



**Ray Stores Ltd v Oruko (Miscellaneous Civil Application
E023 of 2023) [2023] KEHC 772 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 772 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS CIVIL APPLICATION E023 OF 2023**

**KW KIARIE, J
FEBRUARY 9, 2023**

BETWEEN

RAY STORES LTD APPLICANT

AND

HOSBORN OUMA ORUKO RESPONDENT

RULING

1. The applicant moved the court by way of Notice of Motion dated April 28, 2022 under sections 1A, 1B, 3A, 63 (e), 75 & 79G of the [Civil Procedure Act](#), order 43 rules 2 & 3, & order 50 rule 6 of the [Civil Procedure Rules, 2010](#). The applicant is seeking the following orders:
 - a) That this application be certified as urgent service thereof dispensed with and heard forthwith and *ex parte* in the first instance. [Spent]
 - b) That this honorable court be pleased to grant an order of stay of further proceedings in Homabay CMCC no E037 of 2021 – Hosborn Ouma Oruko v Ray Stores Limited (herein after referred to as the primary suit) pending the inter-parties hearing and determination of this application. [Spent]
 - c) That this honourable court be pleased to grant an order of stay of further proceedings in Homa Bay CMCC no E037 of 2021 – Hosborn Ouma Oruko vs Ray Stores Limited (herein referred to as the primary suit) pending the hearing and determination of the intended appeal sought to be filed by the applicant against the ruling and order of the honorable Tom mark Olando (principal magistrate) as was delivered on November 3, 2021.
 - d) That this honourable court be pleased to grant leave to the applicant to file an appeal, albeit out of time, against the ruling and order of the honorable Tom Mark Olando (principal magistrate) as was delivered on November 3, 2021 in Homa Bay CMCC no e037 of 2021 – Hosborn Ouma Oruko vs Ray Stores Limited.



- e) That upon grant of the leave sought in prayer 5 above, this honourable court be pleased to set fresh timelines within which the intended appeal is to be filed and thereby served.
 - f) That the costs of this application be provided for and in any event the same, if at all, be fixed and determined by this court.
2. The application is premised on the following grounds:
- a) The applicant is aggrieved by the ruling and order of the honorable Tom Mark Olando (principal magistrate) as was delivered on November 3, 2021 in Homa Bay CMCC no E037 of 2021 Hosborn Ouma Oriku v Ray Stores Limited whose effect was to dismiss with costs, the applicant's (being the defendant in the primary suit) application dated August 17, 2021 which application sought *inter-alia*, the striking out of the suit for having been filed beyond the statutory limitation period.
 - b) The applicant is desirous of filing an appeal against the foresaid ruling and subsequent order.
 - c) The statutorily prescribed time within which to file an appeal has since lapsed.
 - d) The primary suit has been fixed for hearing and is scheduled to proceed on May 10, 2022.
 - e) The ruling and subsequent order being challenged appears to have disregarded the applicant's application in totality thus there is an apparent error of law and principle by the trial court.
 - f) The respondent shall not suffer any prejudice at all should leave to appeal be granted as the primary suit is relatively new, having been filed in the year 2021 and indeed, hearing has not commenced.
 - g) The applicant stands to suffer irreparable loss and damage should the leave sought be denied as the same shall be tantamount to denial of its right to appeal.
 - h) It is fair and just to order a stay of further proceedings in the primary suit so as to preserve the sub-stratum of the intended appeal and further, enable the appeal court review the spent application vis-a-vis the finding of the trial court with a view to the appellate court reaching an independent conclusion based on the circumstances of the case and applicable law.
3. The respondent opposed the application on the following grounds:
- a) That the applicant did not seek the leave of the court.
 - b) That the applicant did not satisfy the court what loss will be occasioned if the stay is not granted.
4. The impugned ruling was delivered on November 3, 2021 and the current application was filed on April 28, 2022. This was more than five months and the inordinate delay was not adequately explained.
5. The stay of proceedings has been described as a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. The court in the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR while addressing a similar issue stated as follows:
- “...Stay of proceeding 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 right of access to justice, right to be heard without



delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...”

6. Earlier on Ringera J (as he then was) in the case of *Re Global Tours & Travel Ltd* HCWC No 43 of 2000 observed as follows:

“...As I understand the law, 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 case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

7. In the instant application I find that it will not be in the interest of justice to grant the orders sought. If the order is granted, it will cause unnecessary delay in the conclusion of the matter. The applicant will not be prejudiced for after the conclusion of the case if not satisfied, he will have the right to appeal.
8. The application is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 9TH DAY OF FEBRUARY, 2023

KIARIE WAWERU KIARIE

JUDGE.

