



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CIVIL APPEAL NO 99 OF 2015**

**NGWONO TRANSPORTERS.....APPELLANT**

**VERSUS**

**PETER KARIUKI.....RESPONDENT**

**RULING**

1. By a notice of motion application dated 12<sup>th</sup> November 2015, **NGWONO TRANSPORTER** (the applicant) prays that pending hearing of an appeal filed in this court, orders do issue for stay of execution against the judgment and decree dated 11<sup>th</sup> May 2015 entered in favour of **PETER KARIUKI** (the respondent) .
2. The Application is premised on grounds that the appeal has high chances of success and the applicant has already deposited in court the sum of Ksh 250,000 as security. He laments that if the execution proceeds, then the appeal shall be rendered nugatory especially because the respondent has already demonstrated an intention of executing by accessing the deposit to satisfy the decree.
3. It is further explained that there was an application for similar orders made at the lower court, and orders were made that the applicant deposits the entire decretal sum in court as a condition to obtaining the orders. The applicant says it has no means of depositing such sum in court.
4. In an affidavit sworn by the applicant's manager **JAMES MIDOLA ONDIGO**, he deposes that this application has been brought without unreasonable delay and that a sum of Ksh. 250,000 was already deposited in court vide the annexed receipt Ex MMO2 and the said sum remains in court to date.
5. He expresses fear that the respondent has made attempts at executing the decree by seeking to withdraw the sum deposited so as to satisfy the decree, yet he is a man of straw and would not be able to refund the sum were the appeal to succeed.
6. In reply the respondent states that the applicant has deliberately refused to abide by the lower court's orders which required that the decretal sum be deposited in an interest earning account in the joint names of the advocates for both parties. The court is urged to dismiss the application.
7. The applicant in a further affidavit deposes that the applicant is not a limited liability company capable of depositing the said sum, but that in the event that this court finds the orders made by the lower court to be proper, then it should be deemed that the security has already been deposited.

8. In the written submissions, the applicant's counsel contends that a sum of Ksh. 250,000 which was deposited in court as a condition to participating in the proceedings ought to be considered as sufficient security.

9. The respondents counsel submits that this application is made in mala fides and is simply intended to ensure that the respondent does not enjoy the fruits of the judgment. He refers this court to two rulings dated 30<sup>th</sup> September 2015 and 16<sup>th</sup> March 2016 where a conditional stay was granted. And which required compliance within 30 days-that was not met. Counsel points out that having failed to comply the applicant did not appeal against the orders but is simply testing the waters in the hope that the court will accommodate his preference as to how the order ought to have read.

10. I have perused the provisions of Order 42 Rule 6 (1) which provides as follows:-

***“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by asn order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”***

11. Certainly the applicant has a right to seek stay before this court if aggrieved by the orders of the lower court. I have perused the orders by the lower court, infact the last hand written order dated 16<sup>th</sup> March 2016 clearly acknowledged the arguments raised by the applicant and gave the condition of deposit so as to allow the stay. However in this instance there is a deliberate attempt to ignore the conditions set by the court and craft his own preference for reasons best known to him. What is so difficult in retrieving the sum he has already deposited in court and use it to deposit in the interest earning joint accounts as ordered by the court?

12. If the applicant is dissatisfied with the orders as made by the lower court then he ought to have appealed. The applicant cannot try to circumvent the orders by inventing its own conditions then come to the High Court in the hope of sanitizing the conduct. In my view this application although ordinarily a legal provision is made in abuse of the court process and must not be allowed. The application is dismissed with costs to the respondent

**Delivered and dated this 24<sup>th</sup> day of November 2016 at Migori.**

**H.A. OMONDI**

**JUDGE**