

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELCA NO. E002 OF 2021**

**PHILEMON NGENO.....1<sup>ST</sup>**  
**APPELLANT**

**ESTHER CHUMO.....2<sup>ND</sup>**  
**APPELLANT**

**BERNARD NGENO.....3<sup>RD</sup>**  
**APPELLANT**

**VERSUS**

**PICOTY CHEPKOECH NGENO.....1<sup>ST</sup>**  
**RESPONDENT**

**NGENO RONALD KIBET.....2<sup>ND</sup>**  
**RESPONDENT**

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**RULING.**

**Introduction.**

1. This ruling is in respect of the Appellants/Applicants Notice of Motion application dated 15<sup>th</sup> September, 2025. The application is expressed to be brought under **Articles 40, 47, 50, 162 & 165** of the Constitution of Kenya, **Section 4 & 13** of the **Environment and Land Court Act**, **Section 78 (1) b, c, d & e, 1A, 1B, 3A, & 63(e)** of the **Civil Procedure Act**,

**Order 42 Rule 27 and Order 51 Rule 1 of the Civil Procedure Rules.**

2. The application seeks the following orders;

***a. Spent***

***b. Spent***

***c. That in exercising the powers conferred under Section 78(1) of the Civil Procedure Act, this Honourable Court remits/remands this Appeal to the trial Court in Kericho CMELC Case No. 41 of 2018, for the following purpose and on the following terms:***

***1. For the trial Court to receive and take further evidence and make findings regarding:***

***a. the alleged illegal removal of the caution claimed to have been registered over the mother title Land Parcel Kericho Kyogong/1036;***

**b. the circumstances in which the alleged amalgamation/subdivision of the mother titles were effected;**

**c. the provenance and legality of the certificates of title now relied on by the Respondents; and**

**d. any registry irregularities and/or fraud in the making, removal or endorsement of registers;**

**2. For the trial Court to issue summonses to and require attendance and production of documents by the following persons/offices:**

**a. the Bomet County Land Registrar,**

**b. the former Bomet Land Registrar,**

**c. the County Surveyor,  
Bomet,**

**d. the Surveyor who  
prepared the Technical  
Report**

**e. the Land Control Board  
Chairperson/Secretary  
who considered any  
application(s) related to  
the transfers,**

**f. and any other person  
with knowledge; and**

**3. For the trial Court to compel  
production of the registry  
parcel files, mother title files,  
LCB application forms,  
transfer forms, stamp duty  
receipts, mutation and  
mutation records, minutes of  
Land Control Board meetings,  
subdivision plans, registry  
index maps, allotment  
registers and any other  
documents necessary to  
determine the lawfulness of**

**the transfers and caution removal; and**

**4. For the trial Court to complete the further evidence-taking and file its amended record and return the same to this Court within sixty (60) days of receipt of this remand order, or within such time as the Court considers appropriate.**

**OR, in the alternative,**

**d. That this Honourable Court itself receives and considers the additional Evidence and/or cause such further evidence.**

**e. That leave be and is hereby granted to the Appellants to adduce additional/fresh evidence on appeal, being the Trial Bundle in Bomet Chief Magistrate Criminal Case No. E751 of 2025; R. V. Jotham Kipkoech Ngeno.**

***f. That the said additional Evidence be admitted into and form part of the record of appeal.***

***g. That costs of this application be in the cause.***

- 3.** The application is based on the grounds on its face and the supporting affidavit of **Benard Ngeno** the 3<sup>rd</sup> Appellant/Applicant, that is sworn on 15<sup>th</sup> September, 2025.

