



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

Civil Appeal 100 of 1993

WANGUI WAMAI.....APPELLANT

VERSUS

RUTH NYAWIRA WAMAI.....RESPONDENT

*(Being appeal against the orders of E. B. Ochieng, Resident Magistrate,
(D.R.), in the Resident Magistrate's Succession Cause No. 111 of 1983
delivered on 24th November 1988 and 30th November 1990)*

JUDGMENT

This judgment is the result of the appeal against the orders of E. B. Ochieng, the then learned Resident Magistrate made on 24th November 1988 and 30th November 1990 vide NYERI R.M.C.SUCC.C.NO. 111 OF 1983. The learned Resident Magistrate (D.R.), dismissed the Appellant's application dated 24th February 1988 erroneously recorded as dated 24th February 1989 and proceeded to enter judgment in terms of the elders' award. The Appellant applied for the aforesaid orders to be set aside and the application dated 24th November 1988 reinstated vide the application dated 19th February 1990. The aforesaid application was heard on 16th November 1990 and dismissed on 30th November 1990. Being dissatisfied, the Appellant preferred this appeal.

On appeal, the Appellant put forward the following grounds in her amended Memorandum of Appeal:

1. *The Learned Trial Magistrate erred in law and in fact in refusing to exercise his judicial discretion in accordance with the law.*
2. *The Learned Trial Magistrate erred in law and in fact in refusing to give the Appellant's counsel's affidavit any consideration unjustifiably rejecting it without assigning any reasons thereto.*
3. *The Learned Trial magistrate erred in law and in fact when rejecting appellant's counsel's affidavit that indeed he had notified the respondent's counsel of this inability to attend court as the*

- application had been fixed exparte; when there was sufficient evidence to establish that fact.*
4. *The Learned Trial Magistrate erred in law and in fact in visiting the conduct of the Appellant's counsel on the Appellant as a consequence of which the Appellant's application was prejudiced and the exercise of the magistrate's discretion erroneous.*
 5. *The Learned Trial Magistrate erred in law when interpreting all the facts and misdirected himself when dismissing the Plaintiff's application to have her application reinstated for no good reason.*
 6. *The Learned Trial Magistrate erred in law in making the decision he made without considering the matter properly or assigning any good reasoning for his decision.*
 7. *The Learned Trial magistrate erred in law and fact in delivering his order of 23.2.1990 when the application was not served upon the Appellant's counsel on record as evidenced by the proceedings.*
 8. *The Learned Trial Magistrate erred in law and in fact in making his decision without considering all the facts before him and ignored his paramount duty as well as his inherent powers of doing substantial justice in the matter having regard to all the circumstances of the case.*
 9. *In his consideration of the law and facts before him the Learned Trial Magistrate misdirected himself and erred in coming to his decision on wrong principles, thus worked hardship to Appellant that occasioned miscarriage of justice.*
 10. *The Learned Trial Magistrate decisions are unfair and unjust and cannot be maintained as they are contrary to the interest of justice.*
 11. *The Learned Trial Magistrate erred in law and in fact when entering judgment in terms of the award when the grant of the letters of administration had not been made.*
 12. *The decision of the Learned Trial Magistrate is illegal, one sided and contrary to the provisions of law.*
 13. *The Learned Magistrate erred in law by upholding the arbitrators award when in fact the elders had no jurisdiction to determine a succession matter where no administrator was appointed.*
 14. *The Learned Trial Magistrate erred in law and in fact in allowing distribution of an Estate before letters of administration had been granted.*
 15. *The Learned Trial Magistrate erred in law and in fact in failing to appreciate that objection on*

who would be issued with letters of administration was never determined by elders rendering the entire proceedings a nullity.

16. The Learned Trial Magistrate erred in law and in fact in not finding the entire proceedings were a nullity ipso facto as the proceedings thereof were null and void ab initio.

When the appeal came up for hearing, learned counsels appearing herein recorded a consent order to have the appeal disposed of by way of written submissions.

I have re-considered and re-evaluated the case that was before the trial court. I have further considered the written submissions. Let me first set out in brief the facts leading to this appeal before considering the merits or otherwise of the appeal. On 28th day of April 1972 **JAMES WAMAI MURAYA**, hereinafter referred to as the deceased passed away. **RUTHU NYAWIRA WAMAI**, the Respondent applied to be given Letters of Administration intestate to administer the deceased's Estate. When **WANGUI WAMAI**, the Appellant herein, learnt of the Respondent's move, she filed an objection to the making of grant under *rule 17(1)* of the Probate and Administration Rules. The Appellant contemporaneously by way of cross-petition applied to be given a grant of Letters of Administration instead of the Respondent. The dispute between Ruthu Nyawira Wamai (respondent) and Wangui Wamai (appellant) was the question as to who between them was the lawful wife of James Wamai Muraya, deceased. The Respondent claimed she was the lawful wife of the deceased. She also alleged that the Appellant had eloped with another man prior to the Deceased's death. The Respondent alleged that the petition by the Appellant was *resjudicata* having been conclusively dealt with vide Karatina **D.M.C. SUCC. CAUSE NO. 96 OF 1978**. When the matter came up for hearing before the trial court on 28th October 1983, parties to this dispute recorded a consent order to refer the dispute for arbitration before the District Officer, Karatina. In fact the consent referral order stated as follows:

“Matters in dispute as to who is the wife of the deceased referred to the arbitration of the D.O. Karatina. Each party to select two elders to sit with the D.O. Award to be filed within 90 days. Mention 3.2.84.”

