



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

**Civil Appeal 32 of 1991**

**JOHN MIANO RICHARD KARURI.....APPELLANT**

*Versus*

**PRISCILLA WANGUI MWANGI.....RESPONDENT**

*(Being appeal from the Judgment of the Senior Resident Magistrate Kerugoya in her Succession Case No. 13 of 1986 delivered on 13<sup>th</sup> day of February, 1990)*

**JUDGMENT**

The lower court had an objection raised by the Appellant hereof. The Appellant objected to the grant of Letters of Administration being issued to John Muriuki Mwangi. The court by its ruling dated 27<sup>th</sup> Jan. 1988 found that the said John Muriuki Mwangi was the closest relative of the deceased, and was therefore entitled to the letters being issued to him. It transpired that on the day that the court made that ruling the said John Muriuki Mwangi had died the day before i.e. on 26<sup>th</sup> January 1988. An *ex parte* application was made before court by the wife of the said John Muriuki Mwangi seeking to be appointed as a Petitioner in this estate in substitution to her husband. The court granted that order but on a later application by the Appellant the court set aside the said substitution.

The Respondent was however given 21 days of file a formal application for substitution. The Respondent did file that application and after hearing the arguments the court delivered a ruling on 13<sup>th</sup> Feb 1990. The court granted and order that the Respondent be appointed the Petitioner in place of her late husband John Muriuki Mwangi. That order aggrieved the Appellant who filed the present appeal and raised the following grounds:

1. The learned magistrate erred in granting Letters of administration to a deceased a person in contravention of the rule 26 of the Probate and Administration Rules.
2. The Learned Magistrate erred in substituting the respondent in place of her deceased husband in contravention of the rule 26 of the Probate and Administration Rules.
3. The Appellant being the nearest living relative of the deceased was the proper person to whom the grant of Letters of Administration should have been made. “

The Appellant was a nephew to the deceased. The substituted petitioner the Respondent herein was a wife to the brother of the deceased. The Appellant had objected to the substitution of the Respondent on the basis of rule 26 of the Probate and Administration rules. The pertinent rule in our case is rule 26 (3). It provides as follows:

*“Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.”*

This rule requires that a grant be issued to a surviving beneficiary in preference over a personal representative of a person who might have had priority in petitioning. That is the position in this case. The Respondent is a personal representative of the late John Muriuki Mwangi who had priority over the Appellant in petitioning in this estate. The lower court should have paid regard to this rule in considering the application of the Respondent for substitution. Section 66 of the Law of Succession Act provides as follows:

***“When a deceased has died intestate, the court shall save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:-***

***(a) surviving spouse or spouses, with or without***

***association of other beneficiaries:***

***(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;***

***(c) .....***

***(d).....”***

That section affords the court discretion in deciding who ought to be an administrator of an intestate estate. Although the court has that discretion it is to be guided by the relationship of the proposed administrator to the deceased person. Sub para (a) and (b) of that section provides the preference that should have guided the court. I am of the view that the substitution of the respondent in preference to that of the Appellant was wrong. The Appellant was closer in consanguinity to the deceased. The Appellant was correct in ground number 3 of appeal that the lower court was wrong to substitute the respondent whilst he the Appellant was the closest living relative of the deceased. The appeal for those reasons does succeed and the judgment of the court is that the ruling and order of the lower court of 13<sup>th</sup> Feb. 1990 is hereby set aside and is substituted by an order appointing the Appellant John Miano Richard Karuri as the administrator of the deceased estate. The matter shall however be gazetted before a grant is issued to the appellant. The Appellant is awarded costs of the appeal.

**MARY KASANGO**

JUDGE

***Dated and delivered at Nyeri this 2<sup>nd</sup> day of November 2007.***

**By: M. S. A. MAKHANDIA**

JUDGE