



REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL NO. E045 OF 2025

ESTHER GATERIAPPLICANT
VERSUS
SAMSON OINO OTUKERESPONDENT

RULING

[1] Upon an application for stay of execution herein, the Court by a Ruling dated 19/6/2025 granted stay upon terms as follows:

“ORDERS

- 17. Accordingly, the Court finds merit in the application for stay of execution dated 4th April, 2025 and the same is granted as prayed subject to the conditions as to security and filing of the Record of Appeal set out hereinbelow.*
- 18. The appellant shall deposit the entire decretal sum of **Ksh.160,700/=** into court within fourteen (14) days.*
- 19. The Record of Appeal shall be filed within 14 days.*
- 20. In default of any of the above conditions the stay herein granted shall lapse and be of no effect, and the respondent shall be at liberty to execute the decree.*
- 21. Directions as to hearing on 8/7/2025.*
- 22. The costs of the application shall be costs in the appeal.”*

[2] By an application dated 27/6/2025 the appellant filed an application for review of the orders of 19/6/2025 seeking the following specific reliefs:

“1. That this application be certified as urgent and the same be heard ex parte in the 1st instance.

2. That the Honourable court be pleased to extend the orders of stay herein pending the hearing and determination of this application, which orders are lapsing on 2nd July 2025.

3. That the Honourable court be pleased to review and vary the orders issued on the 19th day of June 2025 by extending time limit of 14 days and issue an alternative order of depositing applicant title no. KABAREINGIROCHE/1963 measuring approximately 0.66Ha as security in court

4. That the cost of this application be provided for.”

[3] The application is opposed through a Replying Affidavit sworn on 7/7/2025 principally that the Applicant as a person of means is able to meet the conditions of the stay orders as follows:

“11. That the applicant has intentionally and materially failed to disclose to this Honourable Court that she is also a business woman with many rental apartments within Kirinyaga County as well as with many plots which she leases out hence with adequate income to have deposited the decretal sum that was due then.

12. That the applicant has not sworn an Affidavit of Means and that having loans does not necessarily equate to inability to raise ksh.160,000/- that was required then.

13. that the Applicant is surprisingly able to afford legal fees all through but was unable to raise the decretal sum due.”

[4] Citing section 80 of the Civil Procedure Act and Order 45 of the Civil procedure Rules together with case law authorities of ***Pancrast T. Swai v. Kenya Breweries Limited*** (2014) eKLR and ***Shanzu Investments Limited v. Commissioner for Lands*** Civil Appeal No. 1000 of 1993 [now reported as ***Shanzu Investments Ltd v Commissioner of Lands*** [1993] KECA 36 (KLR)] on review of orders the applicant’s Counsel by written submissions filed in Court dated 18/7/2025 professes to rely on “**sufficient reason**” as a ground of review under Order 45 Rule 1 of the Civil Procedure Rules as follows:

“[Our application is mainly based on the limb of any other sufficient reason.

It is our humble submission the applicant has demonstrated to court that she has several loan facilities that have clogged her financial capabilities hence offered an alternative to the cash deposit. The parcel is 0.66 hectares that translate to 1.63 Acres with mature coffee stems. The value of the land in Kirinyaga has really shot up and we invite the court to take judicial notice that one acre of land in Kirinyaga is going for more than Ksh.1,500,000/- (One Million Five Hundred Thousand Shillings Only) if undeveloped, adding the Coffee stems to the value will shift the price to another level.”

[5] The Respondent relied on their Replying Affidavit and did not file submissions.

Issue for determination

[6] The application for review was filed timeously. The Court will also grant the applicant that the categories of ***sufficient reason*** are not closed.

[7] The only question before the Court is whether the Court will, for the proffered “***sufficient reason***” allow a substitution of a title deed to a parcel of land as a security under Order 42 Rule 6 (2) (b) of the Civil Procedure Rules, which requires as a condition for the grant of stay of execution pending appeal that “***such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.***”

[8] The only reason emanating from the Counsel submissions is that the applicant is in financial difficulties, but the applicant has a prime property whose value is escalating whose title may be deposited into court as security.

[9] There cannot be sufficient reason in a proposal that makes it difficult for the successful party to recover his judgment debt or the due performance of the decree that eventually becomes binding on him upon determination of the appeal.

[10] Security should not be **illusory**; make it impossible or difficult to recover, or cause undue hardship in the recovery, of the judgment debt by the successful party upon determination of the appeal.

[11] This Court has previously considered a similar request for substitution of a title deed in place of an order for payment deposit of money in **Mutuma v Meru Highlands Dairy Limited** (Civil Appeal E109 of 2023) [2024] KEHC 73 (KLR) (11 January 2024) (Ruling) and ruled as follows:

“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.””*

[12] The applicant has available options to enable her meet the requirement of the security for the due performance of the decree that may become binding on the appellant upon determination of the appeal. She can borrow on the title or sell the parcel of land, or portion thereof, to secure the funds for security. The Replying Affidavit as to the means of applicant has not been rebutted.

[13] With respect, it matters not the high value of the parcel of land offered as security; it is the difficulty with which it may be transformed into liquid money for purposes of meeting the appellant’s obligation to the Respondent as may be adjudged against her in the event of an unsuccessful appeal that makes it inappropriate as a security.

[14] To compel the respondent to await, without effective security, the determination of the appeal, which the applicant asserts has overwhelming chances of success, so that the security of deposit of money is not given on the ground of perceived strength of the grounds of appeal is to compel the respondent to partake in a wager, in which he has no interest.

ORDERS

[15] Accordingly, for the reasons set out above, the application for review of the stay of execution orders and substitution of title deed in place of the deposit of the sum of money **Ksh.160,700/-** as ordered on 19/6/2025 is declined.

[16] In the interest of justice, the applicant shall have further **fourteen (14) days to comply with the order for security.**

[17] In default the order for stay of execution shall lapse and be of no effect.

[18] Costs in the cause.

Orders accordingly.

DATED AND DELIVERED THIS 23RD DAY OF OCTOBER 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Munene Muriuki for the Appellant.

Ms. Gwaro for the Respondent.