



REPUBLIC OF KENYA



In re Estate of Barasa Opicho Namuyu alias Barasa Opicho (Deceased) (Succession Appeal E001 of 2022) [2023] KEHC 17547 (KLR) (22 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17547 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION APPEAL E001 OF 2022**

DK KEMEL, J

MAY 22, 2023

**IN THE MATTER OF THE ESTATE OF THE LATE BARASA
OPICHO NAMUYU ALIAS BARASA OPICHO**

BETWEEN

FESTUS NYONGESA APPELLANT

AND

JOSEPH NANDEBE 1ST RESPONDENT

ALEX WASIKE 2ND RESPONDENT

FEDINAND WALIANDA 3RD RESPONDENT

*(Being an appeal against the judgement delivered by Hon C.A.S Mutai
(SPM) on 17th December 2021 in Bungoma CMCC No. 390 of 2019)*

JUDGMENT

1. This cause relates to the estate of Barasa Opicho Namuyu alias Barasa Opicho, who died intestate on the April 2, 1989. His estate comprised of LR No W Bukusu/E Siboti/28. A succession cause was initiated in respect of his estate, in Bungoma CMCCSC No 390 of 2019 and the respective letters of administration were issued and subsequently confirmed with the Respondent being granted the certificate of confirmation.
2. On September 28, 2020, a summons for revocation and/or annulment of grant dated September 25, 2020 was lodged at the Bungoma CMCC No 390 of 2019 by the Respondents premised on section 76 of the *Law of Succession Act* and Rule 44 of the *Probate and Administration Rules*. They sought the revocation of the grant of letters of administration issued to the Appellant and confirmed on March 10, 2020. They alleged that the proceedings which culminated in the grant were fatally defective in substance as they were conducted in contravention of applicable statutory provisions as they demand



- that the grant be confirmed after the lapse of six months from the date of issuance of the letters of administration. They alleged that they were beneficiaries to the estate of the deceased as they did not give their consent and/or the purported consent of the Respondents was a forgery and/or otherwise obtained by malicious fraudulent misrepresentation and outright fraud. They further alleged that the grant was obtained through significant reliance on deliberate falsehood and/or untrue and non-existent allegations of fact. According to them, the grant was fatally unenforceable as it was not an accurate representation of the assets comprising the deceased's actual estate and more particularly purported to describe the property that is bigger than the actual property known as LR No W Bukusu/E Siboti/28.
3. Vide an affidavit sworn on September 25, 2020, the 1st Respondent, Joseph Nyongesa Nandebe, deponed that he was lawfully entitled to a portion from the estate of the deceased as the surviving dependent of Peter Nandebe (Deceased). He averred that he acquired the said portion by way of purchase and the portion vested in him. He attached a copy of the agreement between Peter Nandebe (Deceased) and Barasa Opicho (Deceased) marked as JNN-1. He averred that the property LR No W Bukusu/E Siboti/28 was transferred into the name of the Appellant and that he is in the advanced stages of disposing off the said property to third parties and persons unknown to the Respondents. He averred that the grant was acquired through falsehood and misrepresentation of facts and that the same ought to be revoked. He averred that the grant ought to be revoked as the conduct of the Appellant in the proceedings that brought forth the issuance of the grant of letters of administration were characterized by illegalities and disregard for the applicable statutory provisions. He averred that the certificate of confirmation of grant dated March 10, 2020 that the Appellant purported to administer over property LR No W Bukusu/E Siboti/28 as measuring 8.66Ha was inaccurate as the official search of the records held by the ministry of lands indicated the same measures 6.4 Ha.
 4. Vide an affidavit sworn on September 25, 2020, the 2nd Respondent, Alex Wanjala Wasike, deponed that he was lawfully entitled to a portion of the deceased's estate having acquired the said portion by way of purchase and that the said portion vests in him. He averred that he became aware of the fact that the Appellant had obtained grant of letters of Administration over the deceased's estate which was subsequently confirmed on March 6, 2020. He averred that since the subject matter property is now owned by the Appellant in his personal capacity and is in the advanced stages of disposal to third parties and persons unknown to the Respondents. He averred that the grant ought to be revoked as the conduct of the Appellant in the proceedings that brought forth the issuance of the grant of letters of administration were characterized by illegalities and disregard for the applicable statutory provisions. He averred that the certificate of confirmation of grant dated March 10, 2020 that the Appellant purported to administer over property LR No W Bukusu/E Siboti/28 as measuring 8.66Ha was inaccurate as the official search of the records held by the ministry of lands indicated the same measures 6.4 Ha.
 5. Vide an affidavit sworn on September 25, 2020, the 3rd Respondent, Ferdinand Wafula Walianda, deponed that he was lawfully entitled to a portion of the deceased's estate having acquired the said portion by way of purchase and the said portion vests in him. He averred that he became aware of the fact that the Appellant had obtained grant of letters of Administration over the deceased's estate which was subsequently confirmed on March 6, 2020. He averred that since the subject matter property is now owned by the Appellant in his personal capacity and is in the advanced stages of disposal to third parties and persons unknown to the Respondents. He averred that the grant ought to be revoked as the conduct of the Appellant in the proceedings that brought forth the issuance of the grant of letters of administration were characterized by illegalities and disregard for the applicable statutory provisions. He averred that the certificate of confirmation of grant dated March 10, 2020 that the Appellant purported to administer over property LR No W Bukusu/E Siboti/28 as measuring 8.66Ha