**Factual Background.**

- 4.** By a Memorandum of Appeal dated 13<sup>th</sup> September, 2021, the Appellants/Applicants challenge the decision of Hon. S.M Mokuia in Kericho CM ELC Case No. 41 of 2018. The grounds of appeal are as follows;

***a. The trial Magistrate erred in law and fact in entertaining a suit without the requisite jurisdiction. The suit property is situate within the Bomet Town Municipality and the parties resided within Bomet and that***

***the matter ought to have been adjudicated upon in the nearest Court seized with jurisdiction, which should have been Bomet Law Courts.***

***b. That even in the ouster of ground 1 above, the Learned Trial Magistrate erred in law and fact by failing to cognize the fraudulent circumstances under which the 1<sup>st</sup> Defendant and the Plaintiffs, in collusion with the then Land Registrar Bomet County obtained new titles to the suit property without due process being followed.***

***c. The Learned Trial Magistrate erred in fact and in law by dismissing the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' applications dated 24<sup>th</sup> September, 2018 and 20<sup>th</sup> January, 2021, in both applications, the Applicants sought to call the current Bomet Land Registrar and the County Surveyor to testify on the irregular manner in which land parcels Kericho/Kyogong/1036 and Kericho/Kyogong/1009 which amalgamated to give rise to Kericho/Kyogong/1345 and further sub-***

**divided to birth (sic) Kericho/Kyogong/1478 and Kericho/Kyogong/1531, which search results at the Land Registry indicates that they are non-existent. This prejudiced the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants as they were condemned partly unheard (sic).**

**d. The Learned Magistrate erred in law and fact in completely discrediting the Appellant's defence and the weighty issues raised, more so, on a piece of land that they have lived in their whole lives.**

**e. The Learned Trial Magistrate erred by failing to acknowledge that the suit property belonged to the Defendants' late husband and father and that intestate succession on the property was still ongoing and that there would have been no legal way that Kericho/Kyogong/1036 could have been amalgamated or divided or transferred without being subjected to succession.**

**f. That the Trial Magistrate erred fundamentally in fact by making a determination on land parcels**

**Kericho/Kyogong/1531 and Kericho/Kyogong/1478 which pieces of land are non-existent at the Bomet Land Registry, save for the new titles that were issued irregularly.**

**g. That the Trial Magistrate erred in both law and fact by ignoring the fact that the 3<sup>rd</sup> Defendant had in her possession the original title deed to Kericho/Kyogong/1036.**

**h. That the Learned Trial Magistrate erred both in law and fact by making a determination on land parcels Kericho/Kyogong/1531 and Kericho/Kyogong/1478 by relying on search results on completely different pieces of land, that is, Kericho/Kyogong/1477 and Kericho/Kyogong/1345 respectively.**

**i. That the Learned Trial Magistrate erred both in law and fact by awarding the Plaintiffs general damages amounting to Kshs. 100,000/= each for trespass on land that they own.**

5. The Appellants/Applicants pray for orders that;

**a. That the Appeal be allowed with costs to the Appellant (sic).**

**b. That the judgement and consequential orders emanating from Kericho ELC Case No. 41 of 2018 be set aside in its entirety.**

**c. That this Honourable Court affirms the validity of the title Certificate (sic) to Land Parcel Kericho/Kyogong/1036.**

**d. That title certificates (sic) issued as Kericho/Kyogong/1531 and Kericho/Kyogong/1478 purporting to be offshoots of Kericho/Kyogong/1036 be cancelled.**

6. The appeal was admitted for hearing on 19<sup>th</sup> November, 2024 and the Court issued directions that it be canvassed by way of written submissions.

7. It was mentioned severally to confirm filing of submissions before it was reserved for judgement.

8. Before delivery of judgement, the Appellants/Applicants filed the application under consideration and it first came up for hearing on 19<sup>th</sup> September, 2025 when the Court directed that it be served upon the Respondents.
9. The application came up for hearing on 25<sup>th</sup> September, 2025 when the Respondents were granted a last chance to file their response.
10. On 27<sup>th</sup> October, 2025 the Court issued directions that the application be canvassed by way of written submissions.
11. Counsel for the Respondents sought and was granted leave to cross-examine the 3<sup>rd</sup> Appellant/Applicant on the contents of the affidavit in support of the application and thereafter the application was reserved for ruling on 27<sup>th</sup> January, 2026.

