



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

**Succession Cause 475 of 1998**

**IN THE MATTER OF THE ESTATE OF KIPSANG KANDIE (DECEASED)**

**MARY KIMOI SANG.....PETITIONER**

**VERSUS**

**CHARLES K. KANDIE.....RESPONDENT**

**RULING**

In his Summons for Revocation of Grant brought under Section 46 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules, Charles K. Kandie seeks the revocation of the Grant of Letters of Administration issued in this cause on 13<sup>th</sup> March 2002 to Mary Kimoi Sang, the widow of the deceased, on the ground that it was fraudulently obtained by making a false statement and concealment of material facts.

Before the application could be heard Mr. Kipkenei for the Respondent raised a preliminary objection written notice of which he had given. He argued that a similar application by the applicant having been dismissed by the Hon. Justice D. M. Musinga for non attendance this matter is *res judicata* and the institution of this application without seeking to reinstate the one dismissed for non attendance is an abuse of the process of court.

Mr. Githui for the applicant does not share the same view. He submitted that the matter is not *res judicata*. As it has not been decided on merit and the applicant is entitled to bring an application similar to the one dismissed for non attendance if he explains the cause for his failure to attend court on the date the earlier application was dismissed.

I have considered this preliminary objection. I agree with Mr. Githui that this matter is not *res judicata*. A matter is *res judicata* if it has been decided on merit. See *Kibogy Vs Chemweno* [1981] KLR 35 and *Wanguhu Vs Kania* [1987] KLR 51. This one has not.

I, however, do not agree with Mr. Githui that once a matter is dismissed for non attendance a party can just ignore that dismissal and bring another application on similar grounds. Order 9B Rule 8 of the Civil Procedure Rules provides for the setting aside of a judgment entered against a party or an order dismissing his suit or application for non attendance. It is an abuse of the process of the court to ignore that application and file a fresh one on similar grounds. I therefore strike out the Applicant's summons for revocation of grant dated 8<sup>th</sup> June 2007 with costs to the petitioner.

DATED and delivered at Nakuru this 17<sup>th</sup> day of July 2008.

**D. K. MARAGA**

**JUDGE**