



**Kamau (Suing as the Legal Representative of the Estate of William Kamau Gichatha)
& another v Gichatha (Suing as the Legal Representative of the Estate of Hannah Njeri
Gichatha) (Civil Application E548 of 2023) [2026] KECA 847 (KLR) (30 April 2026) (Ruling)**

Neutral citation: [2026] KECA 847 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E548 OF 2023
PO KIAGE, LA ACHODE & AO MUCHELULE, JJA
APRIL 30, 2026**

BETWEEN

**NELSON MULTURI KAMAU (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF WILLIAM KAMAU GICHATHA) 1ST APPLICANT
DAVID MAINA GICHATHA 2ND APPLICANT**

AND

**JOYCE WAMBURA GICHATHA (SUING AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF HANNAH NJERI GICHATHA) RESPONDENT**

*(Being an application for stay of execution of the Judgment and
Decree of the Environment and Land Court of Kenya, at Nairobi
(L.N. Mbugua, J.) dated 5th October 2023 in ELC No. 445 of 2006))*

RULING

1. The background of this dispute is that the deceased Gichatha Githindi had two families: the family of Hannah Njeri Gichatha and the family of his first wife, Waithera. The children of Waithera included William Kamau Gichatha and David Maina Gichatha. Gichatha Githindi died in 2002. He had several parcels of land which included Loc. 15/Gathukiini/528 (the suit property). He got the suit property to be registered in the name of Hannah Njeri Gichatha on 23rd October 1990. The deceased had other parcels of land which he gave to other members of the family. They included William Kamau Gichatha and David Maina Gichatha.
2. Before the Environment and Land Court (ELC) at Nairobi, in ELC Case No. 445 of 2006, Hannah Njeri Gichatha, as plaintiff, sued William Kamau Gichatha, as 1st defendant, and David Maina Gichatha, as 2nd defendant, claiming that beginning 2005 they had unlawfully and without her consent trespassed on the suit property and constructed residential homes thereon and begun to live there. She



- sought a mandatory injunction against them to remove them and their constructions from the suit property which she claimed she owned absolutely. She also sought general damages for trespass.
3. The defendants responded by claiming that they were lawfully on the suit property because the plaintiff held the same in trust for them. In the alternative, that they had become entitled to the land by adverse possession given that they had had a long and uninterrupted possession and occupation of the suit property since 1964. The further alternative claim was that the plaintiff had obtained her registration by fraud.
 4. The trial court received evidence after which it concluded that the defendants' claim that they had acquired the suit property by adverse possession and not been proved; that the deceased, while still alive, had given the suit property to the plaintiff, and given each defendant his portion and provided for each family member. This meant that the issue of customary trust having been created over the suit property did not arise; and that this meant that the plaintiff had absolute claim to the suit property, and the defendants' occupation of the same was illegal and a trespass. It was for these reasons that the plaintiff's claim for a permanent injunction, mandatory injunction and eviction was allowed. The counterclaim was dismissed. Each party was ordered to pay own costs.
 5. By the time the matter was heard and determined, the defendants had passed on and had been substituted their legal representatives as follows: Nelson Muturi Kamau (now 1st applicant) for the 1st defendant, and James Gichatha Maina (now 2nd applicant) for the 2nd defendant.
 6. The applicants were aggrieved by the determination and filed a notice of appeal seeking to challenge the findings before this Court. By notice of motion dated 21st November 2023 under sections 3A and 7 of the *Appellate Jurisdiction Act* and Rules 4, 5(2)(b), 44(1), (2) and 45(1)(a)(b) of the Court of Appeal Rules, 2022, they have asked for a stay of the execution of the judgment and decree pending the hearing and determination of the intended appeal. The applicants assert that they have an arguable appeal on the basis that the trial court failed to recognize that a customary trust in their favour had been created over the suit property; that the court erroneously, and in the presence of evidence, found against them in respect of their claim for adverse possession; and fell into error when it found that the deceased had, during his lifetime, properly provided for every member of his family. They seek to challenge each of these findings on appeal.
 7. The applicants contend that, unless stay is granted, the respondent (being Joyce Wambura Gichatha, who took over the case following the death of the plaintiff in the superior court who had passed on and her having obtained a grant) will extract the decree and proceed to execute, which means that they will be evicted and their houses demolished. According to them, they will suffer irreparably and the intended appeal rendered nugatory.
 8. The respondent opposed the motion. According to her, the applicants do not intend to appeal, the 2nd applicant having indicated that he did not intend to pursue the dispute and the 1st applicant having not filed the appeal since status quo orders were obtained on 11th March 2024. The respondent swore that, the trial court having found that the deceased had provided for every family member during his lifetime, a fact that the applicants had admitted during trial, there was no arguable appeal. On the question whether, if stay is not granted, the intended appeal, if successful ultimately, will be rendered nugatory, the respondent's case was that each member of the family; the appellants included, have where to stay; each has his portion to which he can relocate.
 9. We received written submissions from learned counsel Mr. Muturi for the applicants and learned counsel Mr. Nyang'au for the respondent. Each highlighted his submissions.



