



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Appeal 276 of 2009

JOEL KITANGO BUSIENEL.....1ST
APPLICANT/APELLANT

ELIZABETH CHEPKEMOI KIPTOO.....2ND
APPLICANT/APELLANT

ESTHER CHEBET BUSIENEL.....3RD
APPLICANT/APELLANT

VERSUS

RICHARD KIPKEMOI TUEI.....1ST
RESPONDENT

CHEPKWONY MANYEI (DECEASED).....2ND
RESPONDENT

RULING

The applicants were aggrieved by the decision of the Rift Valley Land Disputes Appeal Committee and brought this appeal on 23rd December, 2009.

After nearly three years later, on 20th January, 2012, they have instituted the present notice of motion for orders that the said decision of the Appeals Committee and consequent orders be stayed pending appeal on the grounds that the respondent is engaged in acts of wanton destruction of trees on the suit property; that the applicants' erstwhile advocates applied for stay but failed. The rest of the grounds relied on are not relevant in an application but are suitable for the argument of the appeal.

In reply, the respondent has similarly missed the point and concentrated on how the applicants have lost their cases before the Tribunal, Molo Court, Nakuru Chief Magistrate's Court and in the Appeals Committee. The only relevant averments are that the respondent has been living on the suit property for the last 15 years and have developed it; that the effect of the application, if granted, would be to render him homeless and that the photographs annexed to the applicants' affidavit to demonstrate the destruction of trees are old photographs taken in 2009.

An order of stay will be granted under **Order 42 rules 6** of the **Civil Procedure Rules** if the court is satisfied that the applicant will suffer substantial loss unless the order is made; that the application for stay has been brought without unreasonable delay and unless the applicant has undertaken to provide security as may be ordered.

The applicants have expressed their willingness to provide security as may be ordered.

I reiterate that this appeal was filed in 2009 while the decision being challenged in it was rendered in 2006, a delay of three years from the date of the decision. Without sufficient explanation, the period of delay is unreasonable. What loss do the applicants stand to suffer?

The Appeals Committee created under **Section 9** of the repealed **Land Disputes Tribunal Act** upheld the decision of the tribunal thereby dismissing the applicants appeal. Is such an order capable of being stayed?

It is now established by case law that where a matter has been dismissed, the resultant order of dismissal is not a positive order capable of being stayed, save for payment of cost, if ordered. See **Exclusive Estates Limited V. Kenya Post and Telecommunication Corporation & Another**, C.A. No.NAI.162 of 2004 where it was stated that stay of execution envisages:

“,,,,,,,,,,,,,execution of a decree capable of execution in any of the methods stipulated under Section 38 of the Civil Procedure Act.....

The order which dismissed the suit was a negative order which is not capable of execution.”

The applicants’ appeal in the Appeals Committee having been dismissed, there was no positive order capable of being stayed. Furthermore, if this application were to be allowed, it would have the effect of evicting the respondents who are on the land.

In the result, this application fails and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 6th day of June, 2012.

**W. OUKO
JUDGE**