



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CIVIL APPEAL NO. E049 OF 2025**

**MOSES MWAI KABORO.....1<sup>ST</sup> APPELLANT**  
**MUGAMBI RUTERE T/A GIANT AUCTIONEER.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**DAVID MURIITHI MIANO.....1<sup>ST</sup> RESPONDENT**  
**ABIJAH WARUGURU.....2<sup>ND</sup> RESPONDENT**

**RULING**

[1] Upon an application for stay of execution pending appeal by Notice of Motion dated 22/5/2025, the Court by its **Ruling of 6/11/2025** made orders as follows:

1. *[S]tay of execution of judgment/decree of the trial court pending appeal is granted.*
2. *The applicant shall as a condition for stay of execution deposit into an interest earning account in the names of counsel for the parties the sum of Ksh.2,000,000/- within thirty (30) days.*
3. *The appellant shall file the Record of Appeal within sixty (60) days*
4. ***In default of deposit of security, the stay of execution shall lapse.***
5. *Costs shall await the outcome of the appeal.”*

[2] By an application by Notice of Motion dated 2<sup>nd</sup> January, 2026 the applicant seeks the following orders:

**“1. THAT this honorable court be pleased to partially review the orders made on 6/11/2025 in regard to deposit a sum of Kshs 2Million in an interest earning Account by the Applicant/Appellant.**

**2. That this honorable court be pleased to substitute the cash deposit of Ksh 2Million with deposit of security of equivalent value.**

**3. THAT the costs of this Application be in the cause.”**

[3] The application is expressed to be brought “under Order 51 Rule 1, ORDER 45, Rule 1 of the Civil Procedure Rules and section 1, 1A, 1B, 3B, 27 & 80 of the Civil Procedure Act, and all other enabling provisions of the law” and founded on grounds set out in the application as follows:

“Grounds:

1. THAT on 6/11/ 2025 this honourable Court delivered a ruling in regard to Notice of motion dated 22/5/2025.
2. THAT the Court among other orders ordered the Applicant to deposit a sum of Kshs.2Million, into a joint interest earning Account within 30 days.
3. THAT time to comply with the Court order has lapsed.
4. That failure to comply with the Court order has not been deliberate rather than due to financial constraints.
5. THAT the Applicant despite willingness to comply with the order has been unable to do so.
6. THAT the Applicant has found an alternative way to comply with the order vide deposit of a security of a similar amount /value.
7. THAT the Applicant is enjoined by Law to make an application for review and extension of time to comply.
8. THAT the Respondent will be occasioned no prejudice if the orders sought are granted.
9. THAT the Appellant has complied with the 3<sup>rd</sup> limb of the impugned orders and filed his record of appeal.”

[4] The Court has considered the supporting affidavit of the appellant of 2/1/2026, the further supporting affidavit of the surety registered owner of LR No. Kabare/Njiku/3144 of 2/1/2026; the replying affidavit of Abijah Waruguru of 16/1/2026 and the appellant’s supplementary Affidavit of 29/1/2026.

[5] The applicant urges the court to excuse his default in deposit of Ksh.2,000,000/- and states “13. That the failure to comply has not been deliberate but due to failure to get the

*ordered colossal sum of Ksh.2 million as well as getting documentations of the surety. [and] 14. That if my prayers are allowed, my surety is ready and willing to deposit original personal documents, title documents and execute a sureties bond as soon as possible.”*

- [6] Citing Pet. No. 16 of (E023) of 2021 **Westmont Holdings SDN BHD v. Central Bank of Kenya & 2 Others** of 17/2/2023, he urges in his supplementary affidavit para.10 that “*an order made for security of costs is unreasonable if it impedes an [applicant’s access] to justice by imposing a condition precedent before a matter can be heard contrary to Articles 48, 50 & 59 of the Constitution of Kenya.*” (sic)
- [7] The application is opposed by the Respondents and in the replying Affidavit of Abijah Waruguru urging that the application for review is an attempt to delay the recovery by the respondent of the fruits of her judgment and pointing to the long history of the dispute since 1980 filing of “*1980 Report findings by the D/provincial Commissioner Central Province before Nyeri High Court in Civil case No. 230 of 1980 dated 15<sup>th</sup> December 1983 were presented to the Judge.*”
- [8] With respect, different principles apply; the matter before this court is terms of stay of execution pending appeal which are governed by the principles under Order 42 rule 6 of the Civil Procedure Rules while, the provisions of **security for costs** under the various rules of the subordinate Court, the High Court, Court of Appeal and the Supreme Court are express provisions to secure such costs of the proceedings as may be awarded in the proceedings. Such costs not being determined are usually secured by a small amount of money for example Ksh.2,000/- by Rule 107 of the Court of Appeal Rules 2010 (now Ksh.6,000/- by Rule 111 of 2022 edition).
- [9] Counsel for the respondent relied on a list of authorities of Arun **C. Sharma v. Ashana Raikundalia t/a A Raikundalia & Co. Advocates & 2 others** [2014] KEHC 2430 [KLR] on the nature of security under Order 42 rule 6 of the Civil Procedure Rules and **Onyango & 2 Others v. Inda** KEHC 807 [KLR], observing that “*The Court of Appeal, in Coastal Bottlers Limited v Commissioner of Domestic Taxes [2009] KECA 190 (KLR) held that an applicant ought to table evidence to demonstrate their financial position that may lead the court to appreciate that they are unable to furnish such security as ordered by the court. A mere deposition or averment is not enough.*”

