



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Civil Appeal 57 of 2007**

**GRACE MURINGO CHOMBA
CECILY WANDIA KILO.....APPELLANTS**

V E R S U S

MILLICENT WANGU NYAGA.....RESPONDENT

J U D G M E N T

The Appeal herein is against the Ruling and Order of the Acting SRM Wanguru in RM Misc. Succession No. 7 of 2006 which was delivered on 17/5/2007. The said Ruling nominated Millicent Wangu Nyaga who is the Respondent herein to succeed **BETH KARIUKO MUGO** in **Rice Holding Number 2380**. It is necessary to clarify here that the Misc. Succession No. 7 of 2006 was not a proceeding under the Law of Succession Act Cap 160 of the Laws of Kenya but a proceeding pursuant to Regulation 7 of the Irrigation Act Cap 347 of the Laws of Kenya. Under the said Regulations, when a licensee of a Rice holding dies without naming a successor, if the dependents fail to agree on the next successor, then the matter is referred to court which hears the parties and nominates the successor. It should be noted however that no person so nominated may succeed without the approval of the Committee as provided for under Regulation 7 (2) of the Cap 347. This is so because the holders of the Rice holdings are only licensees and the land remains the property of the National Irrigation Board. I have found it necessary to give this explanation because strictly speaking ‘rice holdings’ cannot be part of the “free property” of a deceased person as envisaged under the Law of Succession Act - Cap 160 of the Laws of Kenya. Free ‘property’ under Cap 160 is defined thus

“.....The property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.....”

A rice holding is not therefore a property that can be subjected to the provisions of Cap 160. Nor is a licence issued under that Act because even the Successor of such a licence is subject to the approval of the Committee. Neither Section 38 of the Succession Act nor Kikuyu customary law was applicable in the determination of the Successor of the late Beth Kariuko Mugo.

When the matter was referred to the Senior Resident Magistrate at Wanguru for hearing, the learned trial magistrate heard the parties and applied the principle of equity and a balance of convenience. He then appointed the Respondent Millicent Wangu Nyaga as the Successor for the Rice holding.

This nomination did not go down well with the Appellants herein who filed this appeal. Counsel for the Appellants proffered 4 grounds of Appeal submitting that the learned trial magistrate erred in law in disinheriting the 3 Appellants. As stated earlier on, the Rice holding did not form part of the deceased’s free estate that could have been transmitted to the Appellants as of right. It was and still is the property of the National Irrigation Board and can only be dealt with under Regulation 7 of the said Regulations.

Counsel for the Appellants' submission that the magistrate erred in law in not applying Section 38 of Cap 160 or Kikuyu customary law is in my view not a correct exposition of the law.

I have considered the grounds of Appeal along with the submissions filed by both Counsel *vis a vis* the impugned Ruling. Having found that neither the law of Succession Act nor Kikuyu customary law is applicable in this case, the only question is whether the decision of the magistrate was fair in the circumstances. In arriving at his decision, the learned trial magistrate found that the Respondent herein was the one who was cultivating and otherwise utilizing the said holding alongside the deceased. She produced a bundle of documents to show that indeed she had exclusive use of the holding along with the deceased as opposed to the Appellants herein. Evidence was also adduced to the effect that the Appellants are married elsewhere. They have their properties where they live and were not dependent on the Rice holding. They are staking their claims on the holding under the mistaken belief that the same belonged to their mother.

According to the learned trial magistrate, he saw no reason to upset the *status quo* as it was when the deceased passed away. He also found that unlike the Appellants, the Respondent is the one who had developed the Rice holding and the one who was wholly dependent on it for her livelihood. That in my view is equity and fairness. I cannot fault the finding of the magistrate. He applied his sense of equitability and fairness and in my considered view, the same was not repugnant to justice. The Respondent was rightly named as the successor of the deceased's licence.

She should be allowed to continue working on the rice holding as she did when the deceased was alive. My conclusion is that this appeal lacks merit. The same is dismissed with each party being ordered to pay it's own costs.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 22nd day of June 2010.

In presence of :- Mr. Muchira for Appellant & Mr. Mugo for Kiguru Kahiga for Respondent.