



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

**CIVIL DIVISION**

**CIVIL APPEAL NO 354 OF 2011**

**ALLAN MBUGUA NGANGA.....APPELLANT**

**VERSUS**

**GEORGE KAMANDE**

**(T/a RONGAI GENERAL TRADERS).....RESPONDENT**

**R U L I N G**

1. On 26<sup>th</sup> July 2011 the court granted to the Appellant interim stay of execution of decree upon the condition that he deposits in court the sum of KShs 200,000/00 as security. That condition was met. Subsequently, on 15<sup>th</sup> November 2011, the following consent order was entered which disposed of the Appellant's application for stay of execution pending disposal of the appeal (notice of motion dated 22<sup>nd</sup> July 2011) -

**“By consent of both parties this application is granted on condition that –**

**“1. a) Appellant deposits in a joint interest-earning account of both advocates KShs 800,000/00 within 30 days.**

**b) Appellant to pay Respondent costs of this application; sum to be agreed upon or be taxed.**

**c) In default of depositing of KShs 800,000/00 the stay granted herein be discharged on the first day following the 30<sup>th</sup> day from the date hereof.**

**d) The deposit in court of KShs 200,000/00 to be withdrawable to form part of the sum of KShs 800,000/00 aforesaid.**

**2) Stay of execution pending the hearing and final determination of the appeal herein is hereby granted upon the condition hereinabove stated.”**

2. The Appellant says he was unable to meet the condition for deposit of the further sum of KShs 800,000/00. He applied by notice of motion dated 21<sup>st</sup> May 2012 seeking, *inter alia*, an order for release of the KShs 200,000/00 he had deposited in court to himself. That application was heard and dismissed on 17<sup>th</sup> October 2012 (Onyancha, J).

3. The Appellant has now applied again by **notice of motion dated 18<sup>th</sup> October 2013** seeking the very same order that the same KShs 200,000/00 be released to him. The Respondent has opposed the application by **replying affidavit filed on 3<sup>rd</sup> February 2014**.

4. As pointed out by Onyancha, J in his aforesaid ruling of 17<sup>th</sup> October 2012 the appeal is still pending and has not been disposed of. I would add that the deposit was made to secure part of the decretal sum in exchange for stay of execution. The Appellant enjoyed the stay for the period it lasted before it lapsed upon his failure to meet the further condition for deposit of the KShs 800,000/00. The fact that the stay of execution is no longer in place and that the Respondent is at liberty to execute the decree is not a sufficient reason to release the KShs 200,000/00 deposited to the Appellant. As part of execution, the Respondent may legitimately ask for that sum to be released to him in part satisfaction of the decree.

5. The Appellant's latest application is entirely misconceived. It also has no merit at all as the appeal has not been disposed of and the decree for money against the Respondent him is in still in place. The application is dismissed with costs to the Respondent. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 16<sup>th</sup> DAY OF JULY 2014**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 18<sup>TH</sup> DAY OF JULY 2014**

**REPUBLIC OF KENYA**

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**GEORGE KAMANDE**

**(T/a RONGAI GENERAL TRADERS).....RESPONDENT**

**CORRECTED RULING**

1. When delivering the ruling herein dated 16<sup>th</sup> July 2014 on 18<sup>th</sup> July 2014, I noted a

fundamental error on the face of that ruling. That error was that I proceeded on the basis that the **notice of motion dated 18<sup>th</sup> October 2013** had been brought by the Appellant. In fact it was the application of the Respondent in the appeal. That application was the subject of the aforesaid ruling. I dismissed the application with costs.

2. Had I proceeded, as I should have, upon the correct basis that the application had been brought by the Respondent, I would have allowed the application for the reasons given in the ruling for dismissing it. So, upon those very reasons, and upon the court's own motion, I will correct the error and allow the notice of motion dated 18<sup>th</sup> October 2013 as prayed with costs to the Respondent in the appeal. The order of dismissal with costs entered in the aforesaid ruling dated 16<sup>th</sup> and delivered on 18<sup>th</sup> July 2014 is hereby set aside. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JULY 2014**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 25<sup>TH</sup> DAY OF JULY 2014**