

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC LAND MISC APPLICATION NO. E039 OF 2025**

**BE ENERGY LIMITED .....**  
**APPLICANT**

**VERSUS**

**AFRICA BANKING CORPORATION LIMITED .. 1<sup>ST</sup>**  
**RESPONDENT**

**KYMS LIQUOR STORE LTD ALIAS**  
**GODFREY MUGAMBI KIMATHI ..... 2<sup>ND</sup>**  
**RESPONDENT**

**FAITH AKOTH OKETCH &**  
**COMPANY ADVOCATES ..... 3<sup>RD</sup>**  
**RESPONDENT**

**RULING**

1. Before this Court for determination is the Applicant's Notice of Motion application dated 24<sup>th</sup> February 2025 brought pursuant to **Section 3** and **3A** of the **Civil Procedure Act**, in which the Applicant has sought the following orders:

- a. That the funds deposited and currently being held in the joint interest earning account No. 0112430010000763 at the 1<sup>st</sup> Respondent's Green House Branch, in the joint names of Lestins and Smith Advocates & Faith Akoth Oketch & Company Advocates, together with the*

*interest thereon, be released to the firm of Lestins and Smith Advocates, on behalf of the Applicant.*

*b. That in the alternative, the 3<sup>rd</sup> Respondent who act for the 2<sup>nd</sup> Respondent be ordered forthwith to sign a letter of instructions to the 1<sup>st</sup> Respondent, for the funds to be released to the firm of Lestins and Smith Advocates on behalf of the Applicant.*

*c. That the costs of this application be awarded to the Applicant.*

2. In Support of the application, the Applicant's General Manager, Mr. Ali Abdelghany, swore a Supporting Affidavit wherein he deponed that the Applicant had been sued by the 2<sup>nd</sup> Respondent in **Business Premises and Rent Tribunal Case No. 689 of 2023**; that the Tribunal delivered Judgement against the Applicant on 5<sup>th</sup> October 2023 (Hon. Patricia May) and that being aggrieved by the said judgement, the Applicant instructed its Advocates on record to lodge an appeal.

3. It was deponed that the Applicant's Advocates duly filed a Memorandum of Appeal on 4<sup>th</sup> November 2023. Thereafter, the parties recorded a consent staying execution of the Tribunal's decision, pending hearing and determination of the appeal, on condition that the decretal sum of Kenya

Shillings Four Million and Thirty-Two Thousand and Ninety-Five (Kshs. 4,032,095/-) be deposited by the Applicant in a joint interest earning account in the names of both Advocates on record.

4. Mr. Abdelghany averred that the funds were deposited in African Bank Corporation Limited Account No. 011300001041878 in the joint names of Lestins & Smiths Advocates and Faith Akoth Oketch & Company Advocates and that before the Appeal could be set down for directions, the 2<sup>nd</sup> Respondent filed a Preliminary Objection, challenging the jurisdiction of the court to hear the appeal.
5. It is the Applicant's case that the Court, in a ruling dated 9<sup>th</sup> May 2024 upheld the Objection and held that the Appeal was incompetent having been filed without leave at the tribunal and the court consequently struck it out for want of jurisdiction.
6. It was the Applicant's deposition that the 2<sup>nd</sup> Respondent thereafter filed an application seeking release of the funds in the joint account, contending that by virtue of the Appeal having been struck out meant it had succeeded and that through its advocates, it raised a Preliminary Objection arguing that the court, having downed its tools, lacked jurisdiction to determine the application, the appeal having been found incompetent.

7. The Applicant contended further that the consent order recorded in a matter filed without jurisdiction was null and void ab initio and that the deposited funds ought to revert to the depositor with accrued interest.
8. The Applicant's director averred that by a ruling delivered on 21<sup>st</sup> January 2025, this court upheld the preliminary objection, finding that since the appeal had been struck out, the 2<sup>nd</sup> Respondent could not purport to have succeeded in an Appeal that was never heard on its merits, and that the Court held that it had ceased exercising jurisdiction upon striking out the Appeal, and that all orders, including the Consent for deposit of funds, were null and void.
9. Mr. Abdelghany averred that notwithstanding the said ruling, the 1<sup>st</sup> Respondent has failed to release the deposited funds of Kshs. 4,032,095/- together with interest to the firm of Lestins & Smith Advocates and that the 3<sup>rd</sup> Respondent, acting on the instructions from the 2<sup>nd</sup> Respondent has declined to execute the mandate necessary to release the funds to the Applicant's Advocates.
10. In opposition to the Application, the 1<sup>st</sup> Respondent, filed a Replying Affidavit sworn on 21<sup>st</sup> March 2025 and sworn by Ms. Kajuju Marete, its Senior Legal Manager. She deponed that the Applicant's Advocates and 3<sup>rd</sup> Respondent's Advocates opened a joint fixed deposit account whose operation was subject to a joint mandate.

