



REPUBLIC OF KENYA



**Mburu & 5 others v Mburu & 3 others (Civil Appeal E094 of 2025)
[2025] KEHC 12576 (KLR) (Family) (16 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E094 OF 2025
H NAMISI, J
SEPTEMBER 16, 2025**

BETWEEN

**GEOFFREY NGANGA MBURU 1ST APPELLANT
ALICE WAMBUI MBURU 2ND APPELLANT
ROSEMARY NJERI KIRIKA 3RD APPELLANT
REGINA MUTHONI MBURU 4TH APPELLANT
PATRICK KARANJA MBURU 5TH APPELLANT**

AND

A.I.C KIJABE HOSPITAL INTERESTED PARTY

AND

**IDES WAIRIMU MBURU 1ST RESPONDENT
JOYCE MUTHONI MBURU 2ND RESPONDENT
HANNAH WANJIKU MBURU 3RD RESPONDENT
ANTHONY KINANI MBURU 4TH RESPONDENT**

(Being an appeal from the Judgement and Decree of the Principal Magistrate's Court at Nairobi by Hon. G.M. Gitonga delivered on 12 June 2025 in Civil Case No. E81 of 2024)

RULING

1. In their Notice of Motion dated 17 July 2025, the Applicants seek the following orders:
 - i. Spent;



- ii. That the documents appearing at pages 5-84 of the Supplementary Record of Appeal dated 3 July 2025 be expunged/struck off from the court record;
 - iii. That the documents appearing at pages 316 to 319 of the Record of Appeal be expunged/struck off from the court record;
 - iv. That the costs of this Application be provided for.
2. The Application, which is supported by an Affidavit sworn by the 2nd Applicant, is premised on the following grounds:
- i. That the Appellants in this matter have purported to file a Supplementary Record of Appeal dated 3 July 2025 offending paragraph 14(a) of the Practice Directions on standardization of Practice and Procedures in the High Court 2021 and Order 42 rule 13(4) of the *Civil Procedure Rules*;
 - ii. That the Appellants are purporting to place on record, at appellate stage, documents that were not filed in the lower court and purporting them to form part of the Record of Appeal;
 - iii. That the said documents ought to be expunged from the record ex lege;
 - iv. That the dispute at hand is a burial dispute wherein the Deceased, Mburu Kinani, died on 20 November 2024;
 - v. That the Court is set to deliver a judgement on 7 August 2025 but this Application ought to be determined before then.
3. Briefly, this matter is an appeal from the decision of the trial court delivered on 12 June 2024. The Appellants/Respondents, being aggrieved with the judgement therein, filed a Record of Appeal. Subsequently, on 4 July 2025, they filed a Supplementary Record of Appeal, asserting that certain documents which has been admitted during the trial were inadvertently omitted from the initial record. It is the inclusion of these documents that the Applicants now challenge, contending that they are not properly on record and were introduced in violation of procedural law.
4. The argument by the Applicants is that the impugned documents were never formally filed in the trial court and, therefore, cannot form part of the judicial record for the purposes of this appeal. They contend that the mere listing of a document in a party's List of Documents does not amount to the formal act of filing it with the Court registry. The Applicants rely on the Electronic Case Management Practice Directions 2020 and argue that in the current digital era of the Judiciary, a document is only considered filed upon its successful upload to the e-filing portal, culminating in the system's generation of a confirmation receipt and a notice of electronic filing containing a hyperlink to the said document. To substantiate this claim, the Applicants have annexed a printout from the e-filing portal for the trial court matter, which, they submit demonstrates that while various pleadings, witness statements and lists of documents were filed, the actual documentary evidence now in contention was never uploaded onto the system.
5. The Applicants rely on the case of *Kenneth Nyaga Mwiye v Austin Kiguta & 2 Others* [2015] eKLR in which the Court of Appeal affirmed that once documents are produced in evidence and admitted by the Court, they become part of the judicial record and constitute evidence. They posit that the first and indispensable step is the formal filing of the document. The Applicants argue that without this step, the subsequent stages of tendering the document for production and admission as an exhibit are rendered legally null and void. In their view, the procedural chain was broken at its very first link, and no subsequent action can repair it. Consequently, they dismiss the Appellants' arguments regarding cross-



examination and lack of objection at trial, asserting that parties cannot, by their conduct or consent, circumvent the mandatory procedural rules of the Court, which are not mere suggestions but pillars of the judicial process.

