

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**FAMILY CIVIL APPEAL NO. E008 OF 2024**

**ISAAC MBINGI OKELLO.....APPELLANT**  
**VERSUS**  
**JOSEPHAT OUMA MBINGI.....RESPONDENT**

**(Appeal from judgement and orders of Hon. Nyaloti Ameyo, Chief Magistrate, CM, of 7<sup>th</sup> November 2024, in Busia MCSUCC/227/2018)**

**JUDGEMENT**

1. The appeal herein arises from orders that the trial court made, in a judgement delivered on 7<sup>th</sup> November 2024. The said judgement had arisen from a summons for rectification or revocation of grant, dated 22<sup>nd</sup> February 2022.
2. The deceased person, in that cause, Yosam Wanjala Mbingi, had died on 23<sup>rd</sup> November 1992. The Assistant Chief, in a letter dated 28<sup>th</sup> October 2013, identified his survivors as Joyce Nabwire Anjaia, widow; and Josephat Ouma Mbingi, Johnstone Wanjala Odunga, Stanley Ojiambo Mbingi, Hezron Mubweka Mbingi, Milton Barasa Wanjala and Stephen Wabwire Wanjala, sons. Rose Atola Makokha and Marcela Wesonga Muketi were listed as daughters-in-law. Mundulisia Primary School was also listed. It was indicated that the family had nominated Josephat Ouma Mbingi to apply for representation.
3. A petition was lodged in the cause, by Josephat Ouma Mbingi, on 31<sup>st</sup> October 2013, for representation. He listed the 9 individuals in the Chief's letter, as the survivors of the deceased, and Mundulisia Primary School as a liability. The deceased was said to have had died possessed of Bukhayo/Bugengi/199. Representation was made to Josephat Ouma Mbingi, on 8<sup>th</sup> April 2014, and a grant issued to him, dated 6<sup>th</sup> June 2014. He caused that grant to be confirmed, on 7<sup>th</sup> December 2018, vide an application, dated 4<sup>th</sup> September 2018. The estate was distributed amongst the 9 survivors listed in the letter from the Assistant Chief and the petition, plus Mundulisia Primary School, at diverse proportions. A certificate of confirmation of grant, dated 7<sup>th</sup> December 2018, was duly issued.

4. A summons, dated 22<sup>nd</sup> February 2022, was then filed on 24<sup>th</sup> February 2022, by Isaac Mbingi Okello, a grandson of the deceased, by his son, the late Fredrick Richard Okello. He complained that the petition had failed to disclose all the beneficiaries, *inter vivos* gifts had not been acknowledged, not all the beneficiaries had consented to the process and shares of each beneficiary had not been ascertained. He claimed that some beneficiaries had been left out of the letter by the Chief.
5. There was a reply to that application, by the administrator, Josephat Ouma Mbingi. He raised the *locus standi* of the applicant, being a grandchild of the deceased. He argued that there was consensus on his appointment, as administrator. He disclosed that the deceased had 5 families, but he had settled the first 3 *inter vivos*, leaving only Bukhayo/Bugengi/199, to be shared out amongst the last 2 families. He stated that he left out all his sisters, as they were all married. He filed affidavits by those relatives, such as Christopher Elisha Mbingi, Josephine Mujongit and Phylis Wanjala to support his allegations.
6. The application, dated 22<sup>nd</sup> February 2022, was disposed of *viva voce*. Testimonies were taken from the applicant, Kennedy Wanjala Mbingi, Harmens Joseph Wanjala, the administrator, Christopher Mbingi and Josephine Mugendi. Judgement was delivered, on 7<sup>th</sup> November 2024, dismissing that application, on the basis that there was no proof that the grant was obtained fraudulently.
7. The applicant, in the application, who is the appellant herein, was aggrieved, and he brought the appeal herein. He avers that his evidence was not properly captured, the court failed to capture the issues for determination, the court failed to determine whether the appellant had been left out, the matter was turned into land and customary law hearings, and failure to find fraud and misrepresentation in the manner the grant was obtained and confirmed.
8. The parties canvassed the application by way of written submissions. In the end, only the appellant filed and served written submissions, which I have read, and noted the arguments made.
9. On the matter of the trial court not framing issues, I note that that was done at page 2/3 of the judgement. The court framed 3 issues, around whether the grant was obtained fraudulently, whether facts

were concealed, and whether the case was proved to the required standard.

10. The trial court did not analyse the evidence on record, with a view to draw conclusions, one way or other. However, it did recite the filings by both sides, and the oral testimonies of the witnesses presented by both sides. The issue should be whether the trial court came to the right conclusions, in view of the material that was before it, despite not analysing the evidence.
11. The principal complaint, by the appellant, was that the administrator had left out some family members, including him and others. It emerged that the deceased had died a polygamist, having married 6 times. It also emerged that the deceased had settled the first 3 of his families, and the remaining 2 were the only ones entitled to share of the land that had not been distributed *inter vivos*. The succession proceedings only involved those from the 2 families, who had not benefitted from the *inter vivos* gifting or settlement. Of course, the administrator should have disclosed all the 6 houses, and involved them in the process, and made disclosures of the *inter vivos* transfers in the proceedings, but, in view of the recorded evidence, no one was prejudiced.
12. I note that the appellant was a grandson of the deceased. His father was from 1 of the 3 houses that had been settled *inter vivos*. His witnesses were his cousins, themselves grandchildren of the deceased. Among the persons the administrator of the estate called as his witnesses were his uncles, the children of the deceased, from the first 3 houses, who the appellant claimed had been left out. Those children, whom the appellant claimed to bring the revocation application on behalf of, supported the position taken by the administrator, that the deceased had settled the first 3 houses, and that the land remaining was meant for the last 2 houses, that had not been settled in the lifetime of the deceased. Christopher Mbingi and Josephine Mungeti were such children. They were from the first 3 houses, and confirmed that the appellant's father had been given land, in the lifetime of the deceased. His inclusion, and of the others in his position, would not have made a difference. In any event, the children of the deceased would be expected to know better than the grandchildren.

13. It was alleged that the trial court had turned the proceedings into a land and customary law matter. I do not find anything unusual in that. The evidence, taken, was meant to provide a background, that there was *inter vivos* distribution, done in accordance with customary law, to explain why the administrator involved only the last 2 houses of the deceased, to the exclusion of the first 3, who had been the beneficiaries of the *inter vivos* distribution.
14. On fraud and misrepresentation not being considered by the trial court, I note that the trial court concluded that there was no proof that the grant was obtained fraudulently. Disclosure of a section of the family was not made, which could suggest fraud, but the administrator called witnesses, being children of the deceased, to satisfy the court that, despite those non-disclosures, there was no fraud, as the non-disclosures could be explained. They were explained to the court to the required standard. It was established that the father of the appellant benefitted from the *inter vivos* distribution, hence he was not disadvantaged, by the non-disclosure.
15. Overall, I do not find material, in the appeal, pointing to existence of merit. I am persuaded that the trial court came to the right conclusion, based on the materials it saw and the testimonies it heard. The appeal herein is, accordingly, dismissed. Each party shall bear its own costs. The trial court records shall be returned to the relevant registry. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT  
BUSIA, ON THIS 4<sup>TH</sup> DAY OF DECEMBER 2025.**

**WM MUSYOKA  
JUDGE**

**Mr. Arthur Etyang, Court Assistant.**

**Advocates**

**Mr. Jumba, instructed by Erick Jumba & Company, Advocates for the appellant.**

**Ms Wanjala, instructed by Omurwa, Advocate for the respondent.**