was inaccurate as the official search of the records held by the ministry of lands indicated the same measures 6.4 Ha.

6. In response, the Appellant, Respondent then, Festus Nyongesa Barasa, vide a replying affidavit dated January 14, 2020 averred that the application dated September 25, 2020 was frivolous, vexatious and an abuse of Court processes thus ought to be dismissed. He averred that none of the Respondents were beneficiaries of the estate and none of them purchased any land from the deceased. He averred that the 1st Respondent lacked the locus standi to institute the instant application for and on behalf of the estate of his father, Peter Nandebe, and that the application ought to fail. According to him, the 1st Respondent's father entered into a land purchase agreement for purchase of two acres of land from the deceased for a price of Kshs 8, 400/= and that he only made a payment of Kshs 3, 400/= thus could only offer him one acre. He averred that it was true the land as distributed in the certificate of confirmation is 21.39 acres or 8.66 Ha contrary to the measurement indicated in the title deed and/or search which approximated it to 15.81 acres or 6.41 Ha, the same was occasioned by the ground being more than what was indicated in the search a fact that was confirmed by a survey conducted on the suit land on December 11, 2020. He averred that no beneficiary rightly entitled to benefit from the estate of the deceased was left out and that the Respondents failed to highlight the beneficiaries that were excluded and that they had no right to litigate on their behalf.
7. In response to the affidavit sworn by the 2nd Respondent, Alex Wanjala Wasike, he deponed that he was not the son to the deceased and that he was not entitled to benefit from the estate of the deceased. He averred that the 2nd Respondent alleged that he was entitled to a share of the estate of the deceased by virtue of purchase as no purchase agreement was brought forth to prove such a purchase. He deponed that the 2nd Respondent sold 2 ½ acres of the deceased's property LR No W Bukusu/E Siboti/28 illegally and unlawfully to third parties that were purchased by Wakhungu Hezzy Makulia which portions aggregated to 2 ½ acres and which was already given to the purchaser, Wakhungu, in the 3 ¼ acres contained in the certificate of confirmation. He deponed that the 2nd Respondent's application lacked merit and ought to be dismissed.
8. In response to the affidavit sworn by the 3rd Respondent, Ferdinand Wafula Waliaula, he averred that he was allocated 2 acres on ex gratia basis as he is his cousin and he settled there after the death of the deceased thus not entitled to any extra portion.
9. With regard to confirmation of grant being done before the lapse of 6 months, he deponed that leave of the Court was sought during the confirmation stage and that the same was granted. He further deponed that none of the other beneficiaries of the estate of the deceased had a dispute to the distribution and that the revocation application lacked merit.
10. Directions were given on October 1, 2020 that the application be canvassed by way of viva voce evidence.
11. The oral hearing began on January 21, 2021, with the 1st Respondent, Joseph Nyongesa Nandebe, taking the stand as PWI. He told the Court that he wished to adopt his recorded statement dated November 1, 2020 and the annexed documents, Plaintiff's Exhibit 1-15 as his evidence in chief. It was his testimony that the deceased sold land to the late Nandebe. His late father, Peter Nandebe, entered into an agreement dated April 30, 1983 purchasing land from the late Barasa Opicho and that there was no outstanding balance. The agreement was witnessed by four people with two still alive. It was his testimony that after a family meeting held on May 20, 2019, it was agreed that the Appellant was to stand in for them. The area chief did a letter confirming this position. He was to be given 2 ¼ acres from the said property of the deceased and that he was not aware of the succession proceedings that had been filed in Court. It was his evidence that he was only given one acre and that there were people