11. She stated that since 14<sup>th</sup> October 2024, the joint account holders have been in dispute as to whom the monies held therein should be released arising from their respective interpretation of the Court's rulings and orders pursuant to which the account was opened.
12. She stated that both joint account holders had separately written to the 1<sup>st</sup> Respondent demanding release of the funds held to their respective law firms, and that the 1<sup>st</sup> Respondent's position has consistently been that no withdrawal or transfer could be effected without either a valid court order or a jointly written mandate by both account holders.
13. Ms. Marete denied that the ruling in **Milimani ELC Civil Appeal No. 3 of 2024**, delivered on 21<sup>st</sup> March 2025 directed the funds to be released to the Applicant's Advocates. She deponed that, as a responsible banker and as a matter of caution, the 1<sup>st</sup> Respondent required, through a letter dated 17<sup>th</sup> February 2025 from its Advocates on record, informed the parties that it should be furnished with either a court order or a jointly signed mandate before acting on the funds.
14. She concluded that the 1<sup>st</sup> Respondent's actions were lawful and justified and that its inclusion in these proceedings were unnecessary. She prayed that the 1<sup>st</sup> Respondent be

reimbursed costs assessed at Kshs. 75, 000/- for defending the application.

- 15.** The 2<sup>nd</sup> Respondent opposed the Application through a Replying Affidavit sworn on 18<sup>th</sup> March 2025 and sworn by Godfrey Mugambi Kimathi, the Director of Kyms Liquor Store Ltd. He deponed that the application was vexatious, frivolous and intended to circumvent justice and meant to deny him the fruits of judgment delivered in his favor by the Tribunal.
- 16.** He averred that the Consent between the Applicant and the 3<sup>rd</sup> Respondent had been entered into solely to secure a stay of execution pending the intended Appeal. He stated that his advocates successfully challenged the Appeal on grounds that it was not filed procedurally and consequently, it was struck out pursuant to the ruling by Justic MD Mwangi on 9<sup>th</sup> May 2024.
- 17.** While acknowledging the subsequent rulings in ELCA No. 3 of 2024, he disputed the Applicant's assertion that the funds in the joint account should be refunded to them.
- 18.** He contended that the conditions of stay lapsed once the judgement was delivered and the Appeal struck out. He asserted that the Tribunal's Judgment remains in force because the same has not been set aside, there is no lawful basis for the Applicant to object to the release of the decretal sum to the 3<sup>rd</sup> Respondent.

- 19.** The 2<sup>nd</sup> Respondent argued that the Applicant is relying on technicalities to defeat his right to enjoy the fruits of judgement delivered. He maintained that as the appeal was dismissed for want of jurisdiction, the Applicant was not entitled to the decretal sum, and that the refusal to release the funds was unjustified.
- 20.** He further deponed that it would be unjust and prejudicial if the decretal sum is not released to him, since he has a legitimate right to benefit from the Tribunal's judgment. He urged that the funds be released to the 3<sup>rd</sup> Respondent on his behalf to meet the ends of justice.
- 21.** In rejoinder, the Applicant filed a Supplementary Affidavit sworn on 26<sup>th</sup> May 2025 by its General Manager Ali Abdelghany. He averred that any orders issued by a court lacking jurisdiction are nullities in law and that the fixed account having been opened pursuant to such an order ceased to have any legal basis once the Court struck out the Appeal.
- 22.** He deponed that the 2<sup>nd</sup> Respondent has approached the court with unclean hands fully aware that the Applicant has a pending application for leave to Appeal out of time, in which the court directed that status quo be maintained pending the hearing and determination of the said application.
- 23.** The Applicant further stated that the Tribunal's ruling having been adopted in **Milimani Miscellaneous Application**

**Number E039 of 2025** formed the basis for the present Application and that the matter was coming up for mention on 11<sup>th</sup> June 2025 for confirmation of filing submissions.

