



**Yarrow v National Bank of Kenya Limited (Civil Appeal
93 of 2021) [2023] KEHC 1052 (KLR) (14 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1052 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 93 OF 2021
RN NYAKUNDI, J
FEBRUARY 14, 2023**

BETWEEN

ISMAEL YARROW APPELLANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

RULING

1. The Applicant approached this court *vide* an application dated 22nd November 2022 seeking the following orders;
 1. Spent
 2. Spent
 3. This Honourable court be pleased to grant an order for stay of proceedings in Chief Magistrate Court of Eldoret Case No. E333 of 2021 – Ismael yarrow vs National Bank Limited pending the hearing and determination of the appeal.
2. The application is premised on the grounds set out therein and the contents of the affidavit of Ismael Yarrow in support of the same.
3. The Applicant's case is that the trial court delivered a ruling on 30th July 2021 which he is dissatisfied with and intends to appeal. The continuation of the lower court matter will prejudice the appeal and the same raises serious triable issues. He contends that the lower court file needs to be availed at the high court registry for purposes of typing of proceedings so as to facilitate determination of the appeal.
4. The Respondent did not respond to the application. There is no evidence that the application was served on the Respondent.



Analysis & Determination

5. Order 42 Rule 6(1) of the [Civil Procedure Rules](#) states 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.

No order for stay of execution shall be made under sub rule (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.”

6. 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. In my considered view, the test for stay of proceeding is high and stringent. In the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000 the court stated 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 cases, 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” (emphasis added)

7. The issue of stay of proceedings was discussed in [Halsbury's Law of England](#), 4th Edition. Vol. 37 page 330 and 332 as follows;

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards 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 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 a 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.”

8. Stay of proceedings is an equitable relief which requires the court to exercise its discretion. Ideally, he who comes to equity must come with clean hands and in my view the applicant has not met this maxim. The decision to be appealed against was delivered on 30th July 2021. The present application was made on 22nd November 2022. The Applicant has not explained to the court why he took close to 16 months to seek stay of proceedings. It is my considered view that it would not be in the interest of justice to exercise court’s discretion and grant stay of proceedings as it will only serve the purpose of delaying the matter that is pending in the lower court. One further measure which goes against exercise of discretion to stay proceedings at an interlocutory stage before the lower court is clearly stated in the case of *Muchanga Investments Limited –vs-Safaris Unlimited(Afica)Ltd & 2 others* (2009) eKLR that “Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the Administration of Justice”
9. It is doubtful though not sitting as a session judge on an Appeal whether the Applicant has demonstrated that he has an arguable appeal with high chances of success. As a consequence, the application for grant of stay orders of proceedings in respect of ELD CMCC NO E333 of 2021 lacks merit and I therefore dismiss it with costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 14TH DAY OF FEBRUARY 2023

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R. NYAKUNDI

JUDGE

Coram: Before Justice R. Nyakundi

Mayiga & Co. Advocates for the Respondent

Mathai Maina & Co Advocates

Gumbo & Co Advocates