- who appeared on the chief's letter but that the same did not reflect on the grant. He told the Court that the grant of letters of administration issued on October 13, 2019 and confirmed on March 6, 2020, four months and twenty-two days after gazettelement. he observed that the property had already been transferred and registered in the name of the Appellant and he prayed that the grant be revoked.
12. On cross examination, he told the Court that he does not come from the family of the late Barasa Opicho and that his late father, Peter Nandebe Wakungu, bought land from the late Barasa Opicho. It was his testimony that his father died on January 13, 2002 and that he is making this claim on behalf of his estate as its administrator. He told the Court that the original agreement dated April 30, 1983 was in the possession of the Appellant and that the piece of land purchased was still in the name of the deceased, Barasa Opicho. As per the agreement, 2 acres was sold and it was to be sold for Kshs 8,400/=but only Kshs 5,050/= was paid with a balance of Kshs 3, 350/= remaining unpaid. It was his testimony that the deceased received the balance of Kshs 3, 350/= but has nothing to confirm that the deceased acknowledged receipt of the same. He told the Court that he has filed a case with the respective Environment and Land Court via case No Bungoma CMCC No 93 of 2019 and which is still pending. He told the Court that as per the surveyors report, the LR No W Bukusu/E Siboti/28 measurements was 21 acres.
 13. On re-examination, he told the Court that he sued the Appellant together with the land registry in case No Bungoma CMCC No 93 of 2019 seeking 0.93Ha and that the chief's letter was in error in describing him as the buyer. He reiterated that he is the son of the purchaser. He told the Court that as per the land records, the land measured 6.4 Ha, the search confirmed the same but the surveyor's report measured the same as 21 acres.
 14. PWII was Alex Wanjala, who testified that he knew both the deceased and the Appellant. He told the Court that he wished to adopt his recorded statement dated November 1, 2020 as his evidence in chief. It was his testimony that he wanted a piece of the LR No W Bukusu/E Siboti/28 as he inherited the same from his late father Titus Wasike. He represented his siblings. According to him, his late father bought land from the deceased, Barasa Opicho, who was his brother and this happened before his birth. According to him, his late father told him that he bought the piece of land in the year 1965 and that it was agreed with the family of the deceased and the Appellant that the document could be given to him. He agreed to pay them Kshs 30,000/= and an agreement was executed to that effect. He produced the minutes of the meeting held on July 22, 2019 as PEXH V. He told the Court that he owed no outstanding balance and the deceased was to give him the title over the property. It was his evidence that, he was involved in the deceased's succession proceedings and that their names were given to the area chief dated June 3, 2019 produced in Court as PEXH VI. He told the Court that at the date of confirmation, he was locked out of the proceedings and that he was not present when the grant was issued and confirmed. He noted that the Court ought to revoke the grant.
 15. On cross-examination, he told the Court that he is not the son of the late Barasa Opicho and that his late father bought land from the deceased. He testified that he lacked documentation to prove that his father bought the land from the deceased and that he lacked the letter of administration of the estate of the deceased, Titus Wasike despite making the claim through the late Titus Wasike's estate. He produced in Court a letter from the chief identifying him as the buyer but the same is faulty as it was his late father that purchased the land. According to him, he has lived on the land for the past 20 years and that he lacked any acknowledgement to show the Appellant received the Kshs 30,000/=. It was his testimony that on ground the land of the deceased, Barasa Opicho measured 6.4 Ha as he did a search on the same and that he has nothing to confirm the land is not 21 acres. He told the Court that he lacked evidence to confirm that his late father, Titus Wasike, entered into any agreement with the late Barasa Opicho.



