



**HFC Limited (Formerly Known as Housing Finance Company of Kenya Ltd) v Capri Kenya Limited & 2 others (Commercial Case 40 of 2016) [2026] KEHC 701 (KLR) (Commercial and Tax) (23 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 701 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 40 OF 2016  
MN MWANGI, J  
JANUARY 23, 2026**

**BETWEEN**

**HFC LIMITED (FORMERLY KNOWN AS HOUSING FINANCE COMPANY OF KENYA LTD) ..... PLAINTIFF**

**AND**

**CAPRI KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**EXECUTIVE SUPER RIDES LTD ..... 2<sup>ND</sup> DEFENDANT**

**MASTER TILES LTD ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application dated 6<sup>th</sup> May 2024 was filed by the plaintiff under the provisions of Articles 50 and 159 of *the Constitution* of Kenya, 2010, Sections 3, 3A and 63(e) of the *Civil Procedure Act*, Section 47A of the *Evidence Act* and Order 18 Rule 2 of the Civil Procedure Rules, 2010.
2. The plaintiff prays for leave to adduce additional evidence in this matter, being the Judgment in Milimani Magistrate’s Court Criminal Case No. 33 of 2016 - Republic vs Eric Kotani and another, and for costs to be in the cause.
3. The application is supported by an affidavit sworn by 6<sup>th</sup> May 2024, by Mr. Wilson Oduor, the plaintiff’s Head of Security and Investigations. He averred that the substratum of the present suit relates to the recovery of funds disbursed to the 1<sup>st</sup> defendant herein as a loan on the basis of fraud and forged documents. He also averred that arising from the same set of facts, Eric Kotani, a Director of the 1<sup>st</sup> defendant company was duly charged with various offences, including conspiracy to commit



a felony contrary to Section 393 of the Penal Code, stealing contrary to Section 268(1) as read with Section 275 of the Penal Code.

4. Mr. Oduor deposed that vide a Judgment delivered on 24<sup>th</sup> November 2023, Hon. R. K. Ondieki, Senior Principal Magistrate, convicted the said Eric Kotani on all counts. Mr. Oduor attached a copy of the said Judgment to his affidavit as exhibit No. 1.
5. He stated that the said Judgment is relevant and significant to the present proceedings. He further stated that no prejudice shall be suffered by the defendants if the said Judgment was admitted in evidence for reasons that the plaintiff is yet to close its case in this matter, and the said Judgments if admitted in evidence, shall be produced by himself when he takes the stand to testify, as he is yet to testify. He averred that the defendants shall be at liberty to present any rebuttal evidence at the stage of defence hearing. He stated that it is in the interest of justice for the orders being sought herein to be granted as prayed.
6. In response to the application, Mr. Eric Kotani, a Director of the 1<sup>st</sup> defendant filed a replying affidavit sworn on 13<sup>th</sup> December 2024. He stated that whereas the applicant claims to be seeking leave to adduce additional evidence, the import of the application is to reopen the suit wherein some of the plaintiff's witnesses have already testified and the suit is partly heard. He contended that granting the plaintiff leave to adduce additional evidence at this stage would occasion an unavoidable review of pleadings, witness statements and list of documents by the defendants as well as trying the suit de novo, for equality of arms to be achieved.
7. Mr. Kotani averred that the Judgment in Milimani Magistrate's Court Criminal Case No. 33 of 2016 relates to the trial of a criminal case with charges framed under the Penal Code. He contended that the findings of the Court were made solely upon circumstantial evidence.
8. He deposed that this suit is premised on allegations of fraud which must be pleaded and strictly proved.
9. He further deposed that he had instructed his new Counsel on record to challenge the decision of the learned Magistrate, and they had filed the necessary application to the High Court, being HCCCR Misc. Application No. E468 of 2024, seeking leave to appeal out of time, challenging the entire decision in Milimani Magistrate's Court Criminal Case No. 33 of 2016.
10. Mr. Kotani reiterated that the plaintiff has so far called witnesses to prove its case and that the introduction of the Criminal Court's Judgment at this juncture would not only change and/or modify the cause of action to the prejudice of the defendants. He stated that if the Court is inclined to grant the application, the natural consequence would be to allow him an opportunity to amend his defence and also to file additional evidence.
11. He stated that the Judgment in the Criminal Case was delivered on 24<sup>th</sup> November 2023, and the instant application was made on 6<sup>th</sup> May 2024, which is almost 6 months later, which is not only inordinate delay on the part of the plaintiff but also an abuse of the Court process.
12. The hearing of the instant application proceeded by way of written submissions. The firm of Walker Kontos Advocates filed the plaintiff's submissions on 24<sup>th</sup> February 2025, whereas the firm of Litoro and Omwebu Advocates filed the 1<sup>st</sup> defendant's submissions on 10<sup>th</sup> March 2025. The 2<sup>nd</sup> & 3<sup>rd</sup> defendants did not participate in the instant application.
13. Mr. Omino, learned Counsel for the plaintiff submitted that the basis of the suit herein is that the Directors of the 1<sup>st</sup> defendant utilized the said company to defraud the plaintiff herein and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants received in their respective accounts proceeds of the said fraud. He stated that one of



