



REPUBLIC OF KENYA



**APA Insurance Company Limited v Nzioki (Civil Appeal  
E346 of 2023) [2025] KEHC 12225 (KLR) (Civ) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 12225 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E346 OF 2023**

**TW CHERERE, J**

**JUNE 5, 2025**

**BETWEEN**

**APA INSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**SIMON MASINDE NZIOKI ..... RESPONDENT**

**RULING**

1. Before the Court is the Appellant's notice of motion dated 19<sup>th</sup> May 2025, brought pursuant to Sections 1A, 1B, 3, and 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules 2010*, and Article 159 of the *Constitution*. The Appellant seeks the following substantive orders:
  1. That all funds held in Account Number 0992229001 at Diamond Trust Bank Kenya Limited, in the joint names of Muchui & Co. Advocates and Musili Mbiti Advocates LLP, be released to Muchui & Co. Advocates forthwith;
  2. That the sum of KES. 100,000 deposited in court be released to Muchui & Co. Advocates
  3. That the costs of the application be awarded to the Appellant.
2. The application is supported by the affidavit of Wamae Ndegwa, advocate for the Appellant, sworn on 19<sup>th</sup> May 2025. It is deposed that the Appellant deposited a cumulative sum of KES. 391,650, part in a joint interest-earning account and part directly in court, as security for the due performance of the decree appealed from, pursuant to orders of this Court pending the hearing and determination of the appeal. It is further averred that the said appeal was heard and determined on 17<sup>th</sup> October 2024 in favour of the Appellant, and that no appeal lies therefrom.
3. The Respondent opposes the application through a replying affidavit sworn on 26<sup>th</sup> May 2025. He contends that the primary suit remains pending before the trial court and that the security should



continue to be held pending its resolution. He further asserts that no prejudice would be suffered by the Appellant if the funds remain in deposit.

4. Upon careful consideration of the application, affidavits on record, and applicable legal principles, the central issue for determination is whether the funds deposited as security pending appeal should now be released to the Appellant following the conclusion of the appeal in its favour.
5. It is common ground that the security in question was deposited pursuant to an order for stay of execution pending the hearing and determination of the appeal. It is equally undisputed that the appeal has since been heard and determined in favour of the Appellant. The Respondent resists the application solely on the ground that the primary suit remains pending before the trial court and contends that the security should therefore be retained. With respect, that position is misconceived for the reason that security for the due performance of a decree pending appeal is neither intended to subsist indefinitely nor to secure unrelated or future proceedings. Its purpose is well settled in law; to act as a conditional safeguard in the event the appeal is unsuccessful. Once the appeal is conclusively determined, particularly in favour of the party who furnished the security, the justification for its continued retention ceases to exist.

6. In the persuasive decision of *Arun C. Sharma v Ashana Raikundalia t/a A. Raikundalia & Co. Advocates & 2 Others* [2014] eKLR, the court stated as follows:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. ....”.

7. From the foregoing, I find that the continued retention of the funds under the guise of pending primary proceedings is not only misplaced but amounts to an unlawful fetter on the Appellant’s property rights.
8. In the result, the notice of motion dated 19<sup>th</sup> May 2025 is hereby allowed in the following terms:
  1. KES. 291,650 and accrued interest thereof held in Account Number 0992229001 at Diamond Trust Bank Kenya Limited in the joint names of Muchui & Co. Advocates and Musili Mbiti Advocates LLP shall be released forthwith to Muchui & Co. Advocates
  2. The sum of Kshs. 100,000 deposited in court shall similarly be released to Muchui & Co. Advocates
  3. I make no order for costs

**DELIVERED AT NAIROBI THIS 05<sup>TH</sup> DAY OF JUNE 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Mr. Ubah

For Appellant - Mr. Ndegwa for Muchui & Company Advocates,

For Respondent - Mr. Odhiambo for Musili Mbiti & Associates Advocates

