



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 12 OF 2006

EUNICE WAMIRU KIURAAPPELLANT
VERSUS
NDUTA JUMARESPONDENT

J U D G M E N T

From the Record of Appeal filed by the Appellant and the Respondent, it is clear that following the death of Kamau Njoroge (the deceased) there was a dispute between them regarding the licence that had been granted to him by the National Irrigation Board over a four acre rice holding No.1600, unit 8, Mwea Section, each claiming to be the one entitled to succeed the deceased. The Board went to the Resident Magistrate's Court at Wanguru and sought the court to resolve the dispute. The Appellant claimed to be the wife of the deceased whereas the Respondent was the sister (and the only surviving sibling) of the deceased. The dispute was registered as "Arbitration No.43 of 1994" (although it is also referred to as "Misc. Succ. No.43 of 1994").

The matter went before S.M. Juma (DM II) who referred it to arbitration by a panel of elders under the chairman of District Officer for Mwea. It was asked that the award be filed in court within 90 days. An award was filed giving the licence to the Appellant. The Respondent successfully applied to set it aside. It was ordered that the dispute be heard and determined by the court.

The matter was heard by various magistrates and culminated in the judgment being delivered by KIMUTAI K.T. (Resident Magistrate) on 16th February 2006. He found that the Appellant had not established that she was married under kikuyu customary law to the deceased. Referring to Regulation 2 of the Irrigation (National Irrigation Schemes) Regulations (L.N. 16 of 1997) made under the Irrigation Act (Cap. 347), the learned magistrate found that the Respondent was not an "authorized dependant" of the deceased as she was not his father, mother, wife or child. She could not, therefore, succeed the licence. The court terminated the licence and asked the Board to grant a fresh one to whoever it deemed fit.

The Appellant was aggrieved by the judgment and the decree that followed. In her Memorandum of Appeal she claimed that there was sufficient evidence to show that she was the deceased person's customary law wife and that the court had erred in finding otherwise. She asked that the judgment and decree be set aside and in their place the court declares her to be the wife of the deceased, legally entitled to succeed the licence. The Respondent was equally not happy with the decision and cross-appealed. Her contention was that the court had erred in not finding that following the death of the deceased his licence could only be inherited after proceedings under the Law of Succession Act (Cap. 160). She asked the court to find that she was the one, under customary law, legally entitled to inherit the licence. She asked that the judgment and decree be set aside and in their place an order be made declaring her the one entitled to take over the licence. The Appeals were consolidated.

I have considered the dispute, the case for each side and submissions by Mr. Kahigah for the Appellant and Mr. P.N. Mugo for the Respondent.

The Irrigation Act is a 1966 legislation. The Irrigation (National Irrigation Schemes) Regulations were made under the Act in 1977. Under Regulation 4, licences are given to persons occupying any part of a scheme. The licensee may under Regulation 7 nominate another person to succeed him. Where a licensee dies without nominating a successor his “authorized dependant” (that is, his father, mother, wife or unmarried child under the age of 18) may within one month after the death of the licensee nominate, in writing to the manager, a successor who may be approved by the court. The Respondent was the sister of the deceased and could not therefore be an “authorized dependant”. The Appellant claimed to be the deceased’s wife but the court found that she was not. The court went on to find that under Regulation 7 (5) there was no person legible to succeed the licence and therefore the same had been terminated and the holding vacated. It was asked that the manager do issue a fresh licence.

The Law of Succession Act came into operation in 1978. Under section 2:
“2. (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession of estates of deceased persons dying after the commencement of this Act and to the administration of estate of those persons.

2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

The deceased died in 1994 when this Act was in operation. This is an Act of universal application as far as administration of estates of dead persons is concerned. It does appear to me that, despite the provisions of the Irrigation Act or the Regulations made thereunder, the licence granted to the deceased was his free property that was available to be succeeded under the Act. If that was the case, under Section 82 any person seeking to enforce any cause of action arising out of the death of the deceased for his estate was required to obtain letters of administration. Neither the Appellant nor the Respondent had such letters.

Secondly, when the manager came to court as a result of which the dispute was referred to arbitration, he did not follow any known procedure for filing the of suits, and the proceedings that were filed were not in the nature of a succession cause. A miscellaneous application could not originate any competent proceedings to inherit the licence.

The consequence is that neither the Appellant nor the Respondent had a competent claim to the licence, and neither do they have a legitimate complaint in this appeal. It is for these reasons that I dismiss with costs both the appeal and the cross-appeal.

Dated and delivered at Embu this 25th day of July 2011.

**A.O. MUCHELULE
JUDGE**