**The Appellants/Applicants Contention.**

- 12.** The 3<sup>rd</sup> Appellant/Applicant contends that on 7<sup>th</sup> September, 2021, they filed the present appeal challenging the judgement and decree of the trial Court in Kericho CM ELC Case No. 41 of 2018.
- 13.** He also contends that the Court issued directions on the disposal of the appeal and gave a date for judgement.
- 14.** He further contends that there were some developments that led to the filing of the application under consideration.
- 15.** It is his contention that the Directorate of Criminal Investigations Bomet carried out investigations into the dealings with respect to land parcel No's **Kericho/Kyogong/1009, 1036, 1531 and 1478.**
- 16.** It is also his contention that from the said investigations, it emerged that there was a caution registered on land parcel No. Kericho/Kyogong/1036 which was irregularly removed by

the then land registrar one **Jotham Ngeno** in collusion with the 1<sup>st</sup> Defendant in the suit before the trial Court, one **Kipkurui A.**

**Chumo.** He goes on to state that it further emerged that they irregularly amalgamated land parcel No's **Kericho/Kyogong/1009** and **1036** to create land parcel No. **Kericho/Kyogong/1345** that was subdivided into the suit parcels of land.

- 17.** It is further his contention that the police investigations show that land parcel No. **Kericho/Kyogong/1036** was dealt with at the time when the registered proprietor, who was his deceased father was already dead.
- 18.** He contends that the police investigations show that there were no mutation forms prepared in the amalgamation of land parcel numbers **Kericho/Kyogong/1009** and **1036.**

- 19.** He also contends that there were no amendments made on the Registry Index Map, no applications made to the Land Control Board and the due process was therefore not followed in the issuance of the title deeds to the suit parcels of land.
- 20.** He further contends that the trial Court while making its determination relied on the report prepared by the County Surveyor one **Patrick Kipngetich Rotich**. He goes on to state that the said surveyor has now recorded a statement with the Directorate of Criminal Investigations distancing himself from the said report.
- 21.** It is his contention that the police investigations were finalized on 28<sup>th</sup> August, 2025 and the then Land Registrar Bomet County one Jotham Ngeno was charged in Bomet CM Criminal case No. E751 of 2025 on the following charges;

- a. *Fraudulently procuring Registration of title contrary to Section 103 (1)(c) (i) of the Land Registration Act.***
- b. *Intermeddling with the Estate of a Deceased person contrary to Section 45(1) as read with Section 45 (2)(a) of the Law of Succession Act.***
- c. *Abuse of Office contrary to Section 101(1) as read with Section 102 of the Penal Code.***

- 22.** It is also his contention that the said information came to light recently and the trial Court did not have the opportunity to consider it.
- 23.** It is further his contention that before the trial Court, they filed an application dated 20<sup>th</sup> January, 2025 (sic) seeking to have the Land Registrar Bomet County Summoned to Court.
- 24.** He contends that they also filed a Notice to Produce dated 20<sup>th</sup> September, 2018 and goes on to state that the trial Court did not entertain either the application dated 20<sup>th</sup>

January, 2025 (sic) nor the Notice to Produce dated 20<sup>th</sup> September, 2018.

- 25.** He also contends that there was scanty information available to them and the trial Court and adds that the information available was so scanty that the trial Court was blinded as to the existence of the above stated irregularities.
- 26.** He further contends that in light of the said developments, it is in the interest of justice that the Court invokes **Section 78(1)** of the **Civil Procedure Act** and issue the orders sought.
- 27.** It is his contention that the material and official evidence that has surfaced in the Land Registry and the Police files was not available to them during the trial and could not have with reasonable diligence, been discovered earlier.

- 28.** It is also his contention that the new evidence is of an official character. He goes on to state it comprises of the Bomet County Land Registrar's recorded statement in Bomet CM Criminal Case No. E751 of 2025.
- 29.** It is further his contention that the said statement goes directly to the root of the present appeal and goes on to state that the said evidence addresses two issues namely;
- a. *Whether the caution was irregularly removed.***
  - b. *Whether the titles to the suit property were procured by irregularity/fraud.***
- 30.** He contends that he has been advised by his Counsel on record that under **Section 78(1)** of the **Civil Procedure Act**, this Court has power to take additional evidence and/or remand a case for further evidence taking.

- 31.** He also contends that the Court issues the said orders where justice requires the admission of additional evidence and to prevent miscarriage of justice.
- 32.** He further contends that this Court should inquire into the issues raised before it validates the titles to the suit properties.
- 33.** He ends his deposition by stating that they will be prejudiced if the Court delivers judgement before considering and/or remitting for inquiry the newly revealed evidence.

