



**Ngaruni (Suing as the legal representative of the Estate of Kirichu Ngaruini)
& 5 others v Tharibu & 19 others (Environment and Land Appeal
E068 of 2025) [2025] KEELC 7499 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7499 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E068 OF 2025**

**JO MBOYA, J
OCTOBER 23, 2025**

BETWEEN

**JOSEPH KINYUA NGARUNI (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF KIRICHU NGARUINI) & 5 OTHERS & 5 OTHERS & 5
OTHERS APPELLANT**

AND

JOSEPH THARIBU 1ST RESPONDENT
JAMES GITUMA 2ND RESPONDENT
STEPHEN MUKANGU 3RD RESPONDENT
MUTWIRI MBURUNG'A 4TH RESPONDENT
STEPHEN KUBAI LIRIA 5TH RESPONDENT
PATRICIO MUKUBIO 6TH RESPONDENT
FRANCIS MUTUA 7TH RESPONDENT
JOSEPH DAVID MWILARIA 8TH RESPONDENT
MURAGA MAATHI 9TH RESPONDENT
SAMSON MUTIGA 10TH RESPONDENT
CHARLES MWORIA 11TH RESPONDENT
MUTIGA MUKETHA 12TH RESPONDENT
JOSPHAT MWILARIA 13TH RESPONDENT
ZAKAYO MARIMBA 14TH RESPONDENT
TIMOTHY MWINGIRWA 15TH RESPONDENT



SILAS KTIHINJI MURIUNGI	16TH RESPONDENT
M'LITHARA M'LURUMA	17TH RESPONDENT
JENIFFER NYOROKA	18TH RESPONDENT
THE LAND ADJUDICATION AND SETTLEMENT OFFICER TIGANIA EAST/ WEST DISTRICTS	19TH RESPONDENT
THE HON. ATTORNEY GENERAL	20TH RESPONDENT

RULING

1. The ruling herein relates to a Preliminary Objection which was taken by learned counsel for 1st, 5th to 13th, 15th, 16th, & 18th respondents [herein after referred to as the named respondents]. In particular, learned counsel for the named respondents sought to expunge the contents of paragraphs 2, 3, 4 & 11 of the supplementary affidavit sworn by Dennis Kathurima [learned counsel for the appellants].
2. It was contended that the named paragraphs have raised new/fresh issues/matters contrary to the orders of the court that were issued on 8th October 2025. For good measure, learned counsel posited that the directions of the court were clear and explicit. In particular, it was submitted that the supplementary affidavit was to respond to the issues contained in the replying affidavit, but same was not to raise fresh issues.
3. Additionally, it was submitted that the named paragraphs also advert to and concern contentious evidentiary matter[s], which are not within the personal knowledge of the deponent. Moreover, it has been submitted that learned counsel for the appellants ought not to swear an affidavit touching on and concerning contentious evidentiary matters, which are not within his personal knowledge.
4. Thirdly, learned counsel for the named respondents has also submitted that the deponent of the supplementary affidavit has also failed to disclose and or provide the sources of his information and belief. In the absence of disclosure of the sources of information, it has been submitted that the entire supplementary affidavit is irregular, illegal and invalid.
5. Finally, learned counsel for the named respondents has submitted that the issues raised and captured at the foot of the supplementary affidavit are likely to prejudice the rights of the named respondents. Moreover, it has been submitted that the respondents shall not have the requisite opportunity to controvert or challenge the fresh issues adverted to at the foot of the supplementary affidavit.
6. Other than the foregoing, learned counsel for the named respondents has also submitted that the reason why learned counsel for the appellants has sworn the affidavit is because all the appellants are dead save for the 5th appellant. In this regard, it has been contended that learned counsel cannot usurp the mandate or authority of the appellants, including the dead appellant.
7. Learned counsel for the appellants opposed the preliminary objection and contended that the paragraphs adverted to have neither raised new nor fresh issues. On the contrary, it has been submitted that the contents of the named paragraphs have been made in response to the averments contained in the replying affidavit sworn on behalf of the named respondents.
8. Secondly, learned counsel for the appellants has submitted that same has the conduct of the subject matter and by virtue of being in conduct of the subject matter, same [learned counsel] has therefore



acquainted himself with the facts of the case. To this end, counsel has submitted that the factual issues alluded to are therefore known to him.