The record shows that the court noted on 16th March 1984 that the award had been filed. Parties were given time to peruse the award. By the consent of the parties, the aforesaid award which was filed in court on 27th February 1984 was set aside. On 17th October 1986, another consent order was recorded referring the dispute for arbitration by another D.O. Karatina with

the help of four elders, two to be appointed by each party. The award was to be filed in court within 60 days. It would appear the award was filed and read to the parties on 1st February 1988. The panel of elders found the Respondent and the Appellant to be wives of the deceased. The Appellant then filed the chamber summons dated 24th February 1988 in which she applied for *interalia* the elder's award to be set aside. The Respondent opposed the application by filing a replying affidavit she swore on 11th April 1988. The Summons was fixed for interpartes hearing on 24th November 1989. On the aforesaid date, **MR. MAOSA**, learned advocate for the Applicant, (appellant herein), did not attend court. **MR. MWANGI**, learned advocate for the Respondent (respondent herein), applied for the Summons to be dismissed for want of attendance and prosecution. The learned Resident Magistrate proceeded to dismiss the application and entered judgment in terms of the elders award. When the Appellant's counsel learnt of the dismissal order, he filed the summons dated 19th February 1990 in which he sought for the dismissal order to be set aside and for the application dated 24th February 1988 to be reinstated. The Respondent's advocate filed a replying affidavit to oppose the application. **E. B. OCHIENG**, the learned Resident Magistrate, heard and dismissed the application. Being dissatisfied the Appellant preferred this appeal.

I have carefully considered the grounds of appeal put forward by the Appellant. In my view though the Appellant has listed sixteen grounds of appeal the same may be condensed to two main grounds namely:

- (i) *Whether or not the learned Resident Magistrate properly exercised his discretion judicially in dismissing the Appellant's application dated 19th February 1990.*
- (ii) *Whether or not the learned Resident Magistrate visited the mistakes of counsel on the client.*

Let me begin by dealing with the first issue as to whether the trial magistrate properly exercised his discretion judicially before dismissing the Appellant's application. There are complaints that the trial magistrate did not consider the merits of the application and that he did not assign any reasons to his decision. This being the first appellate court, the parties are entitled to a re-evaluation of the case. In the application dated 19th February 1990, the Applicant (appellant herein), sought for the order dismissing her application dated 24th February 1988 wrongly stated as dated 24th February 1989, made on 24th November 1989, to be set

aside thus paving way for the same to be reinstated. The aforesaid application was supported by the affidavit of Thomas Maosa sworn on 27th February 1990. I have already stated hereinabove that the application dated 24th February 1988 (wrongly stated to be dated 24th February 1989) was dismissed for want of attendance and prosecution on the part of the Appellant and her counsel. The record shows that when Mr. Maosa, learned advocate for the Appellant failed to turn up for the interpartes hearing of the application, Mr. Mwangi, learned advocate for the Respondent, successfully applied for the dismissal of the application for want of attendance. In his affidavit in support of the application dated 19th February 1990, Mr. Maosa explained in detail the reasons why he was absent from court on 24th November 1989. He deponed in paragraph 8 of his affidavit that on 21st November 1989, he sent by speed post a letter to notify **MR. KABURU**, the Respondent's advocate, that he will not be available on 24th November 1989 because he was scheduled to travel to Migori Law Courts. Attached to Mr. Maosa's affidavit is the letter dated 21st November 1989. The aforesaid letter read in part as follows:

“We wish to seek your indulgence again because our judgment in a criminal case.” *Mr. Maosa will be in Migori for a*

Mr. Maosa further deponed that his secretary confirmed that the firm of Kaburu & Co. Advocates had received the letter. Mr. Maosa said he presumed his colleague will indulge him but was surprised that Mr. Mwangi, learned advocate and Mr. Kaburu's representative proceeded *ex parte*. In his replying affidavit, **MR. JOB SIMON MWANGI**, learned advocate for the Respondent, deponed that the letter allegedly posted by Mr. Maosa was not in his file when he proceeded *ex parte* to have the application dated 24th February 1988 dismissed. Mr. Mwangi further deponed that Mr. Maosa should not have travelled to appear before the Migori Law Courts for judgment and instead he should have requested another advocate to hold his brief. It is apparent from the averments of both learned counsels that there is no dispute that Mr. Maosa failed to attend the trial court for the interpartes hearing of the application dated 24th February 1988 because he had travelled to Migori Law Courts. Mr. Maosa had specifically deponed that his secretary had confirmed that his letter seeking for indulgence had reached the offices of Kaburu & Co. Advocates in good time. Mr. Mwangi did not controvert this assertion in his replying affidavit. He did not deny having received the letter. He did not even state in the replying affidavit as to

when he received the letter. Let me now examine how the learned Resident Magistrate dealt with the application. On this issue, the learned Resident Magistrate expressed himself in part as follows:

“I have carefully considered the reasons advanced by Mr. Maosa for their failure to appear in court for hearing on 24th November 1989, and I am convinced that the same cannot hold water. The reasons given by Mr. Maosa are unsatisfactory, in all the circumstances of this case. Hence, they have failed to show sufficient cause as to why they did not appear on 24th November 1989 to prosecute their application dated 24th February 1988.”