**The Respondents' Response.**

- 34.** In response to the Appellants/Applicants application, the Respondents filed a Replying Affidavit sworn on 21<sup>st</sup> October, 2025.

- 35.** The Replying Affidavit is sworn by both **Picoty Chepkoech Ngeno** the 1<sup>st</sup> Respondent and **Ngeno Ronald Kibet** the 2<sup>nd</sup> Respondent.
- 36.** They depose that the application under consideration is an abuse of the Court process as it was filed at the eve of judgement with the intention of derailing the expeditious conclusion of the appeal.
- 37.** They also depose that before the trial Court, the Appellants/Applicants filed a Statement of defence. They go on to state that no counterclaim was filed and therefore the allegations of fraud were neither specifically pleaded nor proved.
- 38.** They further depose that the Appellants/Applicants are seeking to introduce a new issue under the guise of new evidence.

- 39.** It is their deposition that the Appellants/Applicants had every opportunity before the trial Court to prove their allegations of fraud but they failed to do so. They go on to state that the Appellants/Applicants cannot therefore seek to reopen their case at the tail end of the appellate stage.
- 40.** It is also their deposition that the criminal proceedings that the Appellants/Applicants are anchoring their application on, are still pending and have not resulted in any conviction and/or judgement to link them (Respondents) to any acts of fraud.
- 41.** It is further their deposition that the Appellants/Applicants have not met the threshold of admission of new evidence or retrial as provided for under **Order 42 Rule 7** of the **Civil Procedure Rules.**

- 42.** They depose that the alleged new evidence was available and could have with reasonable diligence been obtained at the time of trial.
- 43.** They also depose that the said evidence is neither credible nor conclusive as it is based on a criminal charge that is pending hearing and determination.
- 44.** They further depose that the Appellants/Applicants have not advanced any sufficient reason for the matter to be remitted to the subordinate Court for retrial and go on to state that if such an order is issued, it will result in grave prejudice, expense and injustice.
- 45.** It is their deposition that the 3<sup>rd</sup> Appellant/Applicant filed Kericho ELC Case No. E018 of 2023 which was dismissed on 25<sup>th</sup> January, 2024 for being *res judicata*.

- 46.** It is also their deposition that costs were taxed at Kshs. 428,000/= which are yet to be paid and warrants of arrest were issued against the 3<sup>rd</sup> Appellant/Applicant.
- 47.** It is further their deposition that the Appellants/Applicants filed an application dated 17<sup>th</sup> May, 2024 before the trial Court seeking orders of review and that in that application the Appellants/Applicants intimated that they had withdrawn the present appeal.
- 48.** They depose that the said application has not been prosecuted.
- 49.** They also depose that the Appellants/Applicants also filed an application dated 22<sup>nd</sup> June, 2024 seeking that the Learned Trial Magistrate recuses himself, which application was dismissed on 10<sup>th</sup> September, 2024.

- 50.** They further depose that the Appellants/Applicants are yet to complete payment of the costs awarded by the trial Court and add that they entered into a consent on 23<sup>rd</sup> May, 2025 where they agreed on the mode of payment of the said costs.
- 51.** It is their deposition that currently there is a balance of Kshs. 150,852/= and the matter was coming up for Notice to Show Cause on 25<sup>th</sup> November, 2025.
- 52.** It is also their deposition that the Appellants/Applicants have come before this Court with unclean hands and add that the Appellants/Applicants have a chronic habit of forum shopping in order to delay the final determination of the present appeal.
- 53.** They end their deposition by stating that that the application under consideration has been brought in bad faith and that it is in the interest of justice that it be dismissed.

- 54.** On 9<sup>th</sup> December, 2025, the 3<sup>rd</sup> Appellant/Applicant was cross-examined on the contents of paragraphs 5, 13, 15 and 16 of the affidavit in support of the application sworn on 15<sup>th</sup> September, 2025.
- 55.** He stated that his name is **Benard Ngeno** and admitted that on 15<sup>th</sup> September, 2025 he was not in Kenya.
- 56.** He also admitted that he did not appear before an Advocate in Kenya for purposes of commissioning of the affidavit in support of the application.
- 57.** He confirmed that they attached a copy of the charge sheet in the trial bundle and admitted that the Respondents were not parties to the criminal case with respect of which the charge sheet was drawn.