- the Directors in a Judgment delivered in Milimani on 24<sup>th</sup> November 2023, was duly convicted of one count of conspiracy to commit a felony and three (3) counts of stealing from the plaintiff.
14. Counsel relied on Section 47A of the *Evidence Act* to support his submissions that the said Judgment is admissible in evidence in these proceedings as no appeal was filed within the timelines contemplated under Section 349 of the Criminal Procedure Code.
  15. Mr. Omino stated that it was only after the plaintiff filed the present application that the 1<sup>st</sup> defendant's Director purported to file an application to the High Court seeking leave to extend time within which to appeal against the conviction. He submitted that it has not been stated that leave has been granted to the said Eric Kotani to file an appeal out of time, and further, the purported application for extension of time referenced in the replying affidavit of Eric Kotani has not been exhibited to demonstrate to the Court the nature of the orders sought in the said purported application.
  16. Counsel for the plaintiff submitted that the 1<sup>st</sup> defendant shall suffer no prejudice if the instant application is allowed, because only one of the plaintiff's witnesses has testified and the plaintiff is yet to close its case.
  17. He submitted that the additional evidence shall be adduced by the plaintiff's second witness, and there will be no need to recall PWI. He stated that the defendants shall have the opportunity during the defence hearing to adduce any rebuttal evidence in relation to any further evidence produced by the plaintiff.
  18. Mr. Omino stated that the instant application has not been brought after inordinate delay as it was brought within 3 months of delivery of the Judgment in the criminal proceedings.
  19. He emphasized that under Section 47A of the *Evidence Act*, the finding of the Trial Court in Milimani Magistrate's Court Criminal Case No. 33 of 2016 constitutes conclusive evidence of the particulars of fraud pleaded in the plaintiff's case herein, and that the said Judgment constitutes relevant evidence to enable this Court arrive at a just and conclusive finding in this case.
  20. Mr. Omino relied on the case of Pinnacle Projects Limited vs Presbyterian Church of East Africa, Ngong Parish and another [2019] eKLR, to support the instant application and to urge this Court to exercise its discretion in favour of the plaintiff by granting the orders being sought herein.
  21. Mr. Omwebu, learned Counsel for the 1<sup>st</sup> defendant submitted that the application seeking to adduce additional evidence, being the Judgment in Milimani Magistrate's Court Criminal Case No. 33 of 2016, was filed 165 days after the delivery of the said Judgment.
  22. He contended that the import of the application is a belated attempt to bolster the plaintiff's evidentiary matter in support of this suit, which is solely premised upon a claim of fraud as particularized at paragraph 12 of the plaint dated 15<sup>th</sup> June, 2016.
  23. He also contended that granting the plaintiff leave to adduce additional evidence at this stage would occasion an unavoidable review of pleadings, witness statements and list of documents by the defendants as well as trying the suit de novo, for equality of arms to be achieved.
  24. Counsel submitted that the Judgment in Milimani Magistrate's Court Criminal Case No. 33 of 2016 relates to the trial of a criminal case with charges framed under the Penal Code, and the findings of the Court were made solely upon circumstantial evidence. He stated that the 1<sup>st</sup> defendant has filed HCCRC Misc. App. No. E468 of 2024, seeking leave to appeal out of time, challenging the entire decision.



