REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.397 OF 1998

GEORGE OCHIENG ODODA AND 84 OTHERS…… PLAINTIFFS/APPLICANTS

VERSUS

KENYA RAILWAYS CORPORATION……...……..DEFENDENT/RESPONDENT

RULING

This court, on 9th May, 2011, dismissed the applicants' suit against the respondent. Being aggrieved, the applicants filed a notice of appeal. In the meantime, they have brought the present application for orders of stay of execution pending the hearing and determination of appeal. In their view, if the order of stay is not granted, the appeal will be rendered nugatory as the respondent will proceed to evict them from the quarters they occupy in the absence of an order of stay. They have further deposed that they have made the application without inordinate delay and are ready to furnish security as may be ordered.

In response, the respondent, through Victoria Mulwa, its Senior Legal Officer has averred that the suit having been dismissed, there was nothing left capable of being stayed; that the quarters in question belong to the respondent hence the applicants do not stand to suffer any loss; that the deponent of the affidavit in support of the application, Francis Macharia Njuguna did not have authority of the other applicants to swear the affidavit. The respondent has also argued that the applicants have not satisfied the conditions for the grant of the orders of stay of execution. Finally, it is the respondent's prayer that should the court be inclined to grant the application, the applicants ought to be ordered to deposit into court all the accrued and subsequent monthly rent, to physically occupy the quarters (and not to sub-let or assign them), each applicant to furnish proof of their existence and continued interest in these proceedings and the applicants to be given a time frame within which to comply with these conditions.

It is now established beyond debate that only where a court makes a positive order – an order capable of execution – can it issue an order to stay their execution. In other words, where a matter has been dismissed, no positive order has been made hence there can be no stay of execution,

The Court of Appeal dealing with **Order 5(2)(b)** of that **Court's Rules** in the case of **Republic** V. **Municipal Council of Mombasa and 2 others**, *ex parte* **Adopt-A-Light Limited**, Civil Application No. NAI.15 of 2007 said:

"The court has no jurisdiction under Rule 5(2)(b) to stay the nullification of the resolution and the contract. It can only stay the execution of the decree or order of the superior court. The order of *certiorari* granted by the superior court is not capable of execution as the superior court did not order any party to do anything or refrain from doing anything or to pay any sum (of money) other than costs."

The same point was again emphasised by the Court of Appeal where the High Court had dismissed the appellant's application for injunction. The court said:

"The second prayer (for stay of execution) in the application is incompetent because the superior court did not grant any order capable of execution, save for the order for the payment of costs."

The court having dismissed the applicants' suit against the respondent this application is clearly for dismissal. It is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 27th day of January, 2012.

W. OUKO
JUDGE