



REPUBLIC OF KENYA



**Njoguri v Gachegu (Civil Appeal 041 of 2021)  
[2023] KEHC 2053 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2053 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL 041 OF 2021  
LN MUGAMBI, J  
MARCH 16, 2023**

**BETWEEN**

**JOHNSON MS NJOGURI ..... APPELLANT**

**AND**

**SAMUEL MAKINDU GACHEGU ..... RESPONDENT**

*(Being an appeal from the Judgement of the Honourable M.N Gacheru,  
Chief Magistrate in Succession Cause No. 221 of 2017(formerly High Court  
Succession Cause No. 92 of 2001) delivered on the 3rd of December, 2018)*

**JUDGMENT**

1. The Appellant initiated this appeal after being dissatisfied with the ruling by Honourable MN Gacheru, Chief Magistrate in Succession Cause No 221 of 2017 delivered on the 3<sup>rd</sup> of December, 2018.

**Summary pleadings**

2. The Appellant approached the trial Court vide Summons dated December 7, 2006 seeking revocation and/or annulment of the grant issued in the estate of Gichobi Makindu. The Appellant listed a single ground for revocation, being: that the administrator of the said estate, Samuel Makindu Gachegu, the Respondent herein had left out some of the beneficiaries of the deceased namely: Johnson MS Njoguri (son), Rael Mutitu(wife) and other children or the deceased who were supposed to inherit the Land Parcel number Ngandori/Ngovio/379.
3. The affidavit in support of the summons for revocation was deposed by the Appellant.
4. The Respondent filed his replying affidavit to the summons dated June 16, 2007. He deposed that he is the administrator of the estate of his late uncle, Gichobi Makindu but denied the allegations that he was appointed as an administrator through misrepresentation or fraud.



5. He deposed further that he was appointed and declared the sole trustee and beneficiary of the deceased's estate by the Court by virtue of the deceased's will in which he appointed the Respondent as his sole executor, trustee and beneficiary of all his movable and immovable properties, the latter which consists of ½ a share of land parcel number Ngandori/Ngovio/379. That the deceased's Will did not include any other member of his family as executors, trustees or beneficiaries and hence there was no need to involve anyone else in the succession proceedings.
6. The Respondent averred that vide a Misc application No 267 of 2004 the Appellant sought letters of administration to the deceased's estate to enable him prosecute Misc Application No 52 of 2003 for revocation of grant issued to the Respondent by the Court in Succession Cause No 92 of 2001 but the said application was dismissed by Justice I. Lenaola on the December 14, 2004.
7. On the July 2, 2017 the parties consented to have the application proceed by way of written statements, affidavits and documents. Parties were ordered to file the aforementioned documents together with written submissions. However, on the December 4, 2017 the parties consented to proceed by way of viva voce evidence.
8. The hearing of the application proceeded on the March 5, 2018 with the Applicant testifying as PW1 and the only witness for the Petitioner in the said case. The Respondent's witness was one Mr Kathungu who's witness statement was admitted as evidence without calling the maker vide a ruling of the trial court on the September 27, 2018.
9. The Court delivered its judgement on the 3<sup>rd</sup> of December, 2018 and held that:

“...I find that the Will left behind by Gichovi Makindu is valid because it has his signature which has been proved to be genuine by an expert and secondly the said will is witnessed by two people. In short, it complies with section 11 of the *Law of Succession Act*.

For the above reasons, I find that the summons dated December 7, 2006 has not been proved. I dismiss it with costs to the respondent.”

### **The Appeal**

10. Being dissatisfied with the decision of the trial Court, the Appellant lodged the Memorandum of Appeal dated October 19, 2021 and filed on the October 25, 2021 listing the grounds of appeal as:
  - a. That the Honourable Magistrate erred in law and in fact in finding that the Applicant together with the Applicant's mother Rael Mutitu Sare are not dependents of Gichovi Makindu;
  - b. That the Learned Magistrate by holding the above view erred in law by determining issues that were not before the Honourable Court to determine;
  - c. That the Honourable Magistrate erred in law and in fact by finding that Gichovi Makindu owned half of the suit property;
  - d. That the Honourable Magistrate erred in law and in fact by finding that the Will left behind by Gichovi Makindu was valid;
  - e. That the judgement was against the weight of the evidence and the applicable law.



