



**Mutuma v Meru Highlands Dairy Limited (Civil Appeal
E109 of 2023) [2024] KEHC 73 (KLR) (11 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 73 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E109 OF 2023
EM MURIITHI, J
JANUARY 11, 2024**

BETWEEN

ANTONY MUTUMA APPELLANT

AND

MERU HIGHLANDS DAIRY LIMITED RESPONDENT

RULING

1. By a Notice of Motion dated 29/11/2023, brought under Order 45 Rule 1 of the [Civil Procedure Rules](#), Sections 1A, 1B & 80 of the [Civil Procedure Act](#), Article 159 (2) (d) of the [Constitution](#) and all other enabling provisions of the law, the Applicant seeks that, “1.This Honourable Court be pleased to review, vary and/or set aside its orders of 27th July, 2023 requiring the Appellant/Applicant to deposit in Court Kshs. 200,000/= as security for costs and in the alternative the Appellant to be allowed to deposit in Court title deed over a parcel of land No. Nyambene/uringu III/1125.”
2. The application is premised by the grounds on the face of it and the supporting affidavit of the Applicant sworn on even date. Dissatisfied with the judgment in Meru SCCCOMM No. E167 of 2023 where he was ordered to pay the Respondent Ksh. 719,712.21 plus costs and interest of the suit, he has lodged an appeal in this court. On 27/7/2023, he was granted conditional stay of execution upon deposit of Ksh. 200,000 as security for costs. Having tried to raise the aforesaid sum in futility, he approached his father one Stephen Kathuli Chokera who has agreed to have his title deed over parcel No. Nyambene/uringu/III/1125 deposited in court as security. He has exhibited a valuation report for the said parcel of land which is valued at Ksh. 1,000,000 and he urges the court to allow his application.
3. Stephen Kathuli Chokera swore an affidavit on 29/11/2023 in support of the application.
4. The Respondent has opposed the application vide its replying affidavit sworn by David Gitonga, its manager on 18/12/2023. He avers that the application is a non-starter, frivolous, vexatious and an abuse of the court process because it does not meet the conditions for review as contemplated by the



provisions of Order 45 Rule 1 of the *Civil Procedure Rules*. Despite the title deed, which is in a 3rd party's name, being offered by the Applicant as security, this court has no capacity to take the same as security as it is not a banking institution to take charges and the realization of such security would be complicated and thus the same is not good security at all as contemplated by Order 26 of the *Civil Procedure Rules*. He accuses the Applicant of indirectly camouflaging the instant application as one for review but in real sense it is an appeal to the same court. This is not a criminal matter whereby the honorable court accepts title deeds with sureties as security for bond but a civil matter whereby security ought to be in monetary form. The instant matter is pending execution at the lower court while the Applicant is traversing both the High Court and lower Court in a bid to find a favorable outcome. The application is an afterthought and has been brought up with unreasonable delay as judgment herein was delivered way back on 22/6/2023 approximately 6 months ago. It is upon the Applicant to either charge the said property or seek a loan and abide by this court's orders. He urges the court to bring litigation herein to an end by dismissing the application with costs, because the Applicant has never made any steps towards prosecuting the appeal 6 months after the delivery of the judgment.

Analysis and Determination

5. Review is provided for under Order 45 Rule 1 of the *Civil Procedure Rules* as follows:

“Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

6. On 14/11/2023, the court was informed that the orders of 27/7/2023 had not been complied with and it decreed that, “Applicants to comply with orders within 14 days. In default, execution to issue.”

7. The Applicant has proposed to deposit title deed over land parcel No. Nyambene/uringu III/1125, in the name of Stephen Kathuli Chokera, whose value far exceeds the decretal sum, in lieu of deposit of the sum of Ksh.200,000 as decreed by the court. Even if the court were to look at that proposal with its most generous eye, it would still find that the same does not constitute discovery of new or important evidence as envisaged under Order 45 Rule of the *Civil Procedure Rules* to warrant review.

8. I respectfully agree with illustration given by the court (F. Gikonyo J.) in *Arun C Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 Others* [2014] eKLR, 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. It is not to punish the judgment-debtor. The alternative security being offered presents several problems. The first one-the security is owned by another person. This is a civil suit where the Applicants are judgment-debtors. But, the Applicants seem to have borrowed from the criminal procedures where a person stands surety for the attendance of another in court. Civil process is quite different because, in a civil process, the judgment is like a debt hence the Applicants become and are judgment-debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for the due performance



of such decree or order as may ultimately be binding on the Applicants. I presume, the security must be one which can serve that purpose. When one imagines, if it becomes necessary, the steps required to be taken for such security being offered to be realized by the decree-holder, it becomes absolutely clear that mere affidavit by the owner does not convert the said property into any legally binding security for the due performance of such decree or order as may ultimately be binding on the Applicant.”

9. The Court must not be converted into an informal chargee by deposit of title to land who requires to take protracted legal and judicial steps to realise the security. See for example section 79 (7) and (9) of the *Land Act*. See also the decision of this court in Meru HCCC E003 of 2023 *Jackoline Enterprises Limited & 2 Ors. v Consolidated Bank Limited- & 2 Ors.* where the Court said:

“ 4. The nature of the deposit of Kshs. 5,000,000 ordered by the court, which will be readily available to the successful party on determination of the suit cannot be likened and substituted with a deposit of title deed of a parcel of land of whatever high value because that would require protracted process to realize its worth in money.”

Orders

10. Accordingly, for the reasons set out above, the application dated 29/11/2023 fails.
11. In the interest of justice however, the court will extend the time for compliance with the order of 27/7/2023 by a further fourteen (14) days from today.
12. Costs in the Appeal.
- Order accordingly.

DATED AND DELIVERED ON THIS 11TH DAY OF JANUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Nyaga for the applicant.

Mr. Kaba for the Respondent.

