



REPUBLIC OF KENYA



**KENYA LAW**  
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**KSC International Limited (Under Receivership) & 4 others v  
Bank of Africa (Kenya) Limited & 7 others (Civil Case 446 of 2015)  
[2024] KEHC 2909 (KLR) (Commercial & Admiralty) (21 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2909 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND ADMIRALTY  
CIVIL CASE 446 OF 2015  
A MABEYA, J  
MARCH 21, 2024**

**BETWEEN**

**KSC INTERNATIONAL LIMITED (UNDER RECEIVERSHIP) ... 1<sup>ST</sup> PLAINTIFF  
KUNDAN SINGH UBHI ..... 2<sup>ND</sup> PLAINTIFF  
OPKAR SINGH UBHI ..... 3<sup>RD</sup> PLAINTIFF  
RIPTHUMA SINGH UBHI ..... 4<sup>TH</sup> PLAINTIFF  
VISTA WINDOWS LIMITED ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**BANK OF AFRICA (KENYA) LIMITED ..... 1<sup>ST</sup> DEFENDANT  
KENYA COMMERCIAL BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT  
I & M BANK LIMITED ..... 3<sup>RD</sup> DEFENDANT  
KOLLURI VENKATA SUBBARAYA KAMASASTRY ..... 4<sup>TH</sup> DEFENDANT  
DELOITTE CONSULTING LIMITED ..... 5<sup>TH</sup> DEFENDANT  
SAMUEL OKETCH ONYANGO ..... 6<sup>TH</sup> DEFENDANT  
HARVEEN GADHOKE ..... 7<sup>TH</sup> DEFENDANT  
KEYSIAN AUCTIONEERS ..... 8<sup>TH</sup> DEFENDANT**



## RULING

1. On 24/10/2023, this Court dismissed three (3) applications filed by the 1<sup>st</sup> to 3<sup>rd</sup> defendant. They had sought orders to the effect that this suit be marked as having been compromised. Those applications were lodged on 6/3/2023.
2. At the time of filing of those applications, the suit had been fixed for trial on 8/3/2023 and 27/3/2023, respectively. However, because of those applications, the suit did not proceed for trial. After delivering that ruling, the Court set down the suit for trial on 25<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> March, 2024. Those dates were set down on the date of the delivery of the ruling in the presence of all the parties.
3. On 19/2/2024, barely a month to the date of trial, the 1<sup>st</sup> defendant took out a Motion on Notice dated the same date. The same was made under sections 1A, 1B, 3A of the *Civil Procedure Act* and Order 42 Rule of the Civil Procedure Rules. It sought a stay of proceedings of the suit pending the hearing and determination of an appeal against the ruling of 24/10/2023 in the Court of Appeal.
4. The grounds for the Motion were that the 1<sup>st</sup> defendant had preferred an appeal to the Court of Appeal against the ruling of 24/10/2023. That it was only waiting for the typed proceedings to be able to lodge its Record of Appeal in the appellate court.
5. That the intended appeal had high chances of success. That the case was slated for final hearing on 25<sup>th</sup> to 27<sup>th</sup> March, 2024. That if the appeal succeeds, there would be no need for the hearing to proceed and that the stay would save the Court precious judicial time. That no prejudice will be occasioned on the parties.
6. The Motion was opposed by the plaintiffs through the replying affidavit of Opkar Singh Ubhi sworn on 29/2/2024 for the 1<sup>st</sup> to 4<sup>th</sup> plaintiff and the Grounds of Opposition dated 28/2/2024 by the 5<sup>th</sup> and 6<sup>th</sup> plaintiffs.
7. The gist of the opposition was that the application was made mala fides, there was no substantial loss to be suffered if the trial continues and that the application had been made after unreasonable delay. Finally, that the Motion was made with a view to defeat the cause of justice.
8. The parties filed their respective submissions on record which I have considered. The 1<sup>st</sup> defendants' submissions are dated 13/3/2024, those of the 1<sup>st</sup> to 4<sup>th</sup> plaintiffs are dated 14/3/2024, and those of the 5<sup>th</sup> and 6<sup>th</sup> defendant are dated 15/3/2024. Learned Counsels also highlighted those submissions on 18/3/2024.
9. I have carefully considered the opposing averments in the affidavits, the written submissions and the oral highlights thereon. I have also considered the authorities relied on.
10. This is an application for stay of proceedings. It is brought under Order 42 Rule 6 of the Civil Procedure Rules. The principles applicable are well known. An applicant must demonstrate that he will be occasioned substantial loss if the stay is not granted, he must give security for the due performance of the order or decree that might ultimately be binding on him and above all, the application must be made timeously.
11. An order for stay is one to be made in exercise of the Court's discretion. That discretion however, is not to be exercised capriciously but judiciously. That is why the Court has to balance the interests of the parties before it on the basis of the known principles that I have set above.