- 24.** He reiterated that the 2<sup>nd</sup> Respondent can neither execute as against the said judgment nor lay any claim over the deposited funds and that in the absence of a successful party, the parties revert to their positions before the matter was filed in court. He further argued that the 2<sup>nd</sup> Respondent's Replying Affidavit improperly sought orders not prayed for in the present application.

### **Submissions**

- 25.** Learned Counsel for the Applicant reiterated the background to the Application as contained in the Supporting Affidavit sworn by Ali Abdelghany. Counsel submitted that in **ELCLA No. 3 of 2024**, this court upheld a preliminary objection dated 28<sup>th</sup> October 2024 on the ground that the court lacked jurisdiction to hear the appeal.
- 26.** It was argued that consequently, all orders issued therein were declared null and void. Counsel contended that this development had the effect of automatically rescinding the arrangement between the Applicant and the 2<sup>nd</sup> Respondent in relation to the joint account opened with the 1<sup>st</sup> Respondent automatically which account therefore ceased to be legally binding.

27. It was Counsel's submission that where a contract is rescinded, the courts will relieve non-liaible parties from their obligations and restore them to the position they were in before the contract was signed. On this basis, Counsel argued that since the joint account had been opened pursuant to an order subsequently found to be a nullity, the account itself became void and the only remedy was the refund of the funds to the depositor and closure of the said account.
28. In support of this position, Counsel relied on several authorities including **Muigai vs Lisaranja [2023] KEHC 22492 (KLR)**, **Macfoy vs United Africa Company [1961] 3 All ER 1169** and **Wambui vs Mwangi & 3 others [2021] KECA 144 (KLR)** on the effect of null orders.
29. Additional reliance was placed on: **Francis Wahiu Theuri vs Monicah Njeri & 3 Others [2012] eKLR**, **Root Capital Incorporated vs Tekangu Farmers' Co-operative Society Ltd & Another [2016] eKLR**, **Jordan Properties Limited vs Margaret Njoki Migwi [2020] eKLR** and **Patel vs Mirza (2016) UKSC 42**.
30. Counsel further submitted that the 2<sup>nd</sup> Respondent cannot execute against the judgment of the Tribunal until the application in **Milimani Miscellaneous Application No. E039 of 2025** is heard and determined. Reliance was placed on the Court of Appeal's definition of 'status quo' in

**Shimmers Plaza Limited vs National Bank of Kenya Limited (2015) eKLR.**

31. Additional authorities cited included **Republic vs National Environment Tribunal ex-parte Palm Homes Limited & another [2013] eKLR, TSS Spinning & Weaving: Company Ltd vs NIC Bank Limited & Another [2020] eKLR, Kenya Airline Pilots Association (KALPA) vs Co-operative Bank of Kenya Limited & Another [2020] eKLR** and **Ongata Works Limited vs Kenya Airport Authority; Middle East Bank Kenya Limited (Interested Party) [2024] KEHC 7940 (KLR).**
32. Learned Counsel for the 1<sup>st</sup> Respondent's submitted that this Court's ruling did not contain any order directing the 1<sup>st</sup> Respondent to release the funds held in the joint account to the Applicant's Advocates. Counsel contended that the ruling was not explicit on this point and that the Applicant has in effect been inviting the 1<sup>st</sup> Respondent to interpret and or infer a court order which was beyond its remit as a banker.
33. It was submitted that the 1<sup>st</sup> Respondent entered into a contractual relationship with the Advocates for both the Applicants and the 3<sup>rd</sup> Respondent at the time of opening the joint account, and that its duty was to comply with the mandate given at account opening. Reliance was placed on **Eunice Muturi & another vs James Maina Thuku & another [2018] KEHC 4392 (KLR).**

