



REPUBLIC OF KENYA



KENYA LAW
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**Clifford & another v Ateka (Civil Appeal E101 of 2024)
[2025] KEHC 10834 (KLR) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10834 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E101 OF 2024**

**JM OMIDO, J
JULY 24, 2025**

BETWEEN

KOBALI OMONDI CLIFFORD 1ST APPELLANT

HESBON AMATA ANAMBI 2ND APPELLANT

AND

DAVIS NYAIGERO ATEKA RESPONDENT

RULING

A. Background

1. The present appeal, commenced vide the amended memorandum of appeal dated 6th August, 2024, emanates from the judgement and decree of Hon. G.C. Serem, Resident Magistrate/Adjudicator delivered on 16th May, 2024 in Kisumu SCCC No. E421 of 2023, Davies Ateka Nyaigero v Kobali Omondi Clifford & another.
2. Subsequent to the filing of this appeal, the Appellants moved the trial court (Hon. G.C. Serem) vide an application by notice on motion dated 2nd August, 2024 in which they sought the following substantive orders:
 1.
 2.
 3. That this Honourable Court be pleased to grant an interim order for stay of execution pf the judgement and/or decree made on 16th May, 2024 for Ksh.463,000/- together with costs and interests by Hon. G.C. Serem pending the hearing and determination of the appeal in Kisumu HCCA No. E101 of 2024.



4. That a condition for stay of execution pending the hearing and determination of this appeal be and is hereby ordered to provide/issue security for the entire decretal sum/amount in the form of a bank guarantee to be issued by Family Bank Limited.
5. That the costs of this application be provided for.
3. The record of the trial court bears it that the application dated 2nd August, 2024 was resisted by the Respondent. The same was canvassed by way of written submissions. The trial court rendered its ruling on the motion on 9th September, 2024 allowing the same, thereby expressing itself as follows:
 - “9. Accordingly, I hereby allow the Applicants/Appellants’ application dated 2nd August, 2024 in terms of prayer 3 and 4 and grant a stay of execution of the decree on the following conditions:
 - a. The Applicants/Appellants shall deposit the entire decretal sum into an interest earning account in a reputable commercial bank, to be held by both Advocates for the Applicants/Respondent and the Respondent/Claimant within 30 days of this ruling.
 - b. That in the event order (sic) is not adhered to, the stay lapses.
 - c. Costs shall be in the cause.
 10. On the Notice to show cause, the court states that since stay of execution has been granted, the same will be held in abeyance pending compliance of the orders of stay and/or conclusion of the application (sic).

B. The Notice of Motion Dated 10th January, 2025.

4. The Appellants moved this court vide the notice of motion application dated 10th January, 2025, expressed to be brought under Article 159 of the Constitution of Kenya, Sections 1A, 1B, 3A, 80 and 95 of the Civil Procedure Act Cap 21 Laws of Kenya and Order 42 Rule 6, Order 45 and Order 51 Rule 1 of the Civil Procedure Rules, seeking the following orders:
 1. [Spent].
 2. [Spent].
 3. That this Honourable Court be pleased to stay of execution and/or decree (sic) issued herein on 16th May, 2024 pending the hearing and determination of this appeal.
 4. That the court do vary the conditional orders issued on 9th September, 2024 by Hon. G.C. Serem and allow the Applicants to provide an alternative security or deposit the entire decretal sum in court as opposed to depositing in a joint interest earning account.
 5. That this Honourable Court be pleased to enlarge and/or extend time for purposes of compliance with prayer 4, preferably within 21 days.
 6. That costs of this application be provided for.
5. It is the above application that gives rise to the instant ruling.
6. The application was opposed and to that end the Respondent a statement of grounds of opposition dated 30th January, 2025.



7. The application proceeded by way of brief oral arguments that the parties herein made on 19th February, 2025. I will not delve into those submissions for reasons that I will shortly state.
8. It is instructive from the application that the orders sought are that I review and vary Hon. Serem's orders of 9th September, 2024 and allow the Appellants to deposit alternative security or allow the security to be deposited in court, rather than a joint interest earning account in the names of the law firms on record for the parties as was ordered by the trial court. The application further seeks that I enlarge and/or extend the time within which the Appellants are to furnish security.

C. Analysis and Disposition.

9. That said, I have no doubt that the substantive prayers sought in the application are for review, hence perhaps the reason as to why the Appellants moved the court under Section 80 of the [Civil Procedure Act](#) and Order 45 of the Civil procedure rules.
10. It is to be noted that the appeal herein emanates from the Small Claims Court. Although review of decrees and orders in the Small Claims Courts is governed by Rule 29 of the Small Claims Court Rules and is limited to the grounds of errors apparent on the face of the record and/or clerical or arithmetical mistakes, Rule 30 of the Small Claims Court Rules provides that a person aggrieved by the judgment or order of the Small Claims Court may, pursuant to Section 38 of the Small Claims Courts Act, appeal to the High Court in accordance with Order 42 of the Civil Procedure Rules.
11. As the orders (of stay pending appeal) that the Appellants seeks to review were issued pursuant to Order 42 of the Civil Procedure Rules, the proper provision, in my view, under which to seek review is Order 45 of the Civil Procedure Rules, rather than Rule 29 of the Small Claims Court Rules. I say so because the orders that the Appellant seeks to review were issued pursuant to provisions of the Civil Procedure Rules, i.e. Order 42.
12. Under Order 45 Rule 2 of the Civil Procedure Rules, an application for review, such as the present one is one that must be heard by the same court that made the order that is sought to be reviewed. The present application therefore ought to have been filed in the lower court record for consideration by the court as provided for under the said Rule.
13. This court is therefore not seized of jurisdiction to entertain the application that seeks to review Hon. Serem's orders issued on 9th September, 2024. The application has been filed before the wrong court.
14. For the reasons foregoing, it will be pointless to proceed to consider the arguments made by the parties on the application.
15. I proceed to strike out the notice of motion dated 10th January, 2025 with costs to the Respondent.
16. Orders accordingly.

DELIVERED (VIRTUALLY), DATED AND SIGNED THIS 24TH DAY OF JULY, 2025.

JOE M. OMIDO

JUDGE

For the Appellants: Ms. Turgutt.

For the Respondent: Ms. Obaga.

Court Assistants: Mr. Ngoge & Mr. Juma.

Court: Mention for directions on the appeal to be on 23rd October, 2025.



JOE M. OMIDO
JUDGE

