



**In re Estate of Gitari Gichohi (Deceased) (Succession Appeal  
1 of 2019) [2026] KEHC 1085 (KLR) (3 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1085 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION APPEAL 1 OF 2019  
DKN MAGARE, J  
FEBRUARY 3, 2026  
IN THE MATTER OF THE ESTATE OF GITARI GICHOHI (DECEASED)**

**BETWEEN**

**GICHOHI NJIMO GITARI ..... 1<sup>ST</sup> APPELLANT**

**SAMUEL MWAI GITARI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ISAAC GICHOHI GITARI ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL MBUTHIA GITARI ..... 2<sup>ND</sup> RESPONDENT**

**EDITH WAMUYU GICHOHI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application dated 14/10/2025 before the Court is for stay pending appeal. The matter herein was an appeal from the subordinate court. It has been concluded. The applicant now seeks to appeal to the Court of Appeal, by way of a second appeal. Under section 50 of the *Law of Succession Act*, there is no provision for a second appeal. Accordingly, this Court lacks jurisdiction to entertain a further appeal. Section 50 of the Act provides as follows:
  - (1) An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate, and the decision of the High Court thereon shall be final.
  - (2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof, in respect of any point of Muslim law, to the Court of Appeal.



2. In any case, the orders given were negative. In the case of Bidii Traders Savings Credit Group (Suing through its officials) Simon Kiambi Ngaruni (Secretary) & another v Kiarri & another [2022] KEHC 13568 (KLR), the court, TW Cherere, J held as follows:
  7. In the instant case, the court made an order dismissing the Appellant/Applicants case with costs. In the case of Western College Farts and Applied Sciences vs. Oranga & Others [1976] KLR 63, the Court of Appeal whilst considering whether an order of stay can be granted in respect of a negative order and which I fully adopt stated inter alia as follows: “But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”
  8. This position was reiterated by the same court In Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah [2008] eKLR, where it held as follows: “The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything, refrain from doing anything, or pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences v Oranga & Others [1976] KLR 63 at page 66 paragraph C).”
  9. Adopting the same reasoning, I find that Appellants/Applicants seek to stay a negative order which is one that is incapable of execution, and thus, incapable of being stayed. On costs, there is no evidence that a decree and certificate of costs have been drawn and therefore an application for stay of payment of costs would at this stage be premature. On the other hand, it has not been demonstrated that the Respondents are incapable of refunding the costs of the suit in the event the appeal succeeds.
3. The propriety of any appeal in the Court of Appeal will be dealt with by that court. This court cannot, by craft or innovation, assume jurisdiction. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court stated as doth: -
 

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”
4. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. Where no right of appeal lies, the court has no power to deal with an application for stay. In the case of Akinyi v Ogwari & another (Petition (Application) E025 of 2025) [2026] KESC 9 (KLR) (23 January 2026) (Ruling), the supreme court [MK Koome, CJ & P, PM Mwilu, DCJ & VP, SC Wanjala, N Ndungu & I Lenaola, SCJJ] held as follows:
 

We now opine and determine as follows:

  - i. It is trite law that a court’s jurisdiction flows from either *the Constitution* or legislation or both. In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional



Application Number 2 of 2011, this Court dealt with the question of jurisdiction extensively. The Court observed that where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.

5. Without an appeal, there is nothing to stay. Stay in the context of Order 42 rule 6 (1) and (2) of the Civil Procedure Rules provides as follows:
  - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
  - (2) No order for stay of execution shall be made under subrule (1) unless-
    - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
    - b. 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.
6. In the meantime, the application dated 14/10/2025 is struck out for lack of jurisdiction. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

“It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.
7. Given that the matter has now reached its conclusion, it is appropriate that it be brought to a close without further contest. Accordingly, each party shall bear its own costs. The matter shall be heard before Court 2 on the prefixed application on 26th February, 2026.

### **Determination**

8. In the circumstances, I make the following orders: -
  - a. The notice of motion dated 14/10/2025 lacks merit and is accordingly dismissed.
  - b. Each party to bear its own costs.
  - c. The matter shall be heard before Court 2 on the prefixed application on 26th February, 2026.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2026.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -



Mr. Sirma for the Appellant/Applicant

Mr. Muchiri wa Gathoni for the 1<sup>st</sup> Respondent

Mr. Karweru for the 3<sup>rd</sup> Respondent

Court Assistant – Michael

