

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Civil Case 43 of 1999

GEORGE KAMEA MICHAEL.....PLAINTIFF

VERSUS

MATHEW GACHIRI NGURE.....DEFENDANT

RULING

Application dated 12/9/2006 seeks review of court orders made on 28/11/2005 and that this matter be heard de novo before court of competent jurisdiction. The application is brought under section 3 A and Order XLIV rule 1. The grounds set out are that the applicant has found that the application to substitute her as a party in place of her deceased husband was not served upon her but only on the plaintiff's former advocate. The service on Plaintiffs former advocate was in order in view of the first prayer. It is in accordance with Order III Rule 9 A. There is affidavit of service on this party.

Regarding the prayer to substitute the applicant instead of her husband there is no affidavit showing that the widow was served with the application again the rules on substitution of a party are provided under Order 23 CPC where a legal representative of a deceased party may be substituted in his place to proceed with the suit. The substitution must be made within one year.

I have perused this file and I do not see any evidence of death of the Defendant Mathew Gachiri Ngure. However, the provisions provide that where the issues outstanding is the execution of decree the rules of substitution of dead party shall not be applicable. Therefore if the defendant died before the suit was heard and determined the widow would be the right person to be substituted in his place if as it appears here the decree was made after the death execution of decree shall proceed without the substitution of the widow

Therefore the order as it affected the landing wife of the defendant is hereby set aside for non service and also as I see from the record only the execution is pending. Rule 11. Order 23 applies. Regarding prayer for hearing De Novo the applicant should indicate which court is desired no order is made.

The costs of the application to the applicant.

Dated this 2nd July, 2007.

J. N. KHAMINWA

JUDGE

2/7/2007

Khaminwa – Judge

Njue – Clerk

Mr. Utuku present

Ruling read in his presence in open court.

J. N. KHAMINWA

JUDGE