



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CIVIL APPEAL NO.36 OF 2008**

**GERVAS OSOROMO.....APPELLANT**

**=VERSUS=**

**NDUGU TRANSPORTERS.....RESPONDENTS**

***[From the decree and orders of E.H. Keago, Resident Magistrate  
in Busia Principal Magistrates Court Civil Case No.458 of 2003]***

**J U D G E M E N T**

The Appellant was the Defendant in the suit in the court below. The Respondent had sued claiming general and special damages arising from a road accident which occurred on 20.11.2002 along Busia-Mumias road, involving motor registration No. KAJ 366E and a pedestrian. The pedestrian, Harriet Lalimu Achieng, who sustained serious injuries, died in the accident.

The Respondent, Gervas Ochieng Osiromo who was the deceased's pedestrian's husband, filed the claim before obtaining a grant of letters of administration. He had however, taken out and obtained a Grant of Letters of administration ad Colligenda Bona under Section 67(1) of the Law of Succession Act, Cap 160 of the Laws of Kenya.

The pleadings in the defence of the claim denied ownership of the motor vehicle registration No.KAJ 366E which was alleged to have caused the accident. They also denied *locus standi* on the part of the plaintiff/Respondent on the basis that he had no *status* to file the claim, being a person without a grant of letters of administration. Furthermore, the appellant/Defendant argued that even if the court would find that the temporary grant *ad colligenda bona* used by the Respondent to file the suit, was properly issued by Busia Court, the court should still rule it ineffective because Busia was not one of the Courts in Kenya gazetted to issue such documents. Finally, the appellant generally challenged the efficacy and adequacy of the Respondent's evidence to prove his claim.

I have carefully perused and considered the argued grounds of appeal against the evidence on record.

As touches the ground of *locus standi*, there is no doubt that the Respondent filed the suit on the basis that he had obtained a temporary grant of letters *ad colligenda bona* under Section 67(1) of the Laws of Succession Act, aforesaid. That provision, indeed, authorizes the donee of the grant, power and authority to collect and preserve the estate of the deceased pending the issuance of the proper grant of letters of administration. Indeed, the proper provision under which the Respondent should have sought authority to file any relevant court cases in protection of the estate of the deceased, would have been

Section 54 rule 14 under which temporary grants ad litem, are granted.

Accordingly, in my view, had things stopped merely at the point of applicant obtaining a temporary grant *ad colligenda bona* and used it alone to file this suit, the appellants argument that it was not enough to give him authority to file the suit, would probably, be correct and sufficient to enable this court to allow the appeal. However, the *colligenda bona* grant did not stop there. The court that granted it went further and specifically authorized the Respondent to use it. That court stated:-

**“For purposes of instituting compensation proceedings arising out of the deceased’s death”** (page 55 of the Appeal Record).

In my view Mitey, J. who signed the document, gave it the authority of a grant of letters of administration ad litem issuable under Section 54 rule 14 aforesated. I have not heard the appellant stating that the court did not have the power, to make the above order.

As to the issue that Busia High Court as contrasted to other High Courts mentioned in the gazette notice, had no power to issue an *ad colligenda bona* grants, the appellant in my view argued so in error. All I can say for the purpose of this ruling only, is that the case referred to as limiting the issuance of *ad colligenda bona* grants to Nairobi, Mombasa, Nakuru, Nyeri and Kisumu, can be said to be correct on the basis only that those stations were then the only gazetted High Court stations. Every court with a Judge, whether resident or visiting judge, in my understanding, has such jurisdiction to grant *ad colligenda bona* grants. It follows accordingly, that Mitey, J who was a visiting judge of Busia High Court from Bungoma, had the said jurisdiction both at Bungoma and in Busia..

I have also examined the evidence on record. The Respondent who was the plaintiff, adduced probable evidence which to the trial magistrate who listened to it and who had the best opportunity to test the witnesses’ demeanour, accepted. This court has considered it too. I am satisfied that the evidence, proves the claim on the balance of probability. I see no reasonable ground to interfere with the conclusions reached by the trial court. More so because, despite its pleadings, the appellant/defendant failed to give any evidence to controvert the Respondent’s evidence. Whatever the positions that were taken by the appellant in its written submissions, did not in my view, amount to evidence. It is a mere assertion by counsel from the bar intended to persuade the court..

It was surprising accordingly that the trial court, without evidence from the appellant, went ahead to apportion blame to the deceased. Since however, there was no cross appeal, this court sees no ground upon which to interfere.

The appeal on the above reasons, is hereby dismissed with costs here and below. Orders accordingly.

Dated and delivered at Busia this 14<sup>th</sup> day of June 2011.

D.A. ONYANCHA  
JUDGE.