously..."

17. The learned judge proceeded to state:

"Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent..."

18. Accordingly, the defendants were under duty to demonstrate:

- (a) that the application for stay of proceedings was filed expeditiously; and,
- (b) That there is sufficient cause and that it is in the interest of justice to grant stay of proceedings.



19. The applicants have endeavoured to demonstrate that they have an arguable appeal and, while it is not my remit to determine whether or not the appeal has good chances of success, it falls for determination whether sufficient cause has been made by the applicants to warrant stay; and whether the application was filed expeditiously.
20. It is manifest from a perusal of the record that, although the defendants timeously filed a notice of appeal on November 11, 2021, the instant application was not filed until February 22, 2022; with only two days to the hearing date. It is now trite that even one day’s delay can be held to be unreasonable, depending on the circumstances of the case; particularly the explanation for the delay. Hence, in *Jaber Mohsen Ali & another v Priscilla Boit & another* [2014] eKLR it was held that even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.
21. The only reason given herein by the defendants is that the court did not supply certified copies of typed proceedings in time; and that it declined an offer for counsel to lift photocopies of handwritten proceedings for expeditious typing. However, that explanation lacks traction for several reasons. Firstly, a perusal of the file and in particular the letter dated November 11, 2021 shows that it bears no receipt stamp; and that it was placed before a different judge not on the November 11, 2021 or soon thereafter as alluded to by counsel, but on February 22, 2022; thus suggesting that it was submitted at the same time as the instant application. In any case, the letter was never brought to my attention at all. Had that been done, I would have had no reason to decline such a request as I have granted similar requests before in other matters. Therefore, to suggest, as did Mr Kinyua, that there is a general “gag order” on requests for photocopies of handwritten proceedings is to miss the point. The court has no reason to decline such an offer granted the dictates of article 159(2) of the *Constitution* of Kenya. At any rate, nothing precluded counsel from raising the issue in court when the matter came up before the court for mention on March 17, 2022, June 8, 2022 and June 22, 2022.
22. Secondly, while it may be true that the defendants were not in a position to file their intended appeal without the proceedings, the issue at hand is, not the delay in filing an appeal. The pertinent issue is the delay in filing the instant application. In this respect I would agree with both Mr Karega and Mr Gikandi that the delay by the Court in furnishing the defendants with a certified copy of the proceedings and ruling have no nexus at all with the instant application for stay of proceedings.
23. Thirdly, the *Court of Appeal Practice Directions (Civil Appeals and Applications) 2015*, are explicit that:
- “In interlocutory appeals the judge’s notes in the court appealed from are not normally necessary and parties should consider excluding such notes under the proviso to rule 87 (1).” (now Rule 89(1) of the *Court of Appeal Rules, 2022*)
24. Thus, in respect of the first issue, it is plain that the delay in filing the instant application is neither reasonable nor defensible. I find succor in the position taken in the *Milicent Wamaitba Njogu (sued as the administrator of the Estate of Peter Njogu Maraga alias Peter Njogu Muranga) v Pauline Nyambura Waweru* [2022] eKLR, that a delay of two months was unreasonable. The application for stay of proceedings was accordingly dismissed with costs. Here is what Hon. Ngenye-Macharia, J (as she then was) had to say:
- “...the impugned ruling was delivered on August 24, 2021. The Application was filed on October 27, 2021 seeking the stay of proceedings. I find it that the time in between the dates being close to two months since the same was issued. The court in *Re Global Tours & Travel Limited (Nairobi) HC Winding up Cause No 43 of 2000* stated that the test is high and



stringent. Without derogating from this, I find the time taken in filing the Application from the date of issue of the Ruling to be one of a litigant dragging their feet. It must be noted that the matter has been in court since the year 2019 and thus judicial time ought not to be trifled with.”

25. As to whether sufficient cause has otherwise been shown for the grant of the order of stay of proceedings pending appeal and whether it is in the interest of justice to grant the orders, the defendants have essentially hinged their application on their constitutional rights under article 48 and 50(1) of the *Constitution*; contending that it would be unfair for hearing to proceed without full disclosure. Needless to repeat that, it is in the same vein that the plaintiff is equally entitled to the constitutional right to expeditious disposal of the suit; and therefore that it is imperative for the court to balance these competing interests and arrive at a decision that will ensure no prejudice is visited on either side.
26. Having balanced the interests of the parties, it is my considered view that, granted the nature of the defendant’s objection, it would be in the interest of justice to stay these proceedings pending the hearing and determination of the appeal so that judicial resources are not expended in vain, should the appeal succeed. I am convinced that no prejudice will be visited on the plaintiff for which costs would be inadequate recompense.
27. In the premises, the application dated February 21, 2022 is hereby allowed and orders granted as hereunder:
 - (a) That further proceedings herein be and are hereby stayed pending the filing, hearing and determination of an intended appeal against the ruling delivered on November 2, 2021.
 - (b) Costs of the application shall be costs in the cause.
28. It is so ordered.

DATED SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 3RD DAY OF JANUARY, 2023.

OLGA SEWE

JUDGE

