REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 254 OF 2001

JOHN MWANIKI KAROBIA & ANR ..……APPELLANTS

VERSUS

HENRY NJOROGE KAROBIA & ANR ……..RESPONDENTS

RULING

Under Order XLI Rule 4 of the Civil Procedure Rules,

> ***"No ord er 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 due performance of such decree or order as may ultimately be finding on his has been given by the applicant.

In the court's view both conditions should be satisfied and, that condition (a) must be established before condition (b) can come into play.

In the present application no mention is made either in the main body there of or even in the supporting affidavit to show what, if any, substantial loss may result to the applicant if no order of stay is made.

The only thing therein and the submissions in this court is that if the sub-division proceeds as per the respondents plan the applicants will loss some of their tea bushes.

This statement alone does not demonstrate that substantial loss may result if the order of stay is not made given the size of the area allocated to each applicant's for both commercial and agricultural plots.

In fact the impression created by the application for certificate of urgency for 23/5/01 was that the applicants faced eviction from their parcels of land and is not the same as that created in the main application and submissions that they will only lose some of their tea bushes without giving their size and the value.

This is not sufficient to show substantial loss will result to the applicant if the order sought herein is not made.

Moreover, under the same sub-rule (a) of the rule the application should be made without unreasonable delay. The ruling subject to this appeal and/or application was delivered on 7/4/2000 yet the application for stay herein was not filed until 21st May 2001 – over 1 year. It cannot be said this application has been

filed without unreasonable delay.

A delay of one year in an application of this nature, without explanation or a sufficient one is certainly unreasonable and the court cannot exercise its discretion in favour of such applicant in the circumstances.

This application has no merit and is dismissed with no orders for costs.

Delivered this 8th day of July, 2002.

D.K.S. AGANYANYA

JUDGE