[10] The provision for **security for costs** for **suits** in the High Court and the subordinate court is provided for under Order 26 of the Civil Procedure Rules, as the Supreme Court in **Westmont** case [Pet. No. 16 of (E023) of 2021 **Westmont Holdings SDN BHD v. Central Bank of Kenya & 2 Others** of 17/2/2023] relied on by the appellant observed:

*“[51] In civil proceedings before subordinate courts and the High Court, the Civil Procedure Act provides that costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge has full power to determine by whom, and out of what property and to what extent such costs are to be paid, and shall follow the event unless the court or judge shall for good reason otherwise order under Section 27. **However, Order 26 of the Civil Procedure Rules 2010, provides that in any suit the court may order for the whole or any part of the costs any defendant or third party be given by any other party. In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for security for costs shall be in the discretion of the court. If the security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit. If a suit is dismissed and the plaintiff proves that he was prevented by sufficient cause from giving the required security of costs, the court may set aside the order dismissing the suit and extend the time for giving the required security. Here we see the Rules giving an option to have a dismissed suit reinstated if the plaintiff shows cause that he was prevented from giving the required security for costs.**”*

[11] For **appeals** before the High Court, **security for costs** is provided for under Order 42 Rule 14 of the Civil Procedure Rules as follows:

*“**Security for costs.***

*14. (1) At any time **after the memorandum of appeal has been served the court, in its discretion, may order the appellant to give security for the whole or any part of the costs of such appeal.***

**(2) If the appellant is not ordinarily resident in Kenya and has no sufficient property in Kenya (other than property to which the appeal relates) the court shall order the giving of security for the whole or part of the costs of the appeal within a time to be limited in the order.**

**(3) If security for costs is not given within the time ordered the court may dismiss the appeal.”**

[12] The issue of **security for costs** is, however, different from the “**security for the due performance of such decree or order as may ultimately be binding on [an appellant]**” under Order 42 Rule 6(2) of the Civil Procedure Rules as part of an order of stay pending appeal. The authority of the **Westmont** case is clearly inapplicable in the present application before this court.

[13] The order for deposit of **security for due performance of the decree** under Order 42 Rule 6 (2) (b) of the Civil Procedure Rules does not stop the appellant from pursuing his appeal. It is an order for the conditional grant of stay of execution of the decree pending appeal. If the decree is executed for failure to provide the security ordered, and the appellant eventually succeeds in the appeal, he will recover the amount executed against him from the Respondents in the usual way of execution of decrees of court. The default term of the Order for stay was only that “***In default of deposit of security, the stay of execution shall lapse.***” The appeal remains intact for hearing and determination.

[14] The appellant is not prevented from pursuing his appeal. The position is clearly different from the requirement for **security for costs**, which as in **Westmont**, the Supreme Court found “*as being unreasonable particularly to the extent that such security for costs was payable as a condition precedent to the disposal of the appeal [and the appellant had already paid the nominal sum of sh.2,000/- towards security for costs as permitted under the Rules.*”

[15] As regards the stay of execution of decree pending appeal, a decretal sum has already been awarded in this case over 5,000,000/- and the security required here is for the due performance of the decree as may be adjudged against the applicant at end of the hearing of the appeal in terms of Order 42 Rule 6 (2) (b) of the Civil Procedure Rules,

which requires that security “*for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*”

[16] Although the security need not be so high as to amount to an execution of the very decree itself, it ought to have a positive relationship with the decretal amount as to secure and assure that Respondent, who is already a decree-holder entitled to the fruits of his judgment that the decree will be performed as directed by the trial court if the appellant is unsuccessful in his appeal.

[17] The present application before the Court seeks to substitute the nature of security from one of money to one of deposit of title deed to a parcel of land in a similar fashion as security bond in criminal cases. Indeed, the appellant urges that he has secured a friend who has agreed to stand surety for him using his title deed.

[18] With respect the appellant is mistaken. The Court does not in a civil process of stay of execution pending appeal assume a duty or role of a stakeholder who will seek to realize a security by sale to recover monies awarded in a decree for the benefit of the decree-holder. That would make the security provided illusory for purposes of securing the due performance of the decree, a wager rather than a security, in that the respondent’s recovery on the ‘**security**’ will depend on the executability of the ‘security’ by sale of the property to realize the security. That is not the security required under Order 42 Rule 6 (2) (b) of the Civil Procedure Rules.

[19] As this Court has said in *Otuke* case, [Kerugoya HCCA No. E045 of 2025, *Esther Gateri v. Samson Oino Otuke* of 23/10/2025], the security for purposes of Order 42 Rule 6 of the Civil Procedure Rules should not be made illusory by its terms, as follows:

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 Raikundalia & 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.”*

[20] The Court finds that the application for review herein dated 2/1/2026 has no merit and it shall be dismissed.

### **ORDERS**

[21] Accordingly, for the reasons set out above, the Court finds that the review application dated 2/1/2026 seeking substitution of a title deed in place of money security ordered by the Court is without merit, and it is dismissed.

[22] In the interests of justice, considering the alleged financial constraints of the appellant, and so as to grant the appellant more time to comply with the orders of the Court, the time allowed for compliance with the Order for deposit of the amount of Ksh.2,000,000/- is extended by a further period of **thirty (30) days** from the date of this Ruling.

[23] The appeal shall be mentioned for directions as to hearing on **8/7/2026**.

[24] Costs in the appeal.

*Orders accordingly.*

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF APRIL 2026.**

**EDWARD M. MURIITHI**

**JUDGE**

### **APPEARANCES:**

Mr. Chomba for the Applicant.

Ms. Wambui Gitau for Respondent.