- 34.** Counsel submitted that by a resolution conveyed through a letter dated 22<sup>nd</sup> January 2024, the joint account holders specified that instructions on the account could only be acted upon if jointly signed by Mr. Collins Mbanda and Ms. Faith Oketch. It was submitted that the 1<sup>st</sup> Respondent therefore acted within its contractual mandate by insisting that any withdrawal instructions be jointly signed by the two signatories.
- 35.** Counsel contended that the 1<sup>st</sup> Respondent was unnecessarily joined in these proceedings and had been put to expense in defending the Application.
- 36.** Counsel for the 2<sup>nd</sup> Respondent submitted that the Applicant deposited the decretal sum pursuant to **Order 42 rule 6** of the **Civil Procedure Rules** which requires provision of security where an appeal is filed against a money decree.
- 37.** It was stated that both parties' advocates recorded a consent that the Applicant would deposit the decretal sum in a joint interest earning account in consideration of which, stay of execution was granted pending hearing and determination of the appeal. Counsel relied on the case of **Gianfranco Manenthi & another vs Africa Merchant Assurance Company Limited (2019) KEHC 7586 (KLR)**.
- 38.** Counsel submitted that the fact that the Appeal was struck out for want of jurisdiction did not alter the Respondent's status as the Judgement Creditor/ Decree holder in the

Tribunal matter and he remained entitled to enjoy the benefits of that judgement.

- 39.** It was further submitted that the Applicant having been unsuccessful in its Appeal, has no locus to demand release of the security back to it. It was contended that the Applicant had not indicated how it intended to satisfy the lower court's Judgment but instead continued to insist on refund of the funds deposited.
- 40.** Counsel argued that, in the absence of any order of stay of execution, the 2<sup>nd</sup> Respondent was at liberty to enforce the decree. As regards the Applicant's reliance on an order of status quo, it was submitted that such an order is not equivalent to an injunctive order. Reliance was placed on **Fatuma Abdi Jillo vs Kuro Lengesen & Another [2021] eKLR** and **Republic vs National Environment Tribunal ex Parte Palm Homes Limited & Another [2013] eKLR**.
- 41.** Referring to Black's Law Dictionary's definition of 'status quo', Counsel submitted that the status quo in this matter was that there exists a money decree in the 2<sup>nd</sup> Respondent's favour and that since the decretal sum was already deposited in the joint account between the parties' Advocates, justice required that the status be maintained until the Applicant satisfied the decree.
- 42.** On the issue of costs, Counsel invited the court to award the 2<sup>nd</sup> Respondent costs of the application, citing **Republic vs**

**Rosemary Wairimu Munene ex parte Applicant vs  
Ihururu Dairy Farmers Co-operative Society Ltd.**

**Analysis and Determination**

**43.** Having considered the application, responses and the rival submissions by the parties, the issues for the determination of this court are:

- a. Whether this court has jurisdiction to determine this application.*
- b. Whether the funds held in the joint account should be released to the Applicant.*

**44.** This Application has its genesis in **ELC Appeal No. 3 of 2024**, an appeal which emanated from **Business Premises & Rent Tribunal Case No. No. 689 of 2023**. The Appeal was struck out by Justice M.D. Mwangi on 9<sup>th</sup> May 2024 after the Court upheld a Preliminary Objection on the ground that it lacked jurisdiction to entertain the Appeal.

**45.** Pursuant to a Consent recorded in the said Appeal, the decretal sum of Kshs. 4,032,095 had been deposited in a joint interest earning account in the names of the Advocates for the Applicant and the 2<sup>nd</sup> Respondent, to operate on the basis of a joint mandate.

**46.** Subsequently, in a ruling delivered on 21<sup>st</sup> January 2025, Hon. Justice Mwangi upheld a further preliminary objection and dismissed an application by the 2<sup>nd</sup> Respondent seeking release of the funds from the said account. The Court

reaffirmed its lack of jurisdiction over the matter and held that the consent, having been adopted before a court without jurisdiction and the appeal having been struck out, all the orders earlier issued in the matter were rendered null and void.

- 47.** In the present application, the Applicant now seeks an order that the said funds, together with accrued interest, revert to it on the ground that the Appeal was declared a nullity. The 2<sup>nd</sup> Respondent, on the other hand, contends that as Judgment Creditor in the Tribunal matter, the funds ought to be released to it through its Advocates in satisfaction of the decree.
- 48.** The 1<sup>st</sup> Respondent, being the banker, maintains that in the absence of a clear court order or joint instructions from both signatories to the account, it remains contractually bound by the original mandate and cannot unilaterally release the funds.
- 49.** From the foregoing, the first issue that falls for determination is whether this Court has jurisdiction to entertain the Application before it. It is trite law that jurisdiction is everything. As was emphatically stated by Nyarangi, J.A. in **Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited [1989] KLR 1:**