11. On the July 7, 2022, the appeal was admitted for hearing. The Record of appeal was filed on the October 25, 2021 but the Court ordered that the same be amended in order to include information that had been omitted. The amended Record of Appeal was filed on the September 16, 2022. On the October 24, 2022 the Court certified the appeal ready for hearing and ordered that the same be canvassed by way of written submissions.

### **Appellant's submissions**

12. The Appellant filed his submissions on the August 19, 2022. The Appellant reiterated the grounds in his memorandum of appeal and gave a brief background of the case before the court. He stated that the Respondent and him are biological brothers from the same father and mother, their mother being Rael Mutitu Samuel and their father being Samuel Njogure Makindu who died in the year, 2004. That the deceased in the present case, Gichovi Makindu was the step brother to their late father Samuel Njoroge Makindu. The Appellant submitted that the suit was in respect of the estate of deceased comprising land parcel number Ngandori/Ngovio/378 measuring 8 acres which was given to the late Samuel Njogure Makindu by his father, (the parties' grandfather) in the year 1961. Indeed, the Appellant contended that Samuel Njoguri Makindu purchased the said land parcel from his father whom he paid Kshs 4,400/- which the father had asked for in order to allow him to keep the land.
13. That he subsequently developed the land in 1962 and moved his family there.
14. The Appellant alleges that on the October 18, 1962; out of love and noting that his step-brother was an only child with no dependants, the late Samuel Njogure Makindu gave half of the property to his step brother, the late Gichovi Makindu and had his name included in the title deed.
15. The Appellant, cited the case of *China Zhongxing Construction Company Ltd v Ann Akuru Sophia* [2020] eKLR and the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* EA 123 and urged that as an appellate court, this court should subject the entire evidence to a fresh and exhaustive scrutiny and make its own conclusion by finding that the appeal is merited and allowing the same. The Appellant submitted on the three issues for determination in this appeal:
  - a) The Honourable Magistrate erred in law and in fact in finding that the will left behind by Gichovi Makindu was valid;
  - b) Whether the Honourable Magistrate erred in law and in fact by finding that the Applicant together with the Applicant's mother Rael Mutitu Sare are not dependents of Gichovi Makindu; and
  - c) Whether the Honourable Magistrate erred in law and in fact by finding that Gichovi Makindu owned half of the suit property.
16. On the first issue, the Appellant contested the will allegedly made by the late Gichovi Makindu and asserted that the same is fraudulent as the signature is not that of the deceased. He submitted that the will is also invalid because it failed to particularise what property the deceased was distributing. He relied on section 7 of the *Law of Succession Act* (Cap 160) Laws of Kenya. The Appellant attacked the expert opinion on the signatures stating that the said opinion was not cast in stone and urged this Court to disregard it after considering all the circumstances of the case and the evidence. He relied on the case of *In Re Estate of Pradeep Behal (deceased)* [2019] eKLR where Justice W Musyoka cited



the case of *Christopher Ndaru Kagioma v Esther Mbandi Kagina & another* [2016] eKLR where the Court held that:

“...While the test for admissibility of expert evidence from jurisdiction to jurisdiction, judges in all jurisdictions face the common responsibility of weighing expert evidence and determining its probative value. This is no easy task. Expert opinions are admissible to furnish courts with information which is likely to be outside their knowledge and experience...To my mind, the weight to be given to expert evidence will derive from how the evidence is assessed in the context of all other evidence and the circumstances of the case including the real likelihood of expert witness having been compromised or the real possibility of such witnesses using their expertise to mislead the court by placing undue advantage to the party in whose favour they offer the evidence.... ”

17. He submitted that the Honourable Magistrate failed to consider the entire evidence supplied to the Court and failed to exercise discretion in assessing the expert opinion but simply rubber stamped the same by holding that the signature on the will was the deceased's signature.
18. The Appellant further submitted that the alleged will did not particularise the suit property which he submitted contravened section 53(a) of the *Law of Succession Act*. That the said section provides that a grant should be given in respect of all property to which such will applies. The Appellant contends that it is absurd that the Deceased was embroiled in a legal battle over the property for years and could thus make a general will as if he was unaware of the property that belonged to him.
19. On the second issue, the Appellant submitted that the will was invalid for failure to particularise the property that the testator owned hence any property he may have by virtue of section 34 devolved in intestacy as section 34 states:  