- 58.** With regard to paragraph **7** of the affidavit in support of the application, he stated that **Kipkirui Chumo** (Deceased) was the 1<sup>st</sup> Defendant in Kericho CM ELC Case No. 41 of 2018.
- 59.** He stated that at the time of institution of the appeal **Kipkirui Chumo** (Deceased) was alive but he is now deceased.
- 60.** He confirmed that **Kipkirui Chumo** (Deceased) was not listed as an Appellant.
- 61.** With regard to paragraph **10** of the Affidavit in support of the application, he admitted that the survey report was adopted by the trial Court.
- 62.** With regard to paragraph **16** of the Affidavit in support of the application, he confirmed that Criminal Case No. E751 of 2025 is ongoing.

**63.** With regard to paragraph **8** of the Affidavit in support of the application, he stated that he filed the present appeal in his own capacity and not as a representative of his deceased father's estate.

**Issues for Determination.**

**64.** Both the Appellants/Applicants and the Respondents filed submissions on 26<sup>th</sup> January, 2026.

**65.** The Appellants/Applicants submit that the dispute before the trial Court was with regard to the ownership of land parcel No's **Kericho/Kyogong/1531** and **1478** that the Respondents alleged to have acquired upon amalgamation and subdivision of land parcel No's **Kericho/Kyogong/1009** and **1036**.

**66.** The Appellants/Applicants then reiterate the 3<sup>rd</sup> Appellant/Applicant's averments in the affidavit in support of the application.

67. The Appellants/Applicants also reiterate that they made attempts to access registry records and to summon the Land Registrar through a Notice to produce dated 20<sup>th</sup> September, 2018 and an application dated 20<sup>th</sup> January, 2021.
68. The Appellants/Applicants further reiterate that these attempts were unsuccessful and the trial Court proceeded to hear and determine the suit without compelling the production of the relevant documents.
69. The Appellants/Applicants rely on **Section 78(1)** of the **Civil Procedure Act**, the judicial decisions of **Wanje vs Saikwa (No.2) [1984] KLR 284**, **Abdul Hamid Ebrahim Ahmed vs Municipal Council of Mombasa [2004] eKLR**, **Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamed & 3 Others [2018] eKLR** and reiterate that the evidence they seek to introduce is official, it emanates from

statutory investigative agencies and directly challenges the legality of the Respondents titles.

**70.** The Appellants/Applicants rely on **Section 26** of the Land Registration Act, the judicial decisions of **Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 Others [2015] eKLR, Munyu Maina vs Hiram Gathiha Maina [2013] eKLR** and submit that the criminal charges against the Land Registrar coupled with the findings of irregular registry processes raise serious questions that cannot be ignored at this Appellate stage.

**71.** It is the Appellants/Applicants submissions that while criminal proceedings do not automatically determine civil liability, Courts have consistently held that criminal findings that touch on the same subject matter are relevant.

**72.** The Appellants/Applicants rely on the judicial decision of **Kuria Kiarie & 2 Others vs Sammy Magera [2018]eKLR**

and submit that the criminal case relates to the suit parcels of land.

- 73.** It is the Appellants/Applicants submissions that if the appeal proceeds to judgement without the interrogation of the said findings, it will be akin to closing one's eyes to the material truth.
- 74.** The Appellants/Applicants rely on **Articles 40, 60 and 159** of the Constitution, the judicial decision of **Republic vs Land Registrar, Uasin Gishu & another Ex parte Kiplagat [2016] eKLR** and submit that public confidence in the judicial process will be undermined if an Appellate Court validates criminally impugned titles.
- 75.** The Appellants/Applicants rely on **Global Tours & Travels Ltd HC Winding up Cause No. 43 of 2000** and submit that the Court should stay the delivery of judgement.

