



**Kabiru v Agricultural Finance Corporation & another (Civil Appeal  
E045 of 2024) [2024] KEHC 8400 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8400 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E045 OF 2024  
DO CHEPKWONY, J  
JULY 10, 2024**

**BETWEEN**

**HANNAH WANJIRU KABIRU ..... APPELLANT**

**AND**

**AGRICULTURAL FINANCE CORPORATION ..... 1<sup>ST</sup> RESPONDENT**

**JOSRICK MERCHANTS AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is before this court for determination is the Notice of Motion application dated 3<sup>rd</sup> April 2024 which has been filed pursuant to Order 45 Rule 1 of the [Civil Procedure Rules](#) and it seek the following orders:
  - a. Spent.
  - b. That this Honourable Court be pleased to review the orders made by the court on 21<sup>st</sup> March, 2024 by vacating the condition in prayer No 2 for deposit of Kshs One Million (Kshs 1,000,000) within 30 days of the orders.
  - c. That this Honourable Court be pleased to order that the security held over the debt being a charge over LR Githunguri /Gathangari/3646 Kiambu County which is valued at Kenya Shillings Five Million Six Hundred Forty Thousand (Kshs 5,640,000) is adequate security for purposes of stay of execution orders.
  - d. That the costs of this application be provided for.
2. The application is based on the grounds as set out on its face and the Supporting Affidavit of Hannah Wanjiru Kabiru sworn on 3<sup>rd</sup> April, 2024, wherein the Applicant has stated that on 21<sup>st</sup> March, 2024, the court granted him stay of execution orders on condition that he deposits a sum of Kshs 1,000,000/ = in court as security within thirty (30) days of the order. The Applicant seeks to have this condition



set aside or reviewed or vacated since the outstanding debt is Kshs 400,000/= which is fully secured by a charge over charge over LR Githunguri /Gathangari/3646 Kiambu County which is valued at Kenya Shillings Five Million Six Hundred Forty Thousand (Kshs 5,640,000) which is adequate security which she holds that the court overlooked its existence.

3. The Applicant has averred that the vacation of the orders will not prejudice the Respondent and that under Order 45 Rule 1 of the *Civil Procedure Rules*, the court has jurisdiction to review an order where there is new and important matter of evidence that was not brought to the attention of the court at the time the order was made and has thus urged the court to allow the application.
4. The Application was served upon the Respondent on 9<sup>th</sup> April, 2024 but no response has been filed to date. Be that as it may, the court is still called upon to consider the merits of the application even though the same is undefended. The Applicant filed her submissions dated 18<sup>th</sup> April, 2024 which reiterate the arguments raised in the application and the supporting affidavit wherein she stated that the application has met the threshold of the provisions found under Order 45 *Civil Procedure Rules*. On the issue of security for costs, the Applicant has stated that the court should consider the purpose of security for costs and that the same should not be used to punish the judgment debtor.
5. Having gone through the record, this court notes that the issue in dispute arose from a loan contract which the Applicant took from the 1<sup>st</sup> Respondent in the sum of Kshs 800,000/=. That the same was secured by a legal charge of a suit which was worth Kshs 5,000,000/= and now Kshs 5,640,000/= as stated by the Applicant. It is the Appellant's contention that she defaulted in the loan repayment and the 1<sup>st</sup> Respondent initiated the realization of security process. The Applicant filed the suit before the trial court which was dismissed hence the present appeal in this court and the application for stay of execution.
6. Looking at the amount of debt in question and the nature of the case, it is clear that the conditional order of Kshs 1,000,000/= was excessive. It should be noted that the purpose of security is to serve as a guarantee for due performance and not meant to punish the judgment debtor. On this the court relies on the case of *Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 others* [2014 eKLR as submitted by the Applicant where it was stated:-

“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.”

7. Given that the amount of debt now owing is less than one million, it would be prejudicial to order for payment of one million shillings as security. In that regard, and since the application is undefended, the court proceeds to allow the Notice of Motion application dated 3<sup>rd</sup> April, 2024 in the following terms:-
  - a. That the orders made by court on 21<sup>st</sup> March, 2024 be and are hereby reviewed by vacating the condition in Prayer No.2 for the deposit of Kshs One Million (1,000,000/=) within thirty (30) days from the date of this ruling.



- b. That the deposit of Kshs 1,000,000/= is hereby substituted with an order of Kshs Which should be paid in court within thirty (30) days from the date of this ruling.
- c. Failure to comply with order No.(b), the application shall be deemed as dismissed with costs to the Applicant.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT KIAMBU VIA ELECTRONIC MAIL THIS 10<sup>TH</sup> DAY OF JULY, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