6. On their part, the Respondents oppose the Application as a misconceived and belated attempt to mutilate the trial record. They assert that the disputed documents were, in fact, formally produced during the trial hearing on 19 May 2025. They maintain that these documents were tendered in evidence by the 1st Appellant, admitted by the learned trial magistrate without any objection from the Applicants' counsel who was present, and were subsequently marked as Defence Exhibits 1 to 21.
7. The Respondents submit that the certified court proceedings, which are part of the Record of Appeal, provide an express and unimpeachable account of this admission. They argue that it would defy logic and established judicial practice for a trial court to mark documents as exhibits, record their admissions in the official proceedings, and rely upon them in its final judgement if they had not been properly and lawfully incorporated into the record.
8. The Respondents invoke the equitable doctrine of estoppel by conduct and argue that the Applicants, having been present and represented at the trial, had the opportunity to object to the production and admissibility of the documents at the material time. They failed to do so. Instead, the Applicants proceeded to actively engage with the evidence by extensively cross examining the Witness on the contents of those very documents. The Respondents argue that this conduct constitutes a clear and unequivocal waiver of any right to object to the procedural propriety of their admission. To permit the Applicants to raise this objection now, at the appellate stage, would be to allow them to approbate and reprobate, a practice that amounts to an abuse of the court process.
9. The Respondents rely on the Supreme Court case of *Bwana Mohamed Bwana v Silvano Buko Bonayo & 2 Others* [2014] eKLR, which defined the Record of Appeal as the complete bundle of documentation, without which the appellate court would not be able to determine the appeal before it.

Analysis & Determination

10. I have carefully considered the application, the Affidavits and rival submissions of the parties. The Applicants' case herein rests on the administrative act of filing a document, as a condition precedent to its judicial admission as evidence.
11. The life cycle of documentary evidence can be divided into two distinct processes. The first is the administrative act of filing a document with the court registry, which is governed by the Civil Procedure Rules and more recently, the Electronic Case Management Practice Directions, 2020. The primary purpose of this step is to ensure proper record-keeping, provide notice to the opposing party, and comply with pre-trial disclosure obligations.
12. The second process is the forensic act of producing or tendering that documents in evidence during the hearing. This process is governed by the *Evidence Act* and the discretion of the trial court. It is at this point, when a party seeks to have a document formally admitted as an exhibit, that the question of admissibility, authenticity and relevance are determined by the trial court. The ultimate gate-keeper of what constitutes evidence is the trial court itself, not the registry or the e-filing portal. An objection to the admissibility of a piece of evidence is properly raised and argued viva voce before the trial court at the moment it is tendered.



13. In the *Kenneth Nyaga Mwigie* case (*supra*), the Court of Appeal outlines three stages as follows:

“First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case.”

14. This decision underscores that a document merely being on file does not make it evidence. It must be formally tendered and admitted. The converse is also true: a document admitted by the court as an exhibit, especially without objection, becomes part of the record upon which the court’s decision is based, notwithstanding a prior procedural lapse in its filing. The act of admission, when uncontested, can cure a preceding administrative defect.

15. The Applicants are, in essence, inviting this Court to retrospectively invalidate a procedural decision made at trial, which is an improper use of the appellate process for what ought to have been a timely objection at trial. The law does not permit a litigant to sit on their rights, only to raise them when it is opportune. The doctrine of estoppel by conduct prevents a party from taking a position inconsistent with their previous conduct where another party has relied on that conduct to their detriment. By failing to object to the admission of the documents, the Applicants implicitly represented to the Respondents and to the trial court that they had no issue with their admissibility. The Respondents relied on this representation and built their defence around these exhibits. Similarly, the trial court relied on this acquiescence and admitted them into the record. To allow the Applicants to now turn around and challenge the very foundation of that evidence on appeal would be to sanction a grave injustice and an abuse of the court’s process.

16. For the foregoing reasons, this Court finds that the Application is devoid of merit. The Notice of Motion dated 17 July 2025 is hereby dismissed. Costs shall abide the appeal.

DATED AND DELIVERED AT NAIROBI THIS 16 DAY OF SEPTEMBER 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Applicants: Mr. Kinyanjui & Danstan Omari

Respondents: Ms. Awuor h/b Proj Ojienda, SC

Interested Party: N/A

Court Assistant: Lucy Mwangi

