



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO. 160 OF 2007

JOSEPH CHERUIYOT 1ST
APPELLANT

PETER NGETICH 2ND
APPELLANT

KIMORONG MIBEI 3RD
APPELLANT

VERSUS

WILSON BUSIENEI & 19
OTHERS.....RESPONDENTS

RULING

The notice of motion dated 14th October 2008 by the second and third appellants as well as the first appellant (herein, the applicants) is essentially for stay of execution of the orders made on 15th November 2007 by the subordinate court in Eldoret CMCC Award No. 61 of 2001.

The stay is sought pending the hearing and determination of the appeal against the said orders.

Generally, an appeal would not operate as a stay of execution of the Orders appealed from. However, under Order 41 Rule 4 (2) of the Civil Procedure Rules (A, it was then) stay may be granted on the grounds viz;-

(1) If 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.

(2) If such security as the court orders for the due performance of such decree an order as may ultimately be binding on the applicant is given.

On ground one and after having heard the arguments presented by both sides in support of an opposition to the application, this court is far from being satisfied that the applicants have adequately and properly demonstrated that they stand to suffer substantial loss if stay is not granted.

Cancellation of deed plans and title deed would not in the opinion of this court amount to irreparable damage since any subsequent deed plans and title deeds issued during the enforcement of the disputed order may also be cancelled and invalidated if the appeal succeeds.

Other than the fear of cancellation of title deed, the applicants have not shown in what other way they would suffer substantial loss. Besides that, this application has not been made without unreasonable delay.

The ruling/order in dispute was issued on 15th November 2007 yet this application was made on 15th October 2008. There was a delay of almost one year. That was inordinate.

On the issue of security, such has not been given though the applicants have planted that they are prepared to give such. Nonetheless, the giving of security at this juncture may not serve any useful purpose considering the period of delay in having this application filed and prosecuted.

In sum, the application is lacking in merit. It is dismissed with costs to the respondents.

J. R. KARANJA

JUDGE

(Read and signed this 14th day of April, 2011 in the presence of Mr. Cheruiyot for 2nd and 3rd applicants, Mr. Songok holding brief for Mufuku for Respondent and Mr. Okoth holding brief for Nyairo & Co. Advocates).