12. I will start with the timeous or not manner in which the application was lodged. The ruling being appealed against was made on 24/10/2023. Mr Wafula Learned Counsel for the 1<sup>st</sup> defendant submitted that the application was made timeously. That under the authority of *MFI Documents vs Barretto Printing* [2021] eKLR, four (4) months is not unreasonable delay. That the period between 21/12/2023 and 13/1/2024 should not be considered as it is suspended under Order 49 of the Civil Procedure Rules.
13. Mr. Savia and Mr. Taib (Sc) for the 1<sup>st</sup> to 4<sup>th</sup> and 5<sup>th</sup> to 6<sup>th</sup> plaintiffs respectively, submitted otherwise. They were of the view that the period between 24/10/2023 and 19/2/2024 was inordinate.
14. The Court has considered those arguments. It is not in dispute that the period between 24/10/2023 and 19/2/2024 is about 4 months. Unreasonable delay is a question of fact and depends on the circumstance of each case. One month may be unreasonable in one case while it may be reasonable in another.
15. In my view, the reason why the rules require that an application for stay be made timeously is to obviate the possibility of the position of the parties changing. It is meant to avoid prejudice as delay defeats equity.
16. In the present case, the parties knew that the trial would be from 25<sup>th</sup> March, 2024 and the subsequent days. They must have prepared themselves for such. Staying the proceeding at this eleventh hour, in my view would be prejudicial to the plaintiffs. I hold and find that waiting for over 3 months before filing the application was unreasonable. The application was not made timeously.
17. The second issue is substantial loss. The applicant contended that if the trial proceeds, it will be made to pay over monies which it cannot recover. That the 1<sup>st</sup> plaintiff is in receivership and cannot repay any amount that may be ordered in the Judgment.
18. In my view, that is an argument that is difficult to comprehend. The question is, is there a judgment to be executed against the 1<sup>st</sup> defendant? Who told the 1<sup>st</sup> defendant that if the trial proceeds as scheduled, it would lose the case? Is it obvious to the 1<sup>st</sup> defendant that it is destined to be ordered to pay monies to the plaintiffs? If so, how much? To my mind, the argument put forward by the 1<sup>st</sup> defendant is disturbing, improbable and preposterous. There is no obvious positions in litigation until a decision is made.
19. The view the Court takes is that, to stay a proceeding, especially when there is no threat of execution, is a serious affront to Article 159 (2) (b) of *the Constitution* of Kenya, which decrees that justice should not be delayed. Staying a proceeding without just cause is but denying a deserving party access to justice.
20. This is what Gikonyo J meant when he stated in the case of *Kenya Wildlife Service vs James Mutembei* [2019] eKLR, that:-

“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”.
21. Further, in *Halbury’s Laws of England*, 4<sup>th</sup> Edition Vol 37 page 330, the Learned authors state that: -

“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."

22. I fully associate myself to those pronouncements and reiterate them here. This is a 2015 case. The matter has been heard by two previous Judges. It is on the verge of conclusion. Cases are brought to Court for prosecution and not to be packed for exhibition. It will be an affront to the right to access to justice to prevent a proceeding from continuing on the fear that one is likely to lose the case as submitted by the 1<sup>st</sup> defendant.
23. In view of the foregoing, I hold and find that the 1<sup>st</sup> defendant has not demonstrated that it would suffer substantial loss if the trial of the suit is not stayed.
24. As regards security, that does not arise as there is none required here. There is no judgment that is threatened to be executed.
25. In the premises, I find the application to be without merit and hereby dismiss the same with costs.  
It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