- 76.** It is the Appellants/Applicants submissions that if judgement is delivered as scheduled, it will be based on an incomplete record thereby perpetuating an illegality.
- 77.** The Appellants/Applicants rely on the judicial decision of **Kipkemoi Arap Ngeny vs Justice Moijo Ole Keiwua [1997] eKLR** and submit that the most appropriate course is for the suit to be remanded to the trial Court in order to allow a structured inquiry that entails summoning of registry officials and production of original parcel files.
- 78.** The Appellants/Applicants also submit that should this Court deem it expedient, it retains the jurisdiction to directly admit and evaluate the additional evidence.
- 79.** The Appellants/Applicants further submit that they will be prejudiced if the Court does not consider the new evidence as they risk permanent loss of their ancestral land.

**80.** It is the Appellants/Applicants submissions that the Respondents will not suffer any prejudice if the additional evidence is admitted as they will have an opportunity to respond to it.

**81.** The Appellants/Applicants conclude their submissions by urging the Court to allow their application as prayed.

**82.** The Respondents submit on the following issues;

**a. *Whether the application herein is fatally defective.***

**b. *Whether the application herein has merit.***

**c. *Whether the Applicants have locus standi to bring this application.***

**d. *Whether the Applicants are deserving of the orders sought.***

**e. *Who should bear costs of this application.***

**83.** On the first issue, the Respondents rely on **Section 5** of the Oaths and Statutory Declarations Act, the judicial decision of

**Mary Gathoni and another versus Frida Ariri Otolo & another [2020] KEHC 8391 (KLR)** and submit that the 3<sup>rd</sup> Appellant/Applicant who swore the affidavit in support of the application was cross examined.

- 84.** The Respondents also submit that he admitted upon cross examination that he has been abroad since January, 2025.
- 85.** The Respondents also submit that the affidavit in support of the application was sworn in Nairobi before an advocate whose stamp bears an Eldoret address.
- 86.** The Respondents further submit that it is evident that the 3<sup>rd</sup> Appellant/Applicant was not in Kenya for the better part of the year 2025 including the date the affidavit in support of the application was sworn.

- 87.** It is the Respondents submissions that the said affidavit therefore has an incurable defect which affects the veracity and probative value of the averments made therein.
- 88.** It is also the Respondents submissions that the said affidavit should therefore be struck out.
- 89.** On the second issue, the Respondents submit that the 3<sup>rd</sup> Appellant/Applicant admits that the criminal proceedings in Kericho CM Criminal Case No. E751 of 2025 have not been concluded and therefore the charges made therein remain to be mere allegations which have most importantly, not been set against them (Respondents).
- 90.** It is the Respondents submissions that the mere existence of the said suit does not form the basis for grant of the orders sought and the Appellants/Applicants application therefore falls short of the required threshold.

- 91.** The Respondents rely on the judicial decision of **Muthuri and another T/A Karibu Drapers versus Kimathi and 3 Others [2025] KEELC 5088 (KLR)** in support of their submissions.
- 92.** On the third issue, the Respondents submit that the Appellants/Applicants are in their application referring to criminal charges that have been preferred against **Jotham Ngeno** on allegations of fraud together with one **Kipkirui A. Chumo** who is now deceased.
- 93.** The Respondents also submit that the said Land Registrar and **Kipkirui A. Chumo** (deceased) are not parties to the present proceedings.
- 94.** The Respondents further submit that the Appellants/Applicants are seeking to rely on matters affecting the interests of **Kipkurui A. Chumo** (deceased)

without getting a Limited Grant of Letters of Administration Ad Litem.

- 95.** It is the Respondents submissions that the Appellants/Applicants are seeking reliefs under the application under consideration while relying on derivative claims that are anchored on the direct interests of persons not parties to the present proceedings. They submit that this is not legally tenable.
- 96.** It is also the Respondents submissions that Courts must confine themselves to disputes between the parties before it and should not base its decisions on matters involving persons who are not parties to the proceedings.
- 97.** The Respondents rely on the judicial decision of **Mwangi & 2 Others versus Karanja [2024] KEELC 5314 (KLR)** in support of their submissions.

