



**REPUBLIC OF KENYA**  
**N THE HIGH COURT OF KENYA AT KERUGOYA**

**ELCA CASE NO. 139 OF 2013**

GILBERT MWANGI KIBUCHI .....  
APPELLANT

VERSUS

HINDU WANJIRU JUMA .....  
RESPONDENT

**(BEING AN APPEAL FROM THE RULING DELIVERED ON 20<sup>TH</sup> DECEMBER, 2007 BY  
HON. J.N. ONYIEGO – S.R.M AT SENIOR RESIDENT MAGISTRATE’S COURT CIVIL  
CASE NO. 50 OF 1990)**

**JUDGMENT**

This is an appeal against the ruling delivered by J.N. ONYIEGO Senior Resident Magistrate Kerugoya in Kerugoya PMCC No. 50 of 1990 on 20<sup>th</sup> December, 2007.

Only the appellant has filed submissions following my directions issued on 8<sup>th</sup> July, 2014. I have therefore considered this appeal without the benefit of submissions by counsel for the respondent.

The appeal itself was filed pursuant to leave granted by Khaminwa J. in Misc Application No. 31 of 2008 (Embu) on 12<sup>th</sup> May, 2008.

From the Memorandum of Appeal, the following grounds are raised:-

1. ***The learned trial magistrate erred in law and in fact in finding that the application dated 26<sup>th</sup> May, 2006 which was argued on 20<sup>th</sup> July, 2006 was similar with the application dated 17<sup>th</sup> December, 1999***
2. ***The learned trial magistrate erred in law and in fact in holding that the application before him was res-judicata whereas the earlier application whose ruling was entered on 1<sup>st</sup> December, 2005 had been dismissed on a technicality which was rectified later***
3. ***The learned trial magistrate erred in law and in fact in holding that orders issued on 11<sup>th</sup> August, 2006 were not properly obtained.***

The appellant therefore seeks the setting aside of the ruling dated 20<sup>th</sup> December, 2007 and in its place, the orders sought in respect of the application dated 19<sup>th</sup> September, 2007 and 26<sup>th</sup> May, 2006 be granted.

The appellant herein is son to the plaintiff in KERUGOYA PMCC No. 50 of 1990 who had filed a suit in

the subordinate Court seeking to recover some property from the respondent. However, the said plaintiff in KERUGOYA PMCC No. 50 of 1990 (one LIVINGSTONE KIBUCHI WANJIGI) died on 6<sup>th</sup> December, 1997 before the case could be determined. The appellant herein applied for a limited grant of letters of administration so as to continue with the suit and the grant was issued in Nyeri High Court Succession Cause No. 127 of 1998 on 9<sup>th</sup> June, 1999.

Having obtained the said grant, the appellant moved the subordinate Court on 26<sup>th</sup> May 2006 seeking to revive his late father's suit which had abated on 6<sup>th</sup> December, 1998. On 4<sup>th</sup> August 2006, J.N. ONYIEGO Principal Magistrate issued an order reviving the abated suit. That order reviving the suit was however set aside in a ruling delivered on 20<sup>th</sup> December, 2007 after the magistrate found that a similar application had been dismissed and therefore the orders reviving the suit were not properly obtained.

I have considered the appeal and perused the record in Kerugoya PMCC No. 50 of 1990 as well as the ruling dated 20<sup>th</sup> December, 2007 which is the subject of this appeal.

The first ground of appeal is that the learned trial magistrate erred in law and fact in finding that the application dated 26<sup>th</sup> May, 2006 was similar to the one dated 17<sup>th</sup> December, 1999.

I have looked at the two applications above and also the ruling dated 20<sup>th</sup> December, 2007 and which is the subject of this appeal. The application dated 17<sup>th</sup> December, 1999 was founded under **Order XXIII Rule 3 of the Civil Procedure Rules** (as it then was), and it sought the main prayer that the appellant herein be appointed as the legal representative of his deceased father who was the plaintiff in Kerugoya Case No. 50 of 1990 and who had died on 6<sup>th</sup> December, 1997. That application was dismissed by a ruling delivered on 1<sup>st</sup> December, 2005 on the basis that the suit had infact abated by then.

The application dated 26<sup>th</sup> May, 2006 on the other hand sought orders to revive the suit which had abated on 6<sup>th</sup> December, 1998. The ground put forth in that application was that the appellant herein had difficulties in obtaining the grant of letters of administration in time. By a ruling dated 11<sup>th</sup> August 2006, Onyiego J.N. (SRM) allowed the application seeking to revive the suit.

In the ruling dated 20<sup>th</sup> December, 2007 and which is the subject of this appeal, the trial magistrate Onyiego J.N. (SRM) after considering another application dated 19<sup>th</sup> September, 2007 also seeking to have the appellant herein appointed as a legal representative of his deceased father addressed himself as follows:-

***“However, on 20<sup>th</sup> July, 2006 the applicant again sneaked in a similar application seeking for similar orders as in the dismissed application. The respondents have were (sic) not in Court and application was heard exparte. On that basis and without realizing that a similar application had been dismissed, the Court allowed the application as un-opposed and therefore suit was revived. It is this orders how (sic) Mr. Gacheru is relying on to ask for the applicant to be opposed (sic) as a legal representative of the deceased plaintiff for purposes of substituting. Indeed, the application dated 26<sup>th</sup> May, 2006 ought not to have been filed as a similar application had been filed dated 17<sup>th</sup> December, 1999 and dismissed. For Mr. Gacheru to seek a similar application without even drawing the Court's attention to previous orders was wrong. The application was therefore improperly before the Court as the same was res-judicata and amounted to an abuse of the Court process”.***

The trial magistrate had therefore made a finding that the two applications dated 26<sup>th</sup> May, 2006 and 17<sup>th</sup> December, 1999 were similar. That finding was not correct. The application dated 26<sup>th</sup> May, 2006 sought to revive a suit while the application dated 17<sup>th</sup> December, 1999 sought that the appellant be appointed a legal representative of the deceased. The two applications were brought under **Order XXIII**

**Rule 8 (2)** and **Order XXIII Rule 3 of the Civil Procedure Rules** as they then were. So the two applications were brought under different provisions of the law and were not therefore similar. The trial magistrate therefore erred in treating the two applications as similar.

That is enough to dispose of this appeal. I would allow the appeal on that ground and order that the application dated 26<sup>th</sup> May, 2006 be heard on its own merits in the trial Court with no order as to costs.

**B.N. OLAO**

**JUDGE**

**12<sup>TH</sup> JANUARY, 2015**

12/1/2015

B.N. Olao – Judge

Mwangi – CC

Appellant – present

Respondent – absent

COURT: Judgment delivered this 12<sup>th</sup> day of January, 2015

Appellant present in person

Respondent absent

Mr. Gacheru for Appellant absent.

**B.N. OLAO**

**JUDGE**

**12<sup>TH</sup> JANUARY, 2015**