



**Cop-Rink Limited & another v Kayser Investment Limited (Civil Appeal E081 of 2021)  
[2025] KEHC 6709 (KLR) (Commercial and Tax) (26 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6709 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E081 OF 2021**

**F GIKONYO, J**

**MAY 26, 2025**

**BETWEEN**

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

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

**AND**

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

**RULING**

**Release of security**

1. The applicant/ respondent filed the notice of motion dated 4<sup>th</sup> December 2024, seeking an order directing that Kshs. 1, 000,000 deposited in the bank account No. 00024xxxxxxxxx at ABC Bank Limited – Koinange Branch in the joint names of Kipkenda & Company Advocates and AKO Advocates LLP be released to a bank account to be provided by the advocates for the respondent.
2. The application is premised on the grounds set out on its face, the annexed affidavit sworn by Valentine Ataka, Advocate and written submissions dated 5<sup>th</sup> January 2025. The key ground is that the respondent is entitled to the funds deposited following this court’s dismissal of the appellants’ appeal with costs to the respondent, through the ruling of 27<sup>th</sup> August 2024.
3. Mr. Ataka deposed that on 5<sup>th</sup> October 2021, this court gave orders that the appellants deposit in an interest account security of Kshs. 5,000,000.00 pending hearing and determination of this appeal. He also deposed that the parties opened a joint account with ABC Bank Limited – Koinange Branch, under account no. 00024xxxxxxxxx , Kshs 1,000,000 was deposited by the appellants.



4. Mr. Ataka further deposed that the appellants have refused to voluntarily instruct the bank to release the funds. He also deposed that the bank has also refused to release the funds without a court order or a consent of the parties.
5. The applicant submitted that Order 42 Rule 14 provides for payment of security for costs by an appellant. It relied on Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 others [2013] KEHC 78 (KLR) on the court's duty to balance the right of the petitioner to access to justice vis-a-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.

### **No response**

6. The respondents did not file any response to the application, even though they had indicated that they wished to during the mention of the matter on 18<sup>th</sup> December 2024.

### **Analysis and Determination**

7. I have considered the application, the supporting affidavit and the submissions. The dilemma is: whether the security herein should be released to the applicant.
8. The record confirms that on 5<sup>th</sup> October 2021, this court gave orders that the appellants deposit in an interest account security of Kshs. 5,000,000.00 pending hearing and determination of this appeal.
9. Mr. Ataka deposed that the parties' advocates then opened a joint account with ABC Bank Limited – Koinange Branch, under account no. 00024xxxxxxxxxx and Kshs 1,000,000 was deposited by the appellants on 4<sup>th</sup> November 2021. He exhibited a copy of the bank account statement as proof.
10. According to the court record, the funds were deposited as security pending appeal.
11. In the ruling of 27<sup>th</sup> August 2024, Mabeya J struck out the appeal for want of jurisdiction. The judge observed as follows:-
  - “ 12. I have reviewed the record. In the plaint dated 12/2/2020, the lower court was approached for the following orders:-
    - “a) A declaration that the lease agreement dated 19<sup>th</sup> September 2017 is repudiated by the Defendant's breach.
    - b) Vacant possession
    - c) Rent arrears in the sum of Kshs. 1,008,375/-, as at end of January 2020.
    - d) ...”
  13. Clearly, the foregoing shows that the cause of action was the use or occupation of land. Although there were claims about breach of contract, those were periphery. The dominant purpose issue was that of termination of the relationship between a landlord and tenant. There was the issue of recovery of possession of the premises and therefore occupation thereof.
  14. Accordingly, I find that this Court has no jurisdiction to entertain the appeal. The preliminary objection is hereby upheld and the appeal is struck out with costs....”



12. From the above, the court found that it has no jurisdiction to entertain this matter. The security deposited was for stay pending appeal.
13. The pertinent question from the instant application is whether the court could order release of security to the applicant who was not the depositor. Or, what would be the correct course in respect of those funds?
14. In my view, the orders made on 5<sup>th</sup> October 2021 were routed when the court found that it had no jurisdiction.
15. Except, that, the appeal was struck out with costs. The court has power to order costs even where it did not have jurisdiction to try the appeal; and such costs are recoverable in the suit after taxation.
16. See section 27(1) of the Civil Procedure Act that:

‘...the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.’
17. In order to utilize the security deposited in court, the applicant should tax the costs and seek those costs to be paid out of the security. Or, if it wants it used towards satisfaction of any claim arising in the lower court’s decision, attach the security in the normal execution process.
18. In making these propositions, the court anticipates that the respondent may plead status quo ante as the depositor of the security.

**Disposal**

19. In conclusion, the notice of motion dated 4<sup>th</sup> December 2024 is inappropriately pleaded or situated and is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 26<sup>TH</sup> DAY OF MAY, 2025**

.....

**F. Gikonyo M**

**Judge**

In the presence of: -

1. Ms. Ochieng for Ataka for Applicant
2. No appearance for Respondent
3. CA Kinyua