***“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court***

***has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”***

50. The Supreme Court of Kenya, ***in Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others, Application No. 2 of 2011***, authoritatively stated on the question of jurisdiction as follows:

***“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with***

*the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”*

51. In effect, the Applicant has invited this Court to interpret and give effect to the rulings delivered in ELCA No. 3 of 2024, by directing release of the monies held in the joint account to the Applicant.
52. This Court remains mindful of its constitutional obligation, under **Article 159(2)(d)** of the **Constitution**, to administer justice without undue regard to procedural technicalities. While jurisdiction cannot be conferred by **Article 159** where it does not exist, the Court must nonetheless ensure that its determination does not occasion substantive injustice.

53. Moving to the substance of this application, it is not disputed that pursuant to a Consent recorded in the struck-out Appeal, the decretal sum of **Kshs. 4,032,095/-** was deposited in a joint interest earning account. The deposit of the funds was a condition imposed to sustain a stay of execution pending appeal.

54. Where an appeal is dismissed, or otherwise fails, the security furnished becomes immediately available to satisfy the decree in favour of the successful party. However, where an appeal is struck out for want of jurisdiction, a different consideration arises. This is because the court has, in effect, declared that it had no power to entertain the appeal or the incidental orders flowing from it. In such circumstances, the substratum upon which the security was furnished is extinguished.

55. The principle that acts done without jurisdiction are a nullity has long been settled. As was stated by Lord Denning in **Macfoy vs United Africa Company Ltd [1961] 3 All ER 1169:**

***“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to setting aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so.”***

56. In this matter, the appeal having been struck out for want of jurisdiction, the order of stay of execution granted therein lapsed automatically, and the consent under which the funds were deposited became of no legal effect. The deposit, having been founded on an order of a court without jurisdiction, cannot now be treated as a subsisting security. To continue to hold the funds under such a premise would be to perpetuate an illegality.
57. The logical and equitable consequence is that the parties revert to their positions prior to the filing of the appeal. The deposit into the joint interest-earning account, having been founded on a consent recorded in proceedings subsequently declared a nullity, cannot lawfully subsist. The Applicant, as the depositor, is therefore entitled to a refund of the decretal sum together with all interest accrued thereon, and the account shall thereupon be closed.
58. The 2<sup>nd</sup> Respondent remains at liberty to pursue execution of the Tribunal's judgment in the proper forum in accordance with **Section 14 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**. For the avoidance of doubt, nothing in this ruling amounts to a stay of, or pronouncement upon, any execution proceedings properly before the right forum.
59. The Court takes judicial notice that there is **Milimani Commercial Magistrates' Court in MCC Misc. No. 1640**

**of 2023**, and that on 30<sup>th</sup> January 2025 Hon. P. Achieng ordered, inter alia, that status quo be maintained. While such orders bind the parties unless varied, set aside, or stayed, they do not fetter this Court's jurisdiction to determine the distinct question before it.

- 60.** This order should not be construed as varying or setting aside any subsisting directions of the Magistrates' Court.
- 61.** As regards the 1<sup>st</sup> Respondent bank, its role as neutral stakeholder is acknowledged. Absent joint instructions, it could not act on the account. This Court's directives herein constitute sufficient authority for the bank to close the said joint account and release the full amount (principal and accrued interest) to the Applicant's Advocates, in compliance with the terms of this order.
- 62.** On the basis of the foregoing, the Notice of Motion dated 24<sup>th</sup> February 2025 is allowed and the following orders are issued:
  - a. That the funds deposited and currently being held in the joint interest earning account No. 0112430010000763 at the 1<sup>st</sup> Respondent's Green House Branch, in the joint names of Lestins and Smith Advocates & Faith Akoth Oketch & Company Advocates, together with the interest thereon, be released to the firm of**

**Lestins and Smith Advocates, on behalf of the Applicant.**

- b. Costs of this application shall be borne by the 2<sup>nd</sup> Respondent.**

**Dated, signed and delivered virtually in Nairobi this 9<sup>th</sup> day of October, 2025.**

**O. A. Angote  
Judge**

**In the presence of;**

Mr. Mwangi for Juma for 1<sup>st</sup> Respondent

Ms Kariuki holding brief for Oketch for 2<sup>nd</sup> and 3<sup>rd</sup> Respondent

Court Assistant: Tracy