



parcel of land **LR No. Iriaini/Gatundu/104** pending hearing and determination of the application and of an intended appeal.

We shall deal with the application as if it was brought pursuant to **rule 5 (2)(b)** of the **Court of Appeal Rules**.

In grounds in support of the application and in a supporting affidavit by the applicant it is stated amongst other things that if the application is not allowed the applicant will suffer irreparable loss as the respondents may deal with the suit property as they deem fit including disposing, charging or evicting him which would leave him homeless and interfere with the substratum of the appeal; that the respondents will not suffer loss if the application is allowed; that he is in occupation of L.R No. Iriaini/Gatundu/104 subdivided into Iriaini/Gatundu/1870, 1871 and 1872; that he has already filed an appeal. Further, that LR No. Iriaini/Gatundu/104 was registered in the names of his grandmother and that of his father and that he is in possession of the original title; that he has never filed succession proceedings; that in the year 2020 the respondents approached him with title Nos. Iriaini/Gatundu/1870 and 1872 and requested him to sell the lands to them (those were subdivisions of Iriaini/Gatundu/104); that he suspected fraud as he had neither sold nor had he transferred land to them; the respondents have entered the land and have constructed a permanent house and he is apprehensive that they may transfer land(s) to the other parties.

The 1<sup>st</sup> respondent **Houston Muchiri Weru** on his own behalf and on behalf of the 2<sup>nd</sup> respondent **David Mundia Muchugu** in a replying affidavit says that there is a similar application Civil Appeal (Application) No. E128 of 2023 (we were informed that that application had since been withdrawn); that the application is bad in law for being brought under the wrong provisions; that the applicant has not demonstrated that he has an arguable appeal which would be rendered nugatory without stay; that an application for injunction had been dismissed by ELC; that Iriaini/Gatundu/104 was never the suit property as it had been subdivided to create Iriaini/ Gatundu/1870 and 1871; that the application has no merit.

There is a Notice of Appeal “...against the said judgment dismissing with costs his case with costs” and there is a Memorandum of Appeal where nine grounds of appeal are set out.

When the Motion came up for hearing before us on 30<sup>th</sup> June, 2025 learned counsel **Mr. Nyathi** appeared for the applicant while learned counsel **Miss Mwai** appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. We were informed that the 3<sup>rd</sup> and 4<sup>th</sup> respondents had not participated at all at ELC.

Both sides had filed written submissions which they fully relied on and which we have seen and considered.

For an applicant to succeed in an application for stay of execution pending appeal or for an injunction he must firstly show

that the appeal or intended appeal, as the case may be, is arguable which is the same as saying that the same is not frivolous. Such an applicant must in addition show that the appeal would be rendered nugatory absent stay.

It appears uncontested that title to L.R. No. Iriaini/Gatundu/104 does not exist it having been closed and subsequent titles including Iriaini/Gatundu/1870, 1871 and 1872 having been issued after that original title had been subdivided. It is difficult to see how the intended appeal would be arguable when, as it were, the horse bolted after that original title was closed. In any event we note that the Judge dismissed the applicant's suit thus making a negative order not capable of execution. This Court had this to say in similar circumstances in ***Mbaruk vs. Mwasi & 6 Others* (Civil Application E006 of 2020) [2022] KECA 520 (KLR) (6 May 2022) (Ruling);**

***"In response to that challenge, we shall rely and adopt this Court's ruling in the case of County Secretary of Kajiado & 47 others v Salaries & Remuneration Commission & another [2021] eKLR where the Court observed:***

**"In addition, in Daniel Lomagul Kandeji & 2 Others v. Kamanga Holdings Limited & 40 Others (2017) eKLR this Court expressed itself as follows:-**

**"In the motion before us the applicants sought a stay of the striking out of the O.S. This was a negative order which, by parity of a long line of decisions of this court as demonstrated above, is incapable of being stayed."**

Having found that the intended appeal is not arguable we need not consider the other limb relevant to an application of this nature.

We find the Motion to have no merit and dismiss it with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**Dated and delivered in Nyeri this 30<sup>th</sup> day of January, 2026.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**ALI-ARONI**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

*I certify that this is a  
True copy of the original  
Signed*  
**DEPUTY REGISTRAR**