



**Cop-Rink Agencies Limited & another v Kayser Investment Limited (Environment and Land Appeal E216 of 2024) [2025] KEELC 3440 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3440 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E216 OF 2024**

**CG MBOGO, J**

**APRIL 30, 2025**

**BETWEEN**

**COP-RINK AGENCIES LIMITED ..... 1<sup>ST</sup> APPELLANT**

**JING ZHANG AKA JIN WEIBING ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KAYSER INVESTMENT LIMITED ..... RESPONDENT**

**RULING**

1. Before this court for determination is the notice of motion dated 13<sup>th</sup> December, 2024, filed by the appellants/ applicants and it is expressed to be brought under Article 159 (2) of *the Constitution* of Kenya, Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act* and Order 42 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders:
  1. Spent.
  2. Spent.
  3. That pending the hearing and determination of the appeal, there be a stay of execution of the order arising from the ruling delivered by Hon D. O Mbeja (Mr.) Principal Magistrate on 8/9/2021 in Milimani CMCC No. 81 of 2020, Kayser Investment Limited vs Cop-Rink Agencies and Jung Zhang aka Jin Weibing.
  4. That the costs of this application be provided for.
2. The application is premised on the grounds on its face. The application is further supported by the affidavit of the 2<sup>nd</sup> appellant/applicant sworn on even date. The 2<sup>nd</sup> appellant/applicant deposed that vide a ruling delivered on 8<sup>th</sup> September, 2021, the magistrates' court directed for the immediate release of Kshs. 4,000,000/- that was held as security in CMCC No. 81 of 2020. Further, that they have



- lodged an appeal against the said ruling, and that they are apprehensive that the intended appeal will be rendered nugatory if stay is not granted.
3. The 2<sup>nd</sup> appellant/applicant further deposed that the respondent has further written to the bank demanding a release of the funds, and that it has moved the court in HCCA No. E081 of 2021 seeking the same. The 2<sup>nd</sup> appellant/applicant further deposed that the High Court had found their application for stay meritorious, and that as such the instant application has been brought without delay, and there will be no prejudice suffered if it is allowed.
  4. The application was opposed by the replying affidavit of Ruweda Abdulla sworn on 24<sup>th</sup> March, 2025. In its response, the respondent deposed that the court did not make any finding on the appeal being arguable as alleged, and that as far it is concerned, the appellants/applicants participated in the proceedings before the magistrates' court. The respondent further deposed that the magistrates' court issued a decree and a certificate of costs, and that for this reason, they will suffer prejudice if the orders are granted. It was deposed that the ruling of 8<sup>th</sup> September, 2021 was such that the appellants/applicants needed the leave of the court to file an appeal, but the same was never sought or granted.
  5. The respondent deposed that the pleadings are defective for lack of company resolutions, the affidavits have been commissioned by Jotham Okome Arwa, who was appointed the administrator of the firm of Okwach & Company Advocates and further, that the 2<sup>nd</sup> appellant/applicant is a fraud who attempts to pervert the administration of justice through forgeries.
  6. The respondent filed grounds of opposition dated 31<sup>st</sup> January, 2025, challenging the application on the following grounds:
    1. That this court does not have jurisdiction under Order 43 Rule 1 of the Civil Procedure Rules and Section 75 (1)(h) of the Civil Procedure Act since no automatic right of appeal lies from the order appealed against.
    2. That consequently, there is no viable appeal since the appellants did not seek leave to appeal from the lower court in circumstances where leave was mandatory.
    3. That the applicants have not offered any security pursuant to Order 42 Rule 6 (2)(b) and thus no stay can be granted. The decretal sum is excess of Kshs. 10,000,000.
    4. That the appeal is otherwise incurably defective and bad in law.
  7. The 2<sup>nd</sup> appellant/applicant filed his supplementary affidavit in response thereto sworn on 13<sup>th</sup> February, 2025. In his affidavit, the 2<sup>nd</sup> appellant/applicant produced copies of the ruling delivered on 5<sup>th</sup> December, 2024, a copy of the preliminary objection dated 9<sup>th</sup> October, 2024, and a copy of the grounds of opposition dated 17<sup>th</sup> October, 2024.
  8. The application was canvassed by way of written submissions. The appellants/applicants filed their written submissions dated 13<sup>th</sup> February, 2025, and they raised three issues for determination as listed below:
    - i. Whether the respondent's preliminary objection dated 31<sup>st</sup> January, 2025 is meritorious.
    - ii. Whether the respondent's grounds of opposition dated 31<sup>st</sup> January, 2025 is meritorious.
    - iii. Whether the applicants' notice of motion application dated 13<sup>th</sup> December, 2024 is meritorious.