I have critically examined the entire ruling of the learned Resident Magistrate. He has not stated in the ruling that he considered the averments made by Mr. Maosa in the affidavit filed in support of the summons dated 19th February 1990. He has not even mentioned the reasons advanced by Mr. Maosa in support of the application. What the learned Resident Magistrate did was to make a general statement dismissing the application on the basis that the reasons given did not hold water and were unsatisfactory. Had the learned Resident Magistrate taken his time to examine the affidavit of Mr. Maosa, he would have found that the Appellant's advocate had written to the Respondent's advocate seeking the latter's indulgence because he had travelled to Migori. The learned Resident Magistrate would have also noted that the Respondent's advocate did not deny receiving the Appellant's advocate's letter. He would have further noted that the Respondent's advocate did not controvert Mr. Maosa's assertion that the firm of Kaburu & Co. Advocates was served with the letter in good time and in any case before the application proceeded for interpartes hearing. It is obvious that the reasons advanced by the Appellant's advocate for failing to attend court on 24th November 1989 were plausible. Of course I must add from the outset that it is not enough for a party to just seek the indulgence from a colleague to adjourn a matter by correspondence. Such correspondences should be copied to the trial court and further that the absent advocate must send a colleague to hold his brief to formally adjourn the matter. The Appellant's advocate in this matter was presumptuous. He assumed his colleague will indulge him and that the trial court will accept an application for the adjournment of the matter. When the issues raised by Mr. Maosa were put to the attention of Mr. Mwangi, it was expected that Mr. Mwangi would have acceded to the Appellant's application in view of the reasons given by Mr. Maosa to justify his absence from court. The Respondent and her advocate would have been compensated by way of costs.

The second main ground argued on appeal is that the learned Resident Magistrate

erred when he visited the sins of learned advocate on the client. I have carefully looked at the recorded proceedings. It is apparent that the learned Resident Magistrate took into account the conduct of the Appellant's counsel before dismissing the application. Mr. E. B. Ochieng expressed himself in part as follows:

“I am convinced that the general conduct of the applicant towards having his application prosecuted within reasonable periods is quite deplorable. He has not bothered to fix hearing dates for his own application to be heard in time and this has literally forced the respondent to do so in the interest of justice. Such an attitude on the part of the applicant is unacceptable and cannot be condoned by this court.”

It should be born in mind that the Appellant is a lady represented by Mr. Maosa. The matter which was before the trial court was an application. It has always been a practice that applications are normally caused to be listed for hearing by learned advocates on behalf of their clients. I can infer in this context that the learned Resident Magistrate referred to the Applicant (appellant) as ‘he’ in appreciation of the fact that Mr. Maosa was legally bound to list the application for hearing on behalf of his client. Having come to the above conclusion, it is therefore easier to conclude that the learned Resident Magistrate heavily relied on the past conduct of the Appellant's advocate to dismiss the Appellant's advocate. I am convinced that the learned Resident Magistrate erred when he visited the mistakes of the advocate on the Appellant (client). I have already explained in detail that Mr. Maosa acted presumptuously when he absented himself from court before securing a concrete promise from Mr. Mwangi, learned advocate for the Respondent, that the matter would be adjourned. Mr. Maosa also failed to send a colleague to hold his brief. There was also no evidence presented before the learned Resident Magistrate to show that Mr. Maosa's past conduct of not fixing his matters for hearing was known and condoned by the Appellant. In my view, the Appellant herein has shown that her application was dismissed due to the mistakes of her advocate. The mistakes pointed out had nothing to do with her.

In the final analysis, and on the basis of the above reasons, I find the appeal to be with merit. The appeal is allowed. The order issued on 30th November 1990 dismissing the application dated 19th February 1990 is set aside and is substituted with an order allowing the application dated 19th February 1990. The effect of the judgment is that the order issued on 24th November 1989 dismissing the application dated 24th February 1988 (wrongly stated as dated 24th February 1989) is set aside. The aforesaid application dated 24th February 1988 is

reinstated and directed to be heard *denovo* by another magistrate of competent jurisdiction other than E. B. Ochieng on priority basis. Costs of the appeal to be met by the Estate of James Wamai Muraya, deceased.

Dated and delivered at Nyeri this 17th day of September 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Ng'ang'a holding brief Wanjohi for Respondent and Mr. G. Mwangi for Appellant.