10. Learned counsel Mr. Muturi conceded that the 2nd appellant did not intend to pursue the matter anymore. This confirmed what the respondent had deposed to. It was also conceded that the record of appeal had not been filed, the excuse being that proceedings were not ready from the trial court.
11. We have considered the application, the response and the rival submissions. We have to exercise our original, independent and discretionary power to determine whether the applicants have an arguable intended appeal and whether, if we do not grant stay, and were the intended appeal to succeed at the end of the day, the same will be rendered nugatory (see *Trust Bank Limited & Another -vs- Investech Bank Limited & 3 Others*, Civil Application NAI 258 of 1989).
12. We appreciate that an arguable appeal does not mean an appeal that must succeed. An arguable appeal is the one that raises at least one serious question of law or a reasonable argument deserving consideration by the Court (see *Dennis Mogambi Mang'are -vs- Attorney General & 3 Others* [2012] eKLR). In this case the trial court found that the deceased had two houses. About 12 years before his death, he gave and transferred the suit property to the respondent's mother who constituted one of the houses. He, again before his death, gave all his children, including the fathers of the applicants, each two acres. The claim by the fathers of the applicants came up long after the deceased had died. It is not for us, at this stage to make any determinative findings regarding the merits of the intended appeal as that may embarrass the Bench that will ultimately deal with the dispute. Nonetheless, we must find that, on the material contained in the affidavits and the grounds, the intended appeal does not contain any issue that can be said to be arguable. We are certain that this is the reason why the 2nd applicant has indicated that he will no longer pursue any appeal against the judgment and decree.
13. The finding on arguability is sufficient to dispose of the application. We shall, however, say something on the question whether the appeal may be rendered nugatory if stay is not granted. As we do this, we bear in mind that the factors which may render an appeal nugatory are to be considered within the circumstances of each case, including the conflicting claims of both sides. An appeal may be rendered nugatory when the success of the appeal will become worthless or futile because the subject matter, whether property or money, has already been destroyed, sold or disbursed, thereby making it impossible to restore the status quo (see *Housing Finance Company of Kenya -vs- Sharok Kher Mohamed Ali Hirti & Another* [2015] eKLR).
14. In this application, there is no dispute that the applicants each have a parcel of land they can relocate to. It was deposed to the replying affidavit, without any challenge at all, that the applicants built the houses on the suit property long after the deceased had died, and that was done in contemptuous breach of the order of the superior court. No court can aid a party who is guilty of an illegality (*Kenya Airways Limited -vs- Flora*, Civil Appeal No. 54 of 2025 [2013] KECA 545 (KLR)).
15. In conclusion, we find that it has not been shown that the intended appeal will be rendered nugatory if the stay is not granted.
16. The result is that the application has no merit and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL 2026.

P.O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