9. On the first issue, the appellants/applicants submitted that the court in a ruling delivered in ELCL Misc. E204 of 2024 ruled against the objections to the jurisdiction of the court and allowed them to file a memorandum of appeal. Further, that while ground 1 of their memorandum of appeal is premised on certain applications that the court ruled as sub judice, the same are areas of law or grounds which resulted in the judgment being impugned. The appellants/applicants submitted that the respondent's preliminary objection and grounds of opposition are an approbation and reprobation meant to delay the course of justice and waste this court's time. Reliance was placed on the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary Transport & Infrastructure & 3 Others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment).
10. On the second issue, the appellants/applicants submitted that the respondent has not appealed against the ruling delivered on 5<sup>th</sup> December, 2024, and that the court remains functus officio on the issues raised by the respondent. The appellants/applicants further submitted that there is security deposited pursuant to the directions of the lower court, and that a further deposit in a joint account vide the orders of the High Court amounting to Kshs. 5,000,000/-. The appellants/applicants submitted that this amount is adequate to grant the stay of execution. Further reliance was placed in the case of *Mwangi v Gitutu & Anor* [2024] KEHC 2734 (KLR).
11. On the third issue, the appellants/applicants submitted that the application has been made without delay. Further, that substantial loss may result if the orders are not granted, as the respondent is seeking a release of the decretal sum awarded, and that they are apprehensive that the intended appeal will be rendered nugatory. They submitted that the respondent has locked their goods in the store, and that if they access the money deposited without intimating whether the property will be returned to them will be a great loss. To buttress on this submission, the appellants/applicants relied on the cases of *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd* (in liquidation) [2004] 2 EA 331, *Vishva Stone Suppliers Company Ltd v RSR Stone (2006) Limited* [2020] eKLR, and *Gianfranco Manenthi & Another v Africa Merchant Assurance Co. Ltd* [2019] eKLR.
12. The appellants/applicants further submitted that the memorandum of appeal raises cogent issues which the court is yet to apply its mind, and while the lower court made errors of law in arriving at its decision, if the orders are granted, they will be able to have a fair hearing in court. The appellants/applicants relied on the cases of *Stanley Kangethe Kinyanjui v Tony Ketter & Ors* [2013] eKLR.
13. The respondent filed its written submissions dated 25<sup>th</sup> March, 2025 where it and raised three issues for determination as listed below:
  - i. Whether the court lacks jurisdiction since there is no automatic right of appeal against the entire ruling of Hon DO. Mbeja, Principal Magistrate of 8 September 2021.
  - ii. Whether the applicants appeal is incurably defective and bad in law.
  - iii. Whether the applicants have satisfied the conditions under Order 42 Rule 6 (2)(b) to grant stay of execution pending hearing of the appeal.
14. On the first issue, the respondent submitted that the appellants/applicants failed to seek leave from the lower court, and that they are trying to mislead the court. They submitted that what is relevant from its perspective is the order or section of the law which the orders were issued. The respondent relied on the case of *Mbaya v Kamau & another* (Civil Appeal E012 of 2023) [2023] KEHC 24945, and submitted that this court lacks jurisdiction since no automatic right of appeal lies against the entire ruling of 8<sup>th</sup> September, 2021.



15. On the second issue, the respondent submitted that the supporting affidavit dated 13<sup>th</sup> December, 2024 contravenes the provisions of the *Oaths and Statutory Declarations Act* for lack of a seal of the commissioner. Further, that the purported commission of the affidavit by Jotham Okome Arwa contradicts Section 4 (1) of the same Act. They relied on the case of Mohamed *v Judicial Service Commission (Cause E645 of 2022)* [2023] KEELRC 2983 (KLR), and Mary Gathoni & another v Frida Ariti Otololo & another [2020] eKLR.
16. On the third issue, the respondent submitted that the appellants/applicants have not demonstrated what substantial loss they may suffer if stay is not granted. Further, that they have not shown that the respondent would not be able to refund the decretal sum in the event that the appeal succeeds. On security for costs, the respondent submitted that as at November, 2024, the amount owed stands at Kshs. 11,000,000/-, and that the appellants/applicants have not demonstrated their capability to pay in the event the appeal fails. The respondent submitted that in a ruling delivered on 27<sup>th</sup> August, 2024, the High Court struck out the appeal with costs and the Kshs. 1,000,000/- will hardly be sufficient to cover the costs awarded in the High Court. In conclusion, the respondent submitted that the application has been filed three years after the ruling was delivered, and it urged the court to dismiss the application for being incurably defective and failing to meet the conditions contained in Order 42 Rule 6 of the Civil Procedure Rules.
17. I have considered the application, the replies thereof and the written submissions as well as the authorities cited. In my views, the issue for determination is whether the appellants/applicants are entitled to an order of stay of execution pending appeal.
18. First and foremost, it is important to deal with the issue of jurisdiction as argued by the respondent. The respondent in its preliminary objection and grounds of opposition strongly opposed the instant application on the grounds that what is sought to be appealed is not automatic to the appellants/applicant unless leave is sought and granted. With all due respect, this is an issue that was raised in ELC MISC No. E204 of 2024, and it was dealt with. Whether that decision was sound or not cannot be argued here as it would violate the court's longstanding procedure of ensuring that it does not sit on appeal of its own decision. As it is, that decision is still in force, and it is on that basis that the instant application was filed. That ground is thus rejected.
19. Secondly, the respondent contended that the affidavits sworn before Jotham Okome Arwa are defective for being sworn by a partner in the firm of Rachier & Amolo Advocates. In support, the respondent annexed a copy of the succession proceedings for the estate of the late Mr. Wandago Kwach SC. The contention by the respondent did not come out clearly and fairly so, there was no evidence as to the defects of the said affidavit. In fact, from the ruling, Mr. Ambrose Rachier, SC was appointed administrator ad litem and not Mr. Jotham Arwa. This argument thus fails.
20. The court is now left to deal with the issue of stay pending appeal. Order 42 Rule 6 of the Civil Procedure Rules 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 an 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.



