



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

**Civil Case 115 of 2004**

**MARIAM MOHAMED .....APPELLANT**

**VERSUS**

**SALIM THOYA .....RESPONDENT**

**R U L I N G**

I have considered the application and the submissions by both counsel. The Appellant died on 14<sup>th</sup> November 2005. No application for substitution was made under sub-rule 1 within one year and as a result the suit abated. Under rule 3(2) of Order 23 of the Civil Procedure Rules, the legal effect is mandatory. As a result of the foregoing there is no appeal pending except for purposes of costs if the Respondent were to apply.

The appeal having abated, substitution of the appellant is not possible in law. The applicant would be required in law to obtain an order of revival of the appeal first as an initial prayer before seeking substitution. There is no prayer to revive the suit under Rule 8(2) of Order 23 of Civil Procedure Rules.

It follows that the application hereby must fail. I hereby dismiss the same. There shall be no order as to costs for how as the suit has abated and the Estate of deceased has not been enjoined. Orders accordingly.

**Dated at Mombasa this 2<sup>nd</sup> day of September 2009.**

**M.K. IBRAHIM**

**J U D G E**