**98.** On the fourth issue, the Respondents reiterate their averments in the Replying Affidavit and submit that Counsel for the Appellants/Applicants have on many occasions stated that the present appeal has been withdrawn.

**99.** The Respondents rely on the judicial decision of **In Re Estate of SLA (Baby) [2022] eKLR** and submit that the Appellants/Applicants are underserving of the prayers sought as there is uncontroverted evidence of their conduct and the conduct of their counsel.

**100.** The Respondents conclude their submissions by urging the Court to dismiss the Appellants/Applicants application with costs.

**Analysis and Determination.**

**101.** I have considered the Appellants/Applicants application, the response thereto and the rival submissions. It is my view that the following issues arise for determination;

- a. Whether the affidavit in support of the application dated 15<sup>th</sup> September, 2025 is defective.**
- b. Whether this Appeal should be remitted to the trial Court for purposes of taking further evidence.**
- c. Whether in the alternative, this Court should grant leave to the Appellants/Applicants to adduce additional evidence.**
- d. Who should bear costs of this application.**

**A. Whether the affidavit in support of the application dated 15<sup>th</sup> September, 2025 is defective.**

**102.** The Respondents submit that the 3<sup>rd</sup> Appellant/Applicant swore the affidavit in support of the application.

**103.** The Respondents also submit the affidavit in support of the application is sworn in Nairobi before an Advocate whose stamp bears an Eldoret address.

**104.**The Respondents further submit that upon cross-examination, the 3<sup>rd</sup> Appellant/Applicant admitted that he was not in the Country when the said affidavit was sworn.

**105.**It is the Respondents submissions that the said affidavit is incurably defective and it should therefore be struck out.

**106.**The Appellants/Applicants did not submit on this issue.

**107. Sections 5 and 8** of the Oaths and Statutory Declarations Act provides as follows;

***“5. Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made...”***

***8. A magistrate or commissioner for oaths may take the declaration of any person***

***voluntarily making and subscribing it before him in the form in the Schedule.”***

**108.**In the judicial decision of **In re Estate of Richard Kanampiu Nanchu (Deceased)**

**[2025] KEHC 16491 (KLR)** the Court held as follows;

***“22. In the present case, the record shows that the Applicant deposed to living in the United Kingdom yet the affidavit purports to have been sworn at Murang’a and commissioned in Chuka. No explanation was offered as to how he appeared before the Commissioner for Oaths while residing abroad. This inconsistency strikes at the integrity and authenticity of the affidavit. Section 5 mandates that the Commissioner states truly the place and date of swearing. The discrepancy raises serious questions about the authenticity of the jurat.***

**23.The affidavit does not demonstrate that the deponent personally appeared before the Commissioner. Personal appearance is fundamental to ensure verification and accountability. The Applicant's argument that technological advancements permit electronic commissioning is valid. However, the same must comply with Section 106B of the Evidence Act Cap 80 which requires a certificate of authenticity. No such certificate has been produced.**

**24.I am also persuaded by the finding in *Elena Darnadelli & 6 Others v Pasquale Tilito* KEELC 392 KLR as cited to me by the Respondent where *Mwangi Njoroge J* held as follows: -**

***“In the instant digital era many things could be done virtually. Even the requirement of Court attendance could be fulfilled virtually. However, the***

**contents of an affidavit were statements under oath which may lead to the offence of perjury if care was not taken; it was not surprising that affidavits were usually required to be commissioned when a deponent was present and was satisfied that the contents were correct. The commissioner too needed know if the deponent understood what he was swearing to. In legal practice as in other sectors, shortcuts may have been adopted to make work easier, but that did not give them the stamp of propriety. In respect of swearing of affidavits certain fundamental issues sprung from the commissioning of an affidavit whose deponent did not appear before the commissioner for oaths.**

***a. The deponent may not have confirmed to the commissioner that he approved of and owned up to all the statements made in the document. If at any point after the purported commissioning the deponents who never appeared before commissioners ever disputed the veracity of the statements in affidavits filed in legal proceedings or the signatures thereon and the Court upheld their objections thereto, there may be a lot of backpedalling that may occasion, contrary to public policy, the deleterious effect of bloating the backlog of cases before Court.***