25. In stating that this case is premised upon allegations of fraud and its entire substratum is built upon particulars of fraud, which must be pleaded and strictly proved, Mr. Omwebu relied on the case of Christopher Ndaru Kagina Vs Esther Mbandi Kagina & another [2016] eKLR.
26. Counsel then proceeded to critique the Judgment of the Trial Court and delved into the demerits of the Judgment of the said Court.
27. Citing the holding in the case of Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR, Counsel for the 1<sup>st</sup> defendant stated that fraudulent conduct must be distinctly proved, and it is not allowable to leave fraud to be inferred from facts.
28. Mr. Omwebu stated that the consequential effect of allowing the instant application would be to reopen considerations in respect of the 1<sup>st</sup> defendant's defence and evidence in the part-heard suit wherein the plaintiff's case has already been prosecuted to some extent through oral testimony of its witness, and the scales of justice would only balance if the 1<sup>st</sup> defendant was given an opportunity to amend its defence or file additional evidence. He urged this Court to dismiss the plaintiff's application with costs.

### **Analysis And Determination.**

29. I have considered the application, the affidavits in support of and in opposition of the application and the written submissions by Counsel for the plaintiff and the 1<sup>st</sup> defendant. The only issue for determination is if the plaintiff should be allowed to adduce additional evidence based on the Judgment in Milimani Magistrate's Court Criminal Case No. 33 of 2016.
30. A perusal of the Court proceedings herein reveals that this case commenced hearing on 7<sup>th</sup> February 2018 before the late Justice J. L. Onguto, and PW1, Eunice Wairimu Kamau testified on 24<sup>th</sup> October 2019. The case was then scheduled for hearing on 29<sup>th</sup> January 2020. On that day, Mr. Omino for the plaintiff informed Lady Justice W. Okwany, that he was not ready to proceed because he had misdiarized the date for hearing and he was unable to get his witness.
31. The case was thereafter adjourned on 28<sup>th</sup> April 2020 and 29<sup>th</sup> July 2020. The case was rescheduled for hearing on 13<sup>th</sup> July 2023. On that day, Mr. Omino for the plaintiff stated that the 1<sup>st</sup> defendant had not served him with the defence and witness statement. He sought an adjournment to go through he said documents. The case was then rescheduled for hearing on 21<sup>st</sup> February 2024. Come the said date, Mr. Ogembo for the 1<sup>st</sup> defendant indicated that he had filed an application to cease from acting for the said defendant. The hearing of the case was adjourned to give room to the said application to be heard. The application was allowed on 11<sup>th</sup> March 2024.
32. On 7<sup>th</sup> May 2025, Mr. Omino for the plaintiff indicated to the Court that a Director of the 1<sup>st</sup> defendant had been convicted on four (4) counts in a criminal case, and as a result, the plaintiff had filed a certificate of urgency application in this case, seeking to rely on the Judgment of the criminal case. Directions were thereafter given for hearing of the plaintiff's application.
33. It is therefore apparent that the application by the plaintiff was filed after the conviction of the 1<sup>st</sup> defendant's Director, Mr. Eric Kotani, on 24<sup>th</sup> November 2023. Since the outcome of the criminal case could not be predicted, the plaintiff could only file the instant application after a determination had been made by the Trial Court in the criminal case.
34. In opposition to the application herein, the 1<sup>st</sup> defendant's Director, Eric Kotani, averred that after being convicted in the criminal case, he filed an application seeking leave to appeal out of time and as such, the provisions of Section 47A of the Evidence Act are not applicable in favour of the applicant.