‘A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect’.
20. That this would bring in section 39 which stipulates how the property of an intestate should devolve and since the deceased had no family, as both his mother and father were dead, the only family he had was his late half-brother Samuel Njoguri Makindu and since he predeceased his half-brother who survived him but who also subsequently passed on, then the property devolves to the wife and children of the late Samuel Njoguri Makindu.
21. That the Respondent cannot purport to solely own any property that the deceased may have left, but the same ought to be shared by all his beneficiaries. That instead of the whole suit-land being divided into half, it ought to have been divided and distributed among all the children and widow to the late Samuel Njoguri Makindu.
22. That the deceased had not legally adopted the Respondent for him to say that any property that belonged to the deceased solely belongs to him.
23. On the final issue, the Appellant submitted that he had elaborated how the deceased came to be in possession of the said suit property and contends that the deceased was holding the said property in trust for the Appellant and his dependants. He urged this Court to consider the averments in the case of *NWK v JKM & Another* [2013] eKLR where Justice P Nyamweya cited the case of *Hussey v Palmer* (1972) 3 All ER 744, and defined a constructive trust as one that is imposed by law whenever justice and good conscience require it.
24. The Appellant contends that since the deceased did not give any consideration for the suit property the same should have been construed as a trust. He stated that this case required the Learned Magistrate to



thoroughly engage the facts and the law in weighing the weight of the evidence on both sides. That the Magistrate was required to presume facts which ought to have been presumed as existing in the natural course of human interaction as provided under section 119 of the *Evidence Act*. That the presumption is that the deceased had no family and was a bachelor and had never married. The late Samuel Njoguri Makindu knew and further intended that the property revert to him upon the demise of the deceased. That with this fact in mind, the deceased cannot be said to have owned the property in absolute capacity and hence cannot purport to distribute the same.

25. The Appellant concluded by urging this Court to allow the appeal and the judgement delivered on the December 3, 2018 in succession Cause No 221 of 2017 be set aside and the Confirmation of grant probate made on the July 10, 2002 and confirmed on the April 1, 2003 be revoked with costs to the Appellant.

### **The respondent's submissions**

26. The Respondent filed his submissions on December 22, 2022 and admitted that he and the Appellant are blood brothers.
27. Nevertheless, he refuted the background narrated by the Appellant in his submissions in certain key aspects of the matter before the court.
28. He denied the avouchment that it was their father who gave the deceased the said property. He instead stated that on the contrary, the correct position which was borne by evidence is that Gichovi Makindu and his step-brother Samuel Njoguri Makindu contributed equally towards the purchase price of parcel number Ngandori/Ngovio/379, bought the same and were registered as proprietors in common for undivided  $\frac{1}{2}$  share each which fact was acknowledged in the Respondent's witness statement he had filed and adopted in the suit as well as the replying affidavit sworn on June 16, 2007.
29. The Respondent thus refuted that the land was given to the deceased out of love.
30. That sensing the step-brother wanted to deprive him, the deceased filed a suit in relation to the property, that is Embu SRMCC No 325 of 1989 and the Court ordered that his half-brother, Samuel Njoguri Makindu transfer  $\frac{1}{2}$  of the land to Gichovi. That Samuel's attempts to appeal the ruling were unsuccessful.
31. The Respondent contends further that their father, Samuel purported to make a will bequeathing the entire suit parcel to his children instead of the  $\frac{1}{2}$  share he was entitled to but the Court held that the said will was null and void as the Testator was only entitled to  $\frac{1}{2}$  a share of the said property.
32. The Respondent submitted that he lived with the deceased during his lifetime, helping him in all ways including the running errands for him which bonded their relationship and the deceased developed love and passion for him.
33. That it was only after his death that the Respondent discovered that the deceased had left behind a will dated 23<sup>rd</sup> September, 1993 in which he had named the Respondent as the executor and trustee and bequeathed him all his movable and immovable properties which included land parcel number Ngandori/Ngovio/379.
34. That the Respondent instituted succession proceedings in the estate of the deceased in Embu High Court Succession Cause No 92 of 2001 and was granted the probate of the deceased will as well as  $\frac{1}{2}$  a share of the land parcel number Ngandori/Ngovio/379.