16. PWII was Ferdinard Wafula Walianda, who testified that the deceased sold him a piece of land and that he wished to adopt his recorded statement dated November 1, 2020 as his evidence in chief. According to him, his late father's name Walianda Nabiswa who was an uncle to the deceased. His late father bought 2 ½ acres of land from the deceased and he produced in Court a copy of the agreement dated July 1, 1978 between the deceased and Mr. Walianda Nabiswa as PEXH.VII. He told the Court that he was part of the succession cause and on issuance of a grant he observed that he was only given 2 acres instead of 2 ½ acres. A survey was conducted on the LR No W Bukusu/E Siboti/28 which indicated that it measured 16 acres. He prayed for this Court to grant him the 2 ½ acres.
17. On cross-examination, he told the Court that he did not buy any piece of land from the deceaseds, Barasa Opicho and that he has a grant in respect to his father's estate but did not avail the same in Court. It was his evidence that the case was brought on behalf of his deceased father who died on December 3, 2007. He told the Court that there was a case at the Environment and Land Court CMCC Bungoma case No ELC 93 OF 2019. It was his evidence that he has lived on the LR No W Bukusu/E Siboti/28 for 27 years.
18. On re-examination, he told the Court that he is only claiming the 2 ½ acres of land from LR No W Bukusu/E Siboti/28.
19. At the close of the Respondent's case, the Appellant proceeded to call his witnesses. DW1 was Josephat Wamalwa, who testified that he is a village elder and knew the deceased and that he wished to adopt his recorded statement dated November 1, 2020 as his evidence in chief. According to him, the deceased died intestate in 1989 and was survived by amongst others his widowed former spouse who was the mother to the Appellant. The deceased was the owner of the LR No W Bukusu/E Siboti/28 measuring 6.4 Ha and that prior to his demise he had entered into various agreements for the disposal of the said property by way of sale to various individuals including the late Peter Nandebe to whom he sold approximately 2.25 acres and the late Titus Wasike Opicho and Walianda Nabiswa to whom he sold approximately 2.5 acres respectively. It was his testimony that the Respondents herein are the children of the aforementioned purchasers. At the demise of the deceased a 'lufu' was conducted to ensure that none of the deceased's creditors remained unpaid and the debts owed to the deceased were recovered. On audit of the assets and liabilities of the deceased, it was agreed that there were certain individuals entitled to a portion of the deceased's estate by virtue of their respective sale agreements to which the deceased was a party. According to him, it was agreed that Court proceedings for succession be instituted with a view of obtaining the relevant grant of letters of administration to enable the subdivision of the deceased's property and facilitation of the processing of title deeds in the names of the respective purchasers or their legal representatives. It was agreed that any outstanding claims would be satisfactorily ironed out prior to taking any further action. The resolution was communicated to the area chief who assented to the same vide a letter dated June 3, 2019. He told the Court that none of the resolutions were implemented and that the Appellant had deviated from the respective agreements with the Respondents and turned hostile declining to allow them access to their respective portions leading to the institution of the Environment and Land Court CMCC Bungoma case No ELC 93 OF 2019
20. On cross-examination, he told the Court that the deceased sold to Peter Nandebe 2 ½ acres; Joseph Nyongesa Nandebe did not purchase any piece of land from the deceased as was the case with Alex Wanjala Wasike but Ferdinand Wafula had purchased from the deceased 2 ½ acres of land.
21. DWII was Festus Nyongesa Barasa, who testified that he was the son of the late Barasa Opicho and that that he wished to adopt his recorded statement dated January 14, 2020 as his evidence in chief. He proceeded to produce the search from the lands registry as defence Exhibit I; the surveyors report



