



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Akuku & another v Mboga (Civil Appeal E002 of 2022)  
[2025] KEHC 15541 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15541 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL APPEAL E002 OF 2022  
ACA ONG'INJO, J  
OCTOBER 23, 2025**

**BETWEEN**

**SARAH OJWANG AKUKU ..... 1<sup>ST</sup> APPELLANT**

**LUCAS OJWANG MBOGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ERICK ODONGO MBOGA ..... RESPONDENT**

**JUDGMENT**

1. The Respondent herein petitioned the court for Letters of Administration of the intestate estate of Ochieng Ngudi who died on 8<sup>th</sup> September 2009 domiciled at Kakmasia using a letter dated 7<sup>th</sup> March 2011 written by the Assistant Chief who introduced him as the son to the brother of the deceased who died single and was not survived by a wife or child. Based on the introduction by the Assistant Chief the Respondent obtained letters of Administration on 3<sup>rd</sup> May 2012 and later had the same confirmed on 9<sup>th</sup> May 2013 where the whole of LR North Sakwa/ Kakmasia/ 345 was transmitted to him.
2. The Appellants later moved the court by an amended Summons for Revocation of Grant dated 4th November 2021, seeking to revoke the said grant and the certificate of confirmation, to cancel the transfer of the parcel to the Respondent, and to have a fresh grant issued jointly to themselves and the Respondent.
3. They contended that the Respondent secretly and fraudulently undertook the succession proceedings without disclosing that the 1st Appellant was the biological daughter of the deceased and his only surviving child, who had not renounced her inheritance. The Appellants argued that the estate had been settled on Mboga Ngudi the uncle to 1<sup>st</sup> Appellant and father to the 2<sup>nd</sup> Appellant and the Respondent who desired that his two sons settle on the said piece of land.



4. It was also the Appellant's ground that the proceedings undertaken by the Respondent were substantially defective and driven and actuated by mischief purposely to disinherit the Applicants and in particular the 2<sup>nd</sup> Applicant as a beneficiary of the deceased estate.
5. The trial magistrate dismissed the application with costs, holding that the amended summons was not supported by an affidavit, that the Appellants' submissions were filed in respect of a different application, and that the 1st Appellant had contradicted herself by filing a replying affidavit that negated her earlier supporting affidavit.
6. The magistrate therefore found no merit in the application and dismissed it without delving into the merits of the revocation claim.
7. Being aggrieved by the ruling the Appellant brought the appeal herein vide Memorandum of Appeal dated 12<sup>th</sup> January 2022 on the following grounds:
  1. The learned trial Magistrate erred in law and in fact in failing to consider, evaluate and determine the summons for revocation and annulment of the grant dated 19<sup>th</sup> May 2021 as amended on 4<sup>th</sup> November 2021 on merit.
  2. The learned trial Magistrate erred in law and in fact in giving weight and consideration to a supposed Replying Affidavit illegally, unlawfully and mischievously drawn and introduced by Respondent through his counsel when the said counsel neither had the authority or legal mandate to file any document on behalf of the Objectors, and without first filing any notice to act for the 1<sup>st</sup> Objector/ Applicant.
  3. The learned trial Magistrate erred in law and in fact when inspite of the Appellants counsel pointing out the mischief and fraud practiced on the court and on the Objectors by the aforesaid wrongful filing of a replying Affidavit on behalf of the Objector, the court failed to strike out, or declare the same invalid, null and void and being of no effect, but went ahead to act on it and gave it prominence over the Objectors supporting affidavits.
  4. The learned trial Magistrate misconducted himself by wading into the area of dispute and posing and answering to the Appellants prejudice issues that were neither pleaded or canvassed in court.
  5. The learned trial Magistrate failed in his duty in failing to reprimand counsel for the Petitioner/ Respondent for misconducting themselves by purporting to file documents on behalf of the Objectors, an adversary in the cause, and thereby brought the practice of the law into disrepute.
  6. The entire proceedings and determination were unfair and prejudicial to the Appellant.

**Reasons wherefore the Appellants pray for orders that:**

- (a). The ruling, determination and order of the trial Magistrate in Succession Cause No. 10 of 2011 dated 16<sup>th</sup> December 2021 as amended on 4<sup>th</sup> November 2021 be set aside.
  - (b). The Summons for Revocation and Annulment of Grant dated 19<sup>th</sup> May 2021 and amended on 4<sup>th</sup> November 2021 be allowed or in the alternative the Summons dated 19<sup>th</sup> May 2021 be remanded for hearing in the subordinate court.
  - (c). The costs of the appeal and summonses in the subordinate court be granted to the Appellant.
8. The appeal was canvassed by way of written submissions.



9. The Appellant’s submissions are dated 5<sup>th</sup> March 2024 and filed on 13<sup>th</sup> July 2024. The Respondent did not file submissions.