35. That his father, Samuel sought the annulment of the said grant of probate and a reversal of the declaration that the Respondent was entitled to a share of his late uncle's share of the suit land but Samuel died before the application could be heard hence this present application.
36. The respondent submitted that the Appellants have ignored the fact that his petition had nothing to do with his share in his father's estate and that to that extent, the application is misconceived. That the statement by Mr Kathungu advocate confirmed indeed that the Respondent had been named as executor, trustee and sole beneficiary of all the immovable and movable properties of the deceased. That the Appellant's contention that the signature on the will was forged was countered by the handwriting expert Mr Daniel M Gutu who testified that he examined the deceased's signature on the will against his undisputed signature and he made the conclusion that the said signature was his.
37. The Respondent submitted further that there was overwhelming evidence before the Learned Chief Magistrate to prove that the deceased Gichovi Makindu was the registered proprietor of half ½ a share of parcel number Ngandori/Ngovio/379 and that he had bequeathed the same to the Respondent through a valid will and that he was properly declared Trustee and Executor of the deceased's will and was also the sole beneficiary. The Respondent summarised his submissions into three issues:
- a. Did the deceased Gichovi Makindu own ½ a share in land parcel number Ngandori/Ngovio/379?
  - b. Did the deceased leave a valid will and if so, who was/were the beneficiary/beneficiaries of the Will?
  - c. Did the Learned Chief Magistrate determine issues that were not before him for determination?
38. The Respondent contends that from the evidence tendered, the first issue was answered in the affirmative and so was the second issue, with the second limb thereof being that the Respondent was the sole beneficiary of the deceased's Will. That the Learned Magistrate did not entertain any issue that was not raised by the parties for his determination. On the issue of the will being general, the Respondent rebutted that in his opinion the Will was specific that it bequeathed the deceased' movable and immovable properties to the Respondent and this included the land parcel number Ngandori/ Ngovio/379.
39. The Respondent concluded by submitting that the appeal lacks merit, in law and in fact.

### **Determination**

40. From the pleadings and submissions, the following issues arise for determination:
- a. Whether a ½ share of land parcel number Ngandori/Ngovio/379 forms part of the estate of Gichovi Makindu (deceased)
  - b. Whether Gichovi Makindu deceased was holding the land parcel number Ngandori/ Ngovio/379 in trust for the beneficiaries of the late Samuel Njoguri Makindu;
  - c. Whether the will of Gichovi Makindu dated September 23, 1993 is valid;
  - d. Whether the appeal is merited; and
  - e. Who pays for the costs of the appeal?



41. It is trite law that a testator can only bequeath what belongs to him. This therefore becomes the first issue, whether half share of land parcel Ngandori/Ngovio/379 formed part of Gichovi Makindu's estate. Both parties have given their version of how the suit property came to belong to the deceased, Samuel Gichovi Makindu. The parties have totally different versions of the said parcel of land with the appellant even alleging that the said deceased was holding the parcel of land in trust for their father, one Samuel Njogure Makindu who died in 2004. The Respondent has however stated that the issue of ownership of the said parcel was heard and determined in the case of Embu SRM No 325 of 1989. He attached a copy of the said judgement to his submissions. A look at the judgement confirms indeed that a dispute arose between Samuel Gichovi Makindu and Samuel Njogure Makindu with the former claiming that suit parcel number Ngandori/Ngovio/379 belonged to both of them. The Court heard their respective cases and decided in Gichovi's favour awarding him ½ a share of the land parcel number Ngandori/Ngovio/379 and ordered Samuel Njogure to transfer the said share to Gichovi.
42. That Samuel Njogure later appealed the said judgement at the High Court in Nyeri being Civil Appeal Number 26 of 1993 but the said appeal was withdrawn on the 25<sup>th</sup> of January, 1997. Mr Njogure attempted to revive the appeal vide an application dated 21<sup>st</sup> March, 1998 citing that the consent withdrawing the appeal had been arrived at due to fraud, mistake and misrepresentation. Justice JW Mwera (as he then was) disagreed with the said averions and stated that there was nothing on record to show that the judgement was not validly recorded and dismissed the said application.
43. The withdrawal of the appeal and the subsequent dismissal of the application meant that the judgement in Embu SRM No 325 of 1989 still stands that the deceased, Gichovi Makindu, was entitled to ½ a share of land parcel number Ngandori/Ngovio/379.
44. On whether the deceased, Gichovi Makindu was holding the land in trust for Samuel Njogure Makindu and his beneficiaries, the said matter in this Court's opinion is *res judicata*. This is because the issue of ownership was conclusively determined in Embu SRM's Case No 325 of 1989. This Court cannot reopen a matter that was already dealt with years back and a judgement entered by a court of competent jurisdiction, which judgement has never been overturned. That judgment settled the issue of ownership for it was not set aside on appeal or reviewed.
45. The next issue is the validity of the deceased's will. Having established that the suit parcel formed part of the deceased's estate the remaining issue is the validity of his will dated 23<sup>rd</sup> September, 1993 in which the Respondent was named as his Trustee, Executor and sole beneficiary of all his movable and immovable assets. The Appellant alleged that the said will is a forgery and as such should be declared null and void by this Court.
46. While handling this issue in its judgement, the trial Court found the will to be valid because the document examiner confirmed that the signature thereon was genuine and secondly the will was witnessed by two people and it thus complied with section 11 of the *Law of Succession Act*.
47. The Appellant has contested the signature on the will and the fact that the deceased failed to specify his movable and immovable assets that he was bequeathing in the will.
48. During the trial the Appellant and his mother Rael produced their witness statements as evidence and the Appellant gave *viva voce* evidence as well. The Appellant stated during cross-examination that his uncle was too sick to make a will and sign and that the signature on the will as well as those on the attached documents were a forgery. He contended that the deceased never had any children hence his late father's decision to will away the entire suit parcel.