9. Thirdly, learned counsel for the appellants has conceded that some of the appellants are dead. In particular, learned counsel confirmed that the 2nd, 3rd, 4th and 6th respondents are deceased. Moreover, it was admitted that the named appellants died long before the filing of the subject appeal. Nevertheless, learned counsel invoked the provisions of Order 24 Rule 2 of the Civil Procedure Rules, and thereafter invited the court to make an order that the appeal can proceed on behalf of the living appellants.
10. Finally, learned counsel for the appellants has submitted that same has neither disclosed nor demonstrated the source of the information contained in the body of the supplementary affidavit. To this end, counsel conceded that the supplementary affidavit appears to be in contravention of Order 19 Rules 2 and 3 of the Civil Procedure Rules 2010.
11. Be that as it may, learned counsel for the appellants has submitted that the preliminary objection which has been raised by and on behalf of the named respondents is bereft of merits. In this respect, the court has been invited to dismiss the objection and to retain the supplementary affidavit sworn on 13th October 2025.
12. Having considered the preliminary objection raised by counsel for the named respondents and having considered the oral submissions made on behalf of the parties, I come to the conclusion that the determination of the objection turns on three key issues, namely; whether the 2nd, 3rd, 4th and 6th appellants can mount an appeal posthumously or otherwise; whether the impugned paragraphs of the supplementary affidavit have raised new issues or otherwise; and whether the entire supplementary affidavit is valid and lawful on the face of the provisions of order 19 rules 2 & 3 of the civil procedure rules 2010.
13. Regarding the first issue, it is common ground that an appeal, which constitutes a suit by dint of section 2 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, can only be filed and or mounted by a legal entity. To this end, an appeal can only be filed by a living human being [who has attained the age of majority] or a legal body; an inanimate person established/incorporated in accordance with the law.
14. It is instructive to observe that where a person has passed on before the lodgment of an appeal, the appeal [if any] can only be mounted on behalf of the deceased person by his/her legal representative. For good measure, such a representative is enjoined to procure and obtain the requisite grant of letters of administration. [see section 82 of the *law of succession act* cap 160 laws of Kenya].
15. Can a dead person lodge an appeal? In my humble view, a dead person cannot lodge or mount an appeal. It is equally perplexing as to how a dead person can communicate with an advocate and proceed to issue [sic] instructions for purposes of filing of an appeal.
16. Flowing from the foregoing, it is my finding and holding that the appeal by and on behalf of the 2nd, 3rd, 4th & 6th appellants [who are admittedly dead], is invalid and a nullity ab initio. [See the holding in the case of *Mcfoy vs United Africa Ltd (1962) ALL ER 1159*, where the Privy Council expounded on the import and tenor of an act which is void.
17. Turning to the second issue, namely; whether the impugned paragraphs 2, 3, 4 & 11 of the supplementary affidavit sworn on 13th October 2025, have raised new issues or otherwise. To start with, there is no gainsaying that learned counsel for the appellants sought for and obtained leave to file and serve a supplementary affidavit. However, the court proceeded to and directed that the supplementary affidavit shall be confined to responding to the issues raised at the foot of the replying



affidavit. Moreover, the court directed that the supplementary affidavit shall not introduce new issues or at all.