**b. In view of the provisions of section 5 of the Oaths and Statutory Declarations Act, the commissioner in affixing his stamp in the absence of a deponent while stating at the place and on what date the oath or affidavit was taken or made would be in effect uttering a falsehood.”**

**25.I have given due consideration to the provisions of Article 159(2) (d) of the Constitution. However, it is to be remembered that statutory and procedural law create a level playing field for parties before the Court who must adhere to mandatory statutory requirements.**

**26. In the premise, I find that the supporting affidavit of Graham Mugendi Kithae is invalid and is struck out. With**

**the supporting affidavit being struck out, the Application dated 9th July 2025 lacks evidentiary support and has no legs to stand on.** (Emphasis mine)

**109.** In the above cited judicial decision, the Applicant therein deposed that he lived in the United Kingdom but filed an affidavit sworn at Murang'a and commissioned in Chuka.

**110.** The Court held that personal appearance before a Commissioner for Oaths is fundamental to ensure verification and accountability and observed that no explanation was given as to how the said Applicant appeared before the Commissioner of Oaths and yet he resided abroad.

**111.** The mischief intended to be cured by demanding personal appearance is that persons swearing affidavits cannot allege that they are strangers to the matters deposed. How could

they possibly do so and yet they appended their signature before Commissioners for Oaths?

**112.** The tragedy of taking objections as to the veracity of the matters deposed in an affidavit cannot be overemphasised and the Learned Judge in **Elena Darnadelli & 6 Others v Pasquale Tilito KEELC 392 KLR (Supra) as follows;**

*“... there may be a lot of backpedalling that may occasion, contrary to public policy, the deleterious effect of bloating the backlog of cases before Court.”*

**113.** A perusal of the Court record shows that **Benard Ngeno** swore the affidavit in support of the application on 15<sup>th</sup> September, 2025.

**114.** A further perusal of the Court record shows that the said **Benard Ngeno** was cross-examined virtually on 9<sup>th</sup> December, 2025 and upon cross examination, he admitted

that on 15<sup>th</sup> September, 2025, he was not in Kenya and neither did he appear before an Advocate in Kenya for purposes of commissioning the affidavit in support of the application.

**115.**As was held in the above cited judicial decision, personal appearance of a deponent before a Commissioner for Oaths is mandatory and failure to do so is fatal.

**116.**In the present case, since the 3<sup>rd</sup> Appellant/Applicant expressly admits to have been out of the Country on 15<sup>th</sup> September, 2025 and given that there is no explanation as to how he could have appeared before the commissioner in Nairobi while at the same time and by his own admission was out of the country, I find that the affidavit in support of the application is defective.

**117.**In **Dardanelli & 6 others v Tilito & 3 others** [2025] KEELC 392 (KLR) the Court while dealing with a similar application held as follows;

***“The consequence is that I therefore strike out the supporting affidavit of Pasquale Tiritto dated May 23, 2024. As the application, also dated May 23, 2024, cannot stand without any supporting affidavit, the same is hereby struck out with costs.”***

**118.**In view of the foregoing, the affidavit in support of the application dated 15<sup>th</sup> September, 2025 and the application dated 15<sup>th</sup> September, 2025 are hereby struck out.

**B. Whether this Appeal should be remitted to the trial Court for purposes of taking further evidence.**

**119.**Given my finding on issue (a) above, I am unable to address this issue on its merits.

**C. Whether in the alternative, this Court should grant leave to the Appellants/Applicants to adduce additional evidence.**

**120.** Also, given my finding on issue (a) above, I am unable to address this issue on its merits.

**D. Who should bear costs of this application.**

**121.** The general rule is that costs shall follow the event. This is in accordance with the Provisions of **Section 27** of the **Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

**Disposition**

**122.** Taking the foregoing into consideration, the Appellants/Applicants Notice of Motion Application dated 15<sup>th</sup> September, 2025 is hereby struck out with costs.

**123.** It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO  
THIS 30<sup>TH</sup> DAY OF APRIL, 2026.**

**999**

**L. A. OMOLLO  
JUDGE.**

**In the presence of: -  
Parties - Absent**

**Court Assistant; Mr. Joseph Makori.**