49. The Rael Mutitu Samuel had a signed witness statement as well which statement was adopted as her evidence. In her statement she avers that the Respondent changed his name after his uncle's death and filed the present succession cause in order to defraud them of their lawful inheritance. She confirmed in her statement that the Respondent used to live with his uncle and he helped him.
50. The Respondent adopted his witness statements without testifying. In his statement, he confirmed his mother's averments that he used to live with the deceased and ran errands for him. He stated that he only discovered the will way after his uncle's death hence choosing to file Embu High Court Succession Cause No 92 of 2001 for the grant of probate of the deceased's estate to be issued to him since the will named him as the Executor and sole beneficiary. That he went through the entire succession process and after the grant was confirmed, he was registered as the proprietor of ½ a share of the suit parcel. On the allegations of forgery, the Respondent stated that he sought the services of a document examiner to dislodge the said allegations which according to him, he ably did.
51. Joe Kathungu was one of the Respondent's witnesses and his statement was adopted as well. In his statement he confirmed that he was an advocate of the High Court of Kenya and that the deceased had been his long-time client. He stated that the deceased instructed him to draw up the will in which he named the Respondent the executor, trustee and sole beneficiary of all his movable and immovable assets which included ½ a share of land parcel number Ngandori/Ngovio/379. He averred that the will was drawn in accordance with the law, with deceased signing and the same being witnessed.
52. The formal requirements of validity of a written will are stipulated in Section 11 of the [Law of Succession Act](#). It provides that:  
 'No written will shall be valid unless-
- a. The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
  - b. The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
  - c. The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.'
53. The Appellant has relied heavily on the allegation that the will was forged because his uncle was too sick or weak to draft or sign the will. [In re Estate of Samuel Ngugi Mbugua \(Deceased\)](#) [2017] eKLR, the court was of the view that:  
 'The allegation that the said signature was not that of the deceased amounts to a claim that the signature was forged or that fraud was exercised in the procurement of the alleged will. That is to say that someone other than the deceased had affixed that mark on the will with the intent of passing the same as the signature of the deceased. Forgery is a criminal offence. The applicant is in fact imputing criminal conduct on either the person propounding the will or those who were involved in the operation that is purported to have been its execution. The burden of proving forgery lies with the person alleging it.'



In Elizabeth Kamene Ndolo vs George Matata Ndolo Nairobi Court of Appeal civil appeal number 128 of 1995 it was stated that the charge of forgery or fraud is a serious one, and the standard of proof required of the allegor is higher than that required in ordinary civil cases.’