18. For ease of reference, it is appropriate to reproduce the terms of the order of the court made on 8th October 2025.
19. Same are reproduced as hereunder;
 - i. The appellants/applicants be and are hereby granted leave to file and serve a further/ supplementary affidavit and the same to be filed and served within 7 days from the date hereof.
 - ii. Nevertheless, the further affidavit shall be confined to responding to the issues raised in the replying affidavit and the same shall not introduce new issues or at all.
20. It is crystal clear that the appellants' applicants were barred and prohibited from raising new/fresh issues vide the supplementary affidavit. The reason underpinning the directives of the court is explicit. For good measure, a further affidavit is by law restricted to responding to issues raised as opposed to bringing forth new issues. In any event, there is no gainsaying that if new issues are raised vide a supplementary affidavit, then the adverse party would be denied/deprived of the opportunity to controvert same.
21. Such kind of a situation would no doubt impact upon the right to fair hearing and fair trial. [See Article 50 of *the Constitution* 2010].
22. I have examined the contents of paragraphs 2, 3, 4 & 11 of the supplementary affidavit sworn by Dennis Kathurima and I agree with the submissions of learned counsel for the named respondent that the said paragraphs have raised/canvassed fresh issues. To the extent that the offending paragraphs have raised/ agitated fresh issues, same are clearly in contravention of the orders of the court made on 8th October 2025.
23. Additionally, it is not lost on me that the raising of new issues at the foot of the supplementary affidavit is also contrary to the established and trite position of the law. In my humble view, the applicants herein cannot be allowed to contravene the provisions of the law and thereby breach the due process of the law.
24. Turning to the third issue, namely; whether the supplementary affidavit is valid and lawful, it is imperative to recall and reiterate that the contents of the supplementary affidavit relate to and concern contentious evidentiary issues/matters. Such matters would no doubt require proof and hence the deponent must be one who is capable of responding to and proving same.
25. In my humble view, an advocate who is retained in a matter is not at liberty to depone to contentious evidentiary issues/matters. Whenever an advocate degenerates into swearing an affidavit pertaining to contentious matters, such an advocate courts being invited to step down from the privileged position of counsel and thereafter be subjected to cross-examination. Such kind of a scenario ought to be avoided at all costs.
26. In the case of *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR) (Election Petitions) (26 September 2022) (Judgment) the apex Court considered a similar situation and stated thus:

This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients



in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed to.

137. In stating so, we echo the words of Ringera, J in *Kisya Investment Limited & others v Kenya Finance Corporation Ltd* HCCC No 3504 of 1993 (Unreported) that:

“It is not competent for a party’s advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters, the advocate courts an adversarial invitation to step (down) from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions. It is impossible and unseemly for an advocate to discharge his duty to the court and his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides, that, the counsel’s affidavit is defective for the reason that it offends the proviso (to) order XVIII rule 3 (1) (now order 19 rule 3 of the Civil Procedure Rules failing to disclose who the sources of his information are and the grounds of his belief.”

27. The holding of the Supreme Court in the decision [supra] is apt and succinct. Simply put, an advocate is not authorized to depone to contentious evidentiary matters/issues. Moreover, it is clear that the deponent must at all times confine self to matters which are within his/her personal knowledge and not otherwise.
28. It is sufficient to underscore that the deponent of the supplementary affidavit was divested of authority to swear/depone to contentious evidentiary matters. To this end, the entire supplementary affidavit sworn on 13th October, 2025, lends itself to striking out.
29. Before concluding on this matter, it is important to highlight that whenever an affidavit is deponed to on the basis of information and belief, it behooves the deponent to disclose the sources of such information and belief. However, even though the deponent of the supplementary affidavit alluded to the fact that the contents of the supplementary affidavit are believed to be true, same has not provided the sources of his information and belief.
30. For good measure, learned counsel conceded that the sources of information and belief are neither highlighted nor contained in the body of the supplementary affidavit.
31. Suffice it to state that the failure to disclose the sources of information and belief is fatal. Simply put, any deposition/avermnt that is made on the basis of information and belief, but whose source is not disclosed, amounts to hearsay.
32. No doubt hearsay evidence is inadmissible. [see Order 19, Rules 2 & 3 of the Civil Procedure Rules].

Final Disposition.

33. Flowing from the analysis highlighted in the body of the ruling, it must have become apparent that the objection taken by learned counsel for the named respondents is sound, solid and well grounded. The objection is meritorious.
34. In the end, and for the reasons alluded to; the final orders of the court are as hereunder;
 - i. The Appeal by and on behalf of the 2nd, 3rd, 4th and 6th Appellants be and is hereby struck out.



- ii. The Supplementary affidavit sworn by Dennis Kathurima on 13th October 2025 be and is hereby struck out and expunged from the record of the court.
- iii. Costs of the Objection be and are hereby awarded to the named respondents.
- iv. Costs of the Appeal on behalf of the 2nd, 3rd, 4th and 6th Appellants are also awarded to the named Respondents.
- v. Costs in terms of clause [iv] herein shall be borne by learned counsel for the Appellants personally.

35. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF OCTOBER 2025.

OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].

JUDGE

In the presence of:

C/A Hussein

Mr. Carlpeters for the 1st, 5th – 13th, 15th & 18th Respondents.

Mr. Murithi for the Appellants/applicants.