- as defence Exhibit II; 2 sale agreements as Defence Exhibit III (a) and (b). According to him, the Respondents sued him at the Environment and Land Court CMCC Bungoma case No ELC 93 of 2019 but which is still pending. It was his testimony that none of them bought any land from his deceased father neither did they present to Court with the relevant grant of letters of Administration to prove that they were the administrators of the estate of their respective deceased fathers.
22. On cross-examination, he told the Court that the deceased was only survived by three children and that the confirmed grant did not bear the name of Alex Wanjala as he sold his portion to one Hezron Kezi Wakhindi Nahulia. It was his testimony that in the meeting conducted on July 26, 2019 they did not agree on anything and that he never received any money from Alex and that his name appears three times as according to the grant he is entitled to five acres, his brother Tobias name appears two times as he is entitled to four acres and Ferdinard Barasa Machege's name appears two times and that there is nothing wrong with the grant. It was his testimony that the late father of the 2nd Applicant inherited land belonging to the deceased Barasa Opicho. The 3rd Respondent claimed that his father purchased land from the deceased but never availed any agreement on the same and that he resided on that piece of land since 1999 but he was not supposed to be there. He told the Court that he already transferred land to the 1st Respondent and that the survey conducted showed that the parcel LR No W Bukusu/ E Siboti/28 measured 21 acres.
 23. On re-examination, he told the Court that the 2nd Respondent is his cousin and not the son of the deceased and that his name was not part of the grant because he sold his share to Hezi and that he is not supposed to be added any 2 ½ acres. It was his testimony that there was nothing wrong with the grant.
 24. At the end of the oral hearing, the parties were directed to file written submissions. Both parties duly complied.
 25. In his judgement, Hon CAS Mutai held that the interests of the 1st and 3rd Respondents was taken care of at the exclusion of the 2nd Respondent. He further held that the 2nd Respondent was entitled to a share and that the grant be revoked with adjustments made on the mode of distribution where the Respondent shall be entitled to 1.5 acres from the suit land; the 2nd Respondent to be entitled to 2 ½ acres and the 3rd Respondent retains the 2 acres as captured in the mode of distribution with costs to the Respondents.
 26. Dissatisfied with the judgment and decree, the appellant filed this appeal on the following grounds: -
 - i. The learned Magistrate erred in fact and in law by failing to appreciate that the 1st Respondent had no locus standi to litigate on the interest of his deceased father, Peter Nandebe, having not obtained the letters of administration in respect to the deceased father's estate.
 - ii. The learned Magistrate erred in fact and in law by failing to appreciate that the 2nd Respondent had no locus standi to litigate on the interest of his deceased father, Peter Nandebe, having not obtained the letters of administration in respect to the deceased father's estate.
 - iii. The learned Magistrate erred in fact and in law by failing to appreciate that the 3rd Respondent had no locus standi to litigate on the interest of his deceased father, Peter Nandebe, having not obtained the letters of administration in respect to the deceased father's estate.
 - iv. The learned Magistrate erred in fact and in law by revoking the grant issued to the Appellant without stating the reasons thereto in accordance with Section 76 of the *Law of Succession Act*.
 - v. The learned Magistrate erred in fact and in law by reviewing and/or varying the certificate of confirmed grant when the application before him was for revocation of grant only with no prayer for confirmation of grant and/or reviewing or varying the certificate of confirmed grant.



- vi. The learned Magistrate erred in fact and in law by awarding the 1st Respondent 1.5 acres from parcel LR No W Bukusu/E Siboti/28 when the 1st Respondent's claim is based on his father's interest as the purchaser of plot 9 which is a distinct land from the subject property in this appeal.
 - vii. The learned Magistrate erred in fact and in law by awarding the 1st Respondent 1.5 acres from parcel LR No W Bukusu/E Siboti/28 when the 1st Respondent's claim is based on his father's interest that failed to meet the threshold of Section 3(3) (b) of the *Law of Contract Act*.
 - viii. The learned Magistrate erred in fact and in law by awarding the 1st Respondent 1.5 acres from the suit land considering that his late father had not paid the entire purchase price and which portion is not proportional to the consideration paid.
 - ix. The learned Magistrate erred in fact and in law by awarding the 2nd Respondent 2 ½ acres from the suit land considering that the same was never purchased and that no proof was availed.
 - x. The learned Magistrate erred in law in relying on an agreement dated July 22, 2019 to allocate to the 2nd Respondent the 2 ½ acres of the suit property when the agreement does not mention the land and also the 2nd Respondent failed to prove that he had paid consideration.
 - xi. The learned Magistrate erred in fact and in law in disregarding the evidence of the Appellant that the 2nd Respondent had already sold the 2 ½ acres forming part of the estate and could thus not be added extra land.
 - xii. The learned Magistrate erred in fact and in law in holding that the Appellant failed to prove that the 2nd Respondent had sold the 2 ½ acres forming part of the estate when the Appellant produced 2 agreements evidencing the same as D-exhibit 2 (a) and (b).
 - xiii. The learned Magistrate erred in fact and in law in failing to appreciate that awarding the 2nd Respondent the 2 ½ acres will mean that the 2nd Respondent has 5 acres having already sold 2 ½ acres from the estate now forming part of the share of Hezron Makulia Wakhungu alias Hezy Makulia Wakhungu.
 - xiv. The learned Magistrate erred in fact and in law in relying on extraneous factors and disregarding material factors thereby arriving at a wrong decision that is just unsupported in law.
 - xv. The learned Magistrate erred in fact and in law in failing to appreciate the gist of the evidence and that dispute therein between the parties thereby reaching a decision that is unsupported by the evidence on record.
 - xvi. The learned Magistrate erred in fact and in law in failing to appreciate the mode of distribution given in his judgement delivered on December 17, 2021 over distribution of the estate of the deceased to an extent that it renders the grant unenforceable.
27. The Appellant prayed for this Court to allow this appeal; set aside the decision of the lower Court delivered on December 17, 2021 allowing the application dated September 25, 2020 and substitute the same with a judgement dismissing the same; the Appellant be awarded costs for the appeal.
28. The appeal was canvassed by way of written submissions. Both parties filed and exchanged their submissions. I have duly perused and considered the appeal but wish to point out that the Respondents seemed to be submitting on a cross-appeal which I must note was never filed or placed before me for directions.