54. This shifted the burden of proof to the Appellant to prove the alleged forgery or fraud but from the record, the Appellant did not call any expert witness or any other witness to prove the said allegations, forcing the trial court to rely on the evidence to the Respondent’s document examiner. In his report, the document examiner confirmed that the signature on the will was consistent with that of the deceased after carefully looking at all the documents that had been availed to him that contained his signature. The report is dated August 15, 2016 and was compiled by one Daniel M. Gutu a forensic document examiner with the Directorate of Criminal Investigations.
55. The sole ground for seeking revocation by the Appellant was that the testator left out some beneficiaries in his will. He then named the said beneficiaries as Rael Mutitu Samuel and himself. However, the [Law of Succession Act](#) at section 5(1) gives testamentary freedom to a testator to dispose off his properties as he wishes. The Court in the case of [James Maina Anyanga v Lorna Yimbiba Ottaro & 4 others](#) [2014] eKLR held that:
- ‘Failure to make provision for a dependant by a deceased person in his will does not invalidate the will as the court is empowered under Section 26 of the [Law of Succession Act](#) to make reasonable provision for the dependant.’
56. The Court [In re Estate of Julius Mimano](#) (Deceased) [2019] eKLR also relied on the case of [James Maina Anyanga](#) (supra) to hold that:
- “It is true that the deceased had a freedom to dispose of his estate in a manner that was suitable to him. The freedom is the essence of testate succession, and the fact that the will did not provide for some beneficiaries does not, and cannot, invalidate the will....”
57. The Appellant and his witness both confirmed that the deceased had not married and that he had no children. Rael confirmed that the Respondent lived with deceased and helped him out with the errands. It therefore raises no doubt or ill motive as to why the deceased would appoint the Respondent as the Executor, Trustee and Sole beneficiary of the will and if any such motive existed, the Appellant has failed to ably prove it.
58. In view of the foregoing reasons, it is my unequivocal finding that the deceased’s written will dated September 23, 1993 is valid and irrevocable.
59. I have further examined the record of proceedings before the lower court and noticed a spirited attempt by the Appellant through his submissions to introduce a narrative that is different from the position he had taken before the lower court regarding the history of the land parcel Ngandori/Ngovio/379. In his signed statement dated August 29, 2017, which he adopted as his evidence before the lower court, Johnson MS Njoguri had stated thus:
- “On October 18, 1962, my grandfather the late Samuel Njogure Makindu gave half share to my uncle the late Gichobi Makindu out of love. He was a step-brother to my late father as they shared a father...Mr Gichovi was my father’s half brother and he had received half share of the suit land from our grand father as a gift out of love...”



60. The submission by his Advocate on record distort the above narration in what is presented as summary of facts as follows:

“...The suit property Land Parcel No Ngandori/Ngovio/378 measuring 8 acres was given to the late Samuel Njogure Makindu by his father (grandfather to the Respondent) in the year 1961. The late Samuel Njoguri Makindu proceeded to develop the suit property and in 1962, he moved his family there. Indeed Samuel Njoguri Makindu purchased the property from his father having paid Kshs 4,400 which the father asked for so that the late Makindu could keep the land.

In the same year, on October 18, 1962; the late Samuel Njoguri Makindu gave half of the suit property to the late Gichovi Makindu out of love, since he was a lone child and without any dependants; having been unmarried and without children. On October 17, 1962, the late Samuel Njoguri Makindu allowed his step-brother’s name, Makindu to be included in the title deed of the suit property...”

61. Clearly, the submissions relied on in so far as restating the facts are concerned are clearly misleading and contradict the Respondent written statement. I thus had to overlook this portion of submissions that I considered an embellishment that tried to recreate the facts through submissions.

62. In any case, during their lifetime, the two half-brothers had litigated on the said land and ownership dispute had been settled that each of them was entitled to the suit land in equal shares as of right, neither was adjudged a trustee of the other, that decision was not overturned.

63. The consequence of the above is that this Court finds that this appeal lacks merit and is hereby dismissed.

64. As far as costs are concerned, I do take into account that the Appellant and the Respondent are blood brothers hence I make the order that each party shall bear its own costs of this appeal.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 16<sup>TH</sup> DAY OF MARCH 2023.**

**L.N MUGAMBI**

**JUDGE**

**In presence of:**

Appellant- absent

Respondent- absent

Advocate for Appellant- absent

Advocate for Respondent- absent

Court Assistant- Brian

**Court**

This Judgement be transmitted digitally by the Deputy Registrar to the Advocates for the Parties on Record through their respective email addresses.

**L.N. MUGAMBI**

**JUDGE.**

