



**Karani & another v Titus Thuku Mbugua, Patrick Muhoro Mumbura and Philip Njau Wainaina  
(Suing as the Officials of Kioneki Investments Self Help Group) & 3 others (Environment  
and Land Appeal 99 of 2022) [2024] KEELC 365 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 365 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 99 OF 2022  
BM EBOSO, J  
JANUARY 30, 2024**

**BETWEEN**

**JOHN CHEGE KARANI ..... 1<sup>ST</sup> APPELLANT**

**JOHN MWANGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**TITUS THUKU MBUGUA, PATRICK MUHORO MUMBURA AND PHILIP  
NJAU WAINAINA (SUING AS THE OFFICIALS OF KIONEKI INVESTMENTS  
SELF HELP GROUP) ..... 1<sup>ST</sup> RESPONDENT**

**NYAKINYUA INVESTMENTS , SELF HELP GROUP ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. What falls for determination in this ruling is the 1st respondent's notice of motion dated 13/6/2023, through which the 1st respondent seeks the following orders: (i) that the Director of Criminal Investigations be directed to examine the sale agreements dated 9/7/2004 and 23/7/2004 purportedly signed by Mr Muhia Mutura and file a report in court; (ii) that the Honourable Court be pleased to admit the report prepared by the Director of Criminal Investigations as additional evidence in the appeal; and (iii) that the Honourable Court be pleased to make any other orders in the interest of justice. The application is supported by the affidavits of Patrick Muhoro Mumbura and Peter Henry K. Muhia, both sworn on 13/6/2023 and a further affidavit sworn by Patrick Muhoro Mumbura on 14/9/2023.



2. The 1st respondent's case is that they purchased land parcel number Ruiru/Ruiru East Block 2 (Nyakinyua) 2646 (hereinafter referred to as "the suit property") through a sale agreement dated 23/7/2004, which was signed by one Muhia Mutura (deceased) and ratified by one Regina Muhia. They add that the signatures appearing on the sale agreement dated 9/7/2004 through which the 2nd appellant alleged to have bought the suit property differ from the signatures on the agreement dated 23/7/2004. They argue that the signatures contained in the two agreements could not have been signed by the same person. They contend that the 2nd appellant forged the signature in the agreement dated 9/7/2004, purporting the signature to be that of Muhia Mutura. They further contend that it is against public policy and morality for a person to forge a document and attempt to use it to acquire property. They add that the Court has the discretion to allow the taking of additional evidence at the appeal stage. They argue that no party shall be prejudiced if this application is allowed.
3. The appellants oppose the application through a replying affidavit sworn on 25/7/2023 by John Chege Karani. They contend that the 1st respondent have not met the relevant criteria to warrant grant of the orders sought. They add that the 1st respondent seek to introduce evidence that could have been obtained during trial. They further contend that the investigations sought by the 1st respondent will result in an unnecessary delay of the appeal which will amount to denial of justice to the appellants.
4. The application was canvassed through written submissions dated 23/9/2023. I have considered the application, the response to the application, and the 1st respondent's submissions. I have also considered the relevant legal frameworks and jurisprudence. The single question to be answered in this ruling is whether the application satisfies the criteria upon which an appellate court exercises jurisdiction to admit fresh or additional evidence in an appeal. I will be brief in my analysis and determination.
5. The power to take additional evidence on appeal is founded on Section 78 of the [Civil Procedure Act](#) which states that;
  - (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power: -
    - a) To determine a case finally;
    - b) To remand a case;
    - c) To frame issues and refer them for trial;
    - d) To take additional evidence or to require the evidence to be taken;
    - e) To Order a new trial.
  - (2) Subject as aforesaid, the appellate Court shall have the same Powers and shall perform as nearly as may be the same duties as are charged conferred and imposed by this Act on Courts of Original Jurisdiction in respect of suits instituted therein.
6. The Supreme Court of Kenya laid down the following principles in [Mohamed Abdi Mobamud v Ahmed Abdullahi Mohamed & 3 others](#) [2018] eKLR which guide our appellate courts when exercising jurisdiction to admit fresh evidence:

“We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

  - a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;



- b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
  - c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
  - d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
  - e. the evidence must be credible in the sense that it is capable of belief;
  - f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
  - g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
  - h. where the additional evidence discloses a strong prima facie case of willful deception of the Court;
  - i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
  - j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
  - k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”
7. What is before this court is an appeal. Put differently, this court’s jurisdiction in this matter is that of an appellate court, not a trial court. Secondly, it does emerge from the materials placed before the court that the additional evidence which the applicants are inviting the court to admit in this appeal does not exist. The applicants want the court to issue an order directing the Director of Criminal Investigations to carry out a forensic examination of some two agreements to establish the authorship of the signatures that are on the two agreements. In other words, the applicants want this appellate court to assist them discover evidence which they would then produce to bolster their case.
8. Clearly, the applicants are inviting this appellate court to step out of the seat of a neutral appellate arbiter and assume the partisan role of procuring evidence favourable to one party to the appeal. That, regrettably, is not the role of an appellate court, moreso in the absence of consensus by the parties.
9. Secondly, the applicants had the opportunity to cause the two agreements to be subjected to forensic examination prior to commencement of trial in the lower court. They elected not to pursue that recourse. They have not tendered a plausible explanation for their decision not to pursue that avenue prior to commencement of trial yet the claim before the trial court was anchored on fraud.



10. The totality of the foregoing is that, the applicants have not met the criteria upon which an appellate court exercises jurisdiction to admit additional evidence in an appeal. Consequently, the application dated 13/6/2023 is rejected for lack of merit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 30TH DAY OF JANUARY 2024**

**B M EBOSO**

**JUDGE**

**In the presence of:**

Ms. Githui for the Appellants

Mr. Kamwaro for the 1st Respondent

Court Assistant: Osodo

