



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NUMBER 156 OF 2016**

TRANSTRAC LIMITED .....1<sup>ST</sup> APPELLANT/APPELLANT

PAUL MWANJURI.....2<sup>ND</sup> APPELLANT/APPELLANT

VERSUS

NALANGU LOKWAIT.....RESPONDENT

*(An appeal from the Decision of the Chief Magistrate (Honourable David Kemei) delivered on the 16<sup>th</sup> Day of November 2016 in the Nakuru CMCC Civil Suit No. 157 of 2015.*

**RULING**

1. The applicants in their Notice of Motion dated 5<sup>th</sup> December 2016 seek an order of stay of execution of the decree herein pending hearing of their appeal. It is stated in their grounds that the appeal has high chances of success and if execution is carried on, they will suffer irreparable damage. They are willing to deposit as security any sum the court may order. It is further stated that the Respondent has no known assets to enable her refund the decretal sum should the appeal succeed.

It is averred in the supporting affidavit that the Judgment sum is Kshs.3,278,333/20 in general damages and Kshs.897,924/= special damages.

2. I have seen the Memorandum of Appeal filed on the 28<sup>th</sup> December 2016. The main grounds of appeal are on *quantum* of damages. There is no issue on liability as the same had been agreed and recorded at 80% in favour of the plaintiff, and 20% against the plaintiff.

Mr. Gekonga Advocate for the Respondent is opposed to the application, and has not filed either grounds of opposition or Replying Affidavit. He nevertheless has urged the court to set the terms of stay of execution pending the hearing and determination of the appeal.

3. I have considered the decretal sum at of 80% to the Respondent. It is Kshs.3,278,333/20.

I have considered that the Respondent may not be able to refund the entire sum should the appeal succeed.

I have also considered authorities tendered by the applicant. In **Lochab Transport Limited -vs- Teresia Wangari & Another (2015) e KLR** and provisions of **Order 42 Rule 6 (1) of the Civil Procedure Rules**.

Such an application ought to be first filed and urged before the court of first instance. It does not appear

like such an application was filed or argued before the trial court.

That however does not bar this court from hearing the application as it has both original and appellate jurisdiction.

See **Githunguri -vs- Jimba Credit Corporation Ltd (No.2) (1988) 838**. This court is clothed with jurisdiction on both levels under the provisions **of Order 43 of Civil Procedure Rules**. I have stated that there is no objection to the application.

4. The applicant has offered to deposit as security whatever sum the court may direct. In my considered opinion, it will not be justifiable to order the appellant to deposit the total decretal sum into court. There is no dispute on liability. I am persuaded that a sum out of the decretal sum ought to go to the Respondent and while the balance if any should await determination of the appeal.

Other than stating that the Respondent may not be able to refund the money should the appeal succeed, no demonstration of the inability was tendered. That burden ought to have been discharged by the respondent. That was not done.

See **Kenya Orient Insurance Co. Ltd -vs- Paul Mathenge Gichuki & Another (2014) e KLR**.

I have taken into account the above. The respondent has not shown what assets if any that she would raise the money from. She has not even told the court what income she has. Having failed to discharge the burden, the court is left to set terms of stay as it deems fit and appropriate in the circumstances.

5. The appellants application dated 5<sup>th</sup> December 2016 is meritorious. I shall therefore direct that the appellant do pay to the Respondent 30% of the sum of Kshs.3,278,333.20/= that being Kshs.938,499.90/= within 40 days, and the balance of 70% being Kshs.2,294,833/= be deposited in a joint fixed account of counsel for the appellants and counsel for the Respondent in a reputable bank to be agreed upon by both counsel within 40 days of this order.

Failure by the applicant/appellant to comply with the above terms, the order of stay of execution will lapse.

**Dated this 2<sup>nd</sup> Day of February 2017.**

**JANET MULWA**

**JUDGE**