### **Analysis And Determination**

10. Having considered the grounds of appeal and the Appellant’s submissions and having re-evaluated the pleadings in the trial court as well as the Trial Magistrates ruling against which this appeal was filed the following issues arise for determination:
1. Whether the trial magistrate erred in dismissing the application on procedural grounds without addressing the merits.
  2. Whether reliance on the letter from the Assistant Chief — which introduced the Respondent as next of kin while concealing the existence of the deceased’s daughter — constituted concealment of material facts under Section 76 of the *Law of Succession Act*.
  3. Whether the trial court erred in relying on a replying affidavit irregularly filed by the opposing counsel.
  4. What orders should issue.
11. On the Dismissal for Procedural Defects the learned trial magistrate declined to consider the merits of the revocation summons, citing the absence of a supporting affidavit and misfiled submissions. However, Rule 44(1) of the Probate and Administration Rules allows an applicant to seek revocation of grant “at any time” and imposes on the court a duty to inquire into the circumstances of the grant once allegations of concealment or fraud are raised.
12. In *Re Estate of Gathungu (Deceased)* [2018] eKLR, the High Court emphasized that procedural lapses should not bar inquiry into substantive allegations of fraud or concealment in succession matters.
13. Further, Article 159(2)(d) of *the Constitution* requires courts to administer justice without undue regard to procedural technicalities.
14. The trial court’s failure to examine whether the grant was obtained through misrepresentation was therefore a misdirection and an error of law.
2. On the Letter from the Assistant Chief and Concealment of Heirship the Respondent’s entire petition was anchored on the Assistant Chief’s letter dated 7th March 2011, which described the deceased as having died single and without a child and introduced the Respondent as a nephew and next of kin.
15. However, evidence on record — including affidavits and the uncontested assertion by the Appellants — established that the 1st Appellant was the daughter of the deceased and his only surviving child.
16. Under Section 39(1)(a) of the *Law of Succession Act*, where an intestate dies without a spouse, the surviving child or children rank first in priority to inherit. Only in the absence of a child does the estate devolve to the kindred of the deceased, such as parents, siblings, or nephews.
17. By representing to the Assistant Chief (and later to the court) that the deceased left no child, the Respondent materially concealed a fact essential to the grant. This conduct falls squarely within Section 76(b), which provides that a grant may be revoked if it was obtained “by means of an untrue allegation of a fact essential in point of law to justify the grant.”
18. In *Re Estate of Wahome Njoki (Deceased)* [2016] eKLR, the court held that a grant obtained through a false statement that excluded a surviving child “cannot stand, for it rests on fraud and concealment.”



19. Therefore, the Respondent's reliance on a false introduction letter cannot sanitize the illegality of the proceedings. The chief's letter is not conclusive proof of heirship, and the petitioner bears the duty to verify and disclose all rightful heirs before petitioning for a grant.
20. The failure to do so renders the grant fundamentally defective.
21. On the Replying Affidavit Filed by Opposing Counsel it was not disputed that a replying affidavit purporting to have been filed on behalf of the 1st Objector (Appellant) was introduced by counsel for the Respondent. The said counsel had no notice of appointment or authority to act for the Appellant.
22. Under Order 9 Rule 1 & 2 of the Civil Procedure Rules, an advocate cannot act for a party unless duly appointed and on record. Any document filed without such authority is null and void.
23. The trial court's failure to strike out or disregard that affidavit — and its reliance upon it in dismissing the summons — was a gross procedural irregularity that occasioned prejudice and miscarriage of justice.

See *Pashito Holdings Ltd & Another v Paul Ndungu & 2 Others* [1997] eKLR and *Judicial Service Commission v Mbalu Mutava* [2015] eKLR on the duty of fairness and the right to be heard.

Given the combination of:

the concealment of the deceased's rightful heir, the reliance on a false letter of introduction, and the trial court's dismissal on technicalities, it is evident that the proceedings fell short of the standards of fair hearing and substantive justice envisioned under Article 50(1) and Article 159(2)(d) of *the Constitution*.

24. The trial court's approach unjustly shielded a procedurally defective and substantively tainted grant from scrutiny.
25. Having considered the appeal in its entirety, this Court finds that:
  1. The learned trial magistrate erred in law and fact in failing to evaluate and determine the Summons for Revocation on its merits.
  2. The Respondent's petition was founded on a false and misleading letter that concealed the existence of the deceased's daughter, thereby vitiating the grant under Section 76(b) of the *Law of Succession Act*.
  3. The trial court improperly relied on a replying affidavit irregularly filed by opposing counsel.
  4. The proceedings were unfair and prejudicial to the Appellants.
26. Accordingly, the appeal is allowed.
  1. The ruling and order of the lower court dated 16th December 2021 are hereby set aside.
  2. The Summons for Revocation and Annulment of Grant dated 19th May 2021 (as amended on 4th November 2021) is hereby allowed and grant made to the 1<sup>st</sup> Appellant who is the only surviving daughter of the deceased.
  3. LR North Sakwa/Kakmasia/345 shall henceforth devolve to the 1<sup>st</sup> appellant who is the sole beneficiary in whole.
  4. Each party to bear their own costs of this appeal

Orders accordingly



DATED, SIGNED AND DELIVERED AT MIGORI THIS 23<sup>RD</sup> DAY OF OCTOBER, 2025.

.....

**ANNE ADWERA ONG'INJO**

**JUDGE**