35. Section 47A of the [Evidence Act](#) provides for admissibility of a final Judgment rendered by a competent Court in any criminal proceedings after the period for filing an appeal has elapsed or after the decision of any Appeal. It states as follows:-
- “ A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such a judgment or date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of the offence as charged.”
36. In this matter, the 1<sup>st</sup> defendant attached to its replying affidavit an extract from the CTS showing a case tacking number for HCCR Misc. Application No. E468 of 2024, Eric Kotani vs ODPP, to support its assertion that an application for leave to appeal out of time had been filed. The 1<sup>st</sup> defendant was however economical with the truth as to when the said application was filed. That being the case, the only inference to be drawn from the said non-disclosure is that it was filed after the instant application was filed by the plaintiff.
37. I agree with the observation made by Mr. Omino that a copy of the purported application seeking leave to appeal out of time was not attached to the 1<sup>st</sup> defendant’s affidavit as evidence.
38. Applying the provisions of Sections 107 to 109 of the [Evidence Act](#) to the 1<sup>st</sup> defendant’s assertion that an application seeking leave to appeal out of time was filed, it is my finding that the said assertion must fail in the absence of the said defendant exhibiting to its affidavit a copy of the said application.
39. In addition, the outcome of the purported application is unknown since no evidence was adduced in regard to the same.
40. The 1<sup>st</sup> defendant also challenges the instant application on the ground that the particulars of fraud were not pleaded in the plaint in this case, and as such, the plaintiff should not be allowed to adduce evidence of the Judgment of the Criminal Case.
41. Contrary to the 1<sup>st</sup> defendant’s contention, a perusal of the plaint filed by the plaintiff dated 15<sup>th</sup> February 2016, shows that particulars of fraud are pleaded in paragraph 12 of the said plaint.
42. Having found that allegations of fraud are captured in the plaint, the Judgment arising from Milimani Magistrate’s Court Criminal Case No. 33 of 2016, is admissible in evidence in the proceedings herein.
43. The 1<sup>st</sup> defendant also objected to the plaintiff being granted leave to adduce additional evidence of the said Judgment due to the fact that the plaintiff has already called its witness to testify in support of its case. The 1<sup>st</sup> defendant therefore suggested that this case should start de novo if the Judgment in the Criminal case will be relied upon.
44. It is my finding that the above proposition is not tenable. The affidavit in support of the instant application is very clear that the witness through whom the plaintiff intends to adduce the evidence about the Judgment in Milimani Magistrate’s Court Criminal Case No. 33 of 2016, will be its 2<sup>nd</sup> witness by the name of Wilson Oduor. That means that the 1<sup>st</sup> defendant will have the opportunity to test the veracity of the evidence of the said witness through cross-examination.
45. It is therefore my finding that no prejudice will be occasioned to the 1<sup>st</sup> defendant by having the said witness testify about the Judgment in Milimani Magistrate’s Court Criminal Case No. 33 of 2016.
46. The outcome of the instant application rests squarely on the exercise of this Court’s discretion since pleadings have closed. I am persuaded by the authority cited by the plaintiff in the case of Pinnacle



Projects limited Vs Presbyterian Church of East Africa, Ngong Parish and another (supra). The authorities relied on by the 1<sup>st</sup> defendant are not relevant to this case since the particulars of fraud were pleaded in the plaint.

47. One last thing that I would like to mention is that the 1<sup>st</sup> defendant attempted to persuade this Court that it has an arguable appeal as is Director, Eric Kotani, was convicted on circumstantial evidence in the criminal case. I must however state categorically that I am not sitting as an appellate Court to hear the merits or demerits of the Judgment of the Trial Court in Milimani Magistrate's Court Criminal Case No. 33 of 2016. I therefore steer clear of making any comments on the merits or demerits of the said Judgment.
48. I have said enough to demonstrate that I should allow the plaintiff's application as it is merited. I therefore give the following orders to move the case forward: -
- i. The application dated 6<sup>th</sup> May 2024 is hereby allowed. The plaintiff is given 21 days to file and serve an amended plaint and supplementary and/or additional witness statements and a supplementary list and bundle of documents, if necessary;
  - ii. The defendants will within 21 days of service file and serve their amended statements of defence, supplementary and/or additional witness statements and supplementary list and bundle of documents, if necessary;
  - iii. The plaintiff will have 14 days upon service to file a reply to the amended statements of defence; and
  - iv. Costs of the application herein shall be borne by the 1<sup>st</sup> defendant.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD OF JANUARY 2026.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:-

Mr. Omino for the plaintiff/applicant

No appearance for the 1<sup>st</sup> defendant/respondent

Ms. B. Wokabi – Court Assistant.