29. I have carefully considered the record of appeal, the submissions by parties in support and in rebuttal of issues herein as well as the judicial precedence and the law. I take the following view of the matter. The issues for determination herein are:
- i. Whether or not the Respondents lacked locus standi to institute the application before the lower court.
 - ii. Whether or not this Court should interfere with the judgement of the lower Court.
30. The first point for determination is whether or not the Respondents herein lacked the locus standi to bring the lower Court application as alleged by the Counsel for the Appellant in his grounds of appeal. On my review of the trial Court record, it is clear that the Respondents were not the bona fide purchasers of the plots of land from the late Barasa Opicho but rather it was their respective deceased fathers. My understanding of the matter at hand is that the Respondents herein lodged the summons for revocation of grant before the lower Court as beneficiaries of the Estate of their respective late fathers. It is also clear that when there are no indications that they were appointed as executors under a will or appointed by the Court as administrators, they act on behalf of them.
31. Locus standi is basically the right to appear or be heard in Court or other proceedings. That means, if one alleges the lack of the same in certain Court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Respondents lacked the requisite locus standi to seek relief from the Court to revoke the grant in question issued to the Appellant. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues. The mere fact that a person was a surviving spouse or child of the deceased does not make him or her a personal representative of the deceased. One only becomes a personal representative, usually known as an administrator, in the event of intestacy, upon being appointed by the Court as such.
32. The position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo [1986-1989] EALR 468*, the Court rendered itself thus:
- ' An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.'
33. It is very clear that the Respondents' deceased fathers supposedly entered into a sale agreement with the deceased, Bernard Opicho, they did not fall within the category of creditors or liabilities but the estate of their late fathers did. They had no role nor place in the succession cause, to warrant their lodging of the summon of revocation of grant without being properly clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession of their late fathers.
34. The evidence on record suggests that none of the parties availed their respective grant of letters of administration to show they had the capacity to lodge the summons for revocation. A perusal of the trial Judgement shows that the trial Magistrate did not highlight this major flaw. Therefore, in the Court's view, the instant Application was not properly before the lower Court due to lack of capacity by the Respondents to lodge the same. The trial Court had no business nor jurisdiction to entertain the application. The issue of locus standi was quite central in the determination of the matter by the trial court and that the respondents were obliged to avail evidence of their capacity to sue the appellant. As the trial court did not consider the same, the resultant judgement was thus flawed and must be interfered with.



35. In the result, it is my finding that the appellant's appeal has merit. The same is allowed with an order that the trial Court's judgement dated December 17, 2021 allowing the application dated September 25, 2020 is hereby set aside is substituted with an order dismissing the said application with costs. The appellant is awarded the costs of the appeal.

36 It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MAY 2023

D.K. KEMEI

JUDGE.

In the presence of:

Anwar for Appellant

Wekesa for Omeri for Respondents

Kizito Court Assistant