- (2) No order for stay of execution shall be made under sub rule (1) unless-
- (a) the court is satisfied that substantial loss may result to the 1st 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 the due performance of such decree or order as may ultimately be binding on him has been given by the 1<sup>st</sup> applicant.”

21. There are three conditions for grant of stay order pending appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which: -

- i. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
  - i. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

22. In the case of *Masisi Mwita versus Damaris Wanjiku Njeri* [2016] eKLR, the Court of Appeal held that: -

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & Another –VS- Thornton & Turpin Ltd.* where the Court of Appeal Gicheru J.A., Chesoni & Coker AG 1A) held that: “The High Court’s discretion to order stay of execution of its order or Decree is fettered by three (3) conditions namely:- sufficient cause, substantial loss would ensue from a refusal to grant stay the applicant must furnish security, the application may be made without unreasonable delay. In addition the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakolo –VS- Straman E.A. Ltd.*[2013] as follows:-

“In addition the appellant must prove that if the orders sought are not granted and his appeal eventually succeeded them the same shall have been rendered nugatory”. These twin principles go hand in hand and failure to prove one dislodges the other. The court notes with great humility the plaintiff/applicant agrees with it by citing the case of *Vishram Rouji Halal –VS- Thornton & Turpour Civil Appeal No. 15 of [1990] KLR 365.*”

23. On whether the application has been made without delay, I will not labour much on this issue, as it stems from the direction of the court in ELC MISC No. E204 of 2024. Indeed, the application was made without delay.

24. On whether the appellants/applicants will suffer substantial loss, it was contended that the respondent is seeking a release of the decretal sum awarded by the magistrates’ court, and that if at all it is granted the appeal will be rendered nugatory. Further, the appellants/applicants argued that the respondent locked in the goods at the shop and together with the decretal sum, they will suffer great loss. This court is alive to the fact that in deciding whether or not to grant stay of execution, the rights of each party ought to be carefully weighed. On the one hand, there is the party that feels aggrieved and has a right to appeal, and on the other hand, there is the party that is entitled to the fruits of their judgment and/



or ruling. In balancing the interests of the parties, the court has to be satisfied that sufficient evidence has been produced to grant the orders of stay.

25. I have reviewed the grounds of the application and the response, and as I have understood the appellants/applicants, their fears lie with the sums they deposited in court, which they are apprehensive, they might not recover. However, and as it was argued by the respondent, it was not demonstrated or shown to this court that the respondent is incapable of satisfying the court's decree in case the appeal succeeds. On this issue, I am not satisfied that the appellants/applicants will suffer loss that cannot be recovered.
26. I have also looked at the memorandum of appeal filed. The same raises arguable issues which can be argued in court. I will say no more. In my view, the appellants/applicants have not sufficiently proved to this court the substantial loss to be incurred or suffered, and for this reason the court declines to grant stay orders pending the hearing and determination of the appeal.
27. Arising from the above, the notice of motion dated 13<sup>th</sup> December, 2024 lacks merit, and it is hereby dismissed. Each party to bear its own costs. Further mention on 25<sup>th</sup> June, 2025 for directions in regard to the appeal.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF APRIL, 2025.**

**HON. MBOGO C.G.**

**JUDGE**

**30/04/2025.**

In the presence of:

Mr. Benson Agunga - Court assistant

Ms. Oduor holding brief for Mr. Okwach for the Applicant – present

Mr. Bulent for the Respondent – present

