

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL 39 of 03

DISHON KARUGA MBURIAAPPELLANT

VERSUS

KATHUNGU NJOKA.....RESPONDENT

RULING

The application dated 18.8.2005 seeks order to appoint Hellen Wangari Kathungu and to substitute her for her husband, Kathungu Njoka who is now deceased to take up the appeal.

The death occurred on 9/9/2004 and this application was filed just before the expiration of the 12 months period provided under order 23 civil procedure Rules. It is admitted that at the time of death the deceased held a licence to utilize a Rice Holding by National irrigation board. The Rice Holding is now utilized by the children of deceased because the widow says that she is too old to work. The issue is whether or not there is a personal successor with a grant of representation to be substituted in place of deceased. Also does the right to work on Rice Holding Estate survive the death of licensees?.

The Irrigation Act Cap. 347 and regulations made therein (regulation 7) provides that the licensee may at any time nominate a successor in case of death. I find the license survives the deceased by virtue of the Act.

On the issue of abatement of suit Civil Procedure Rules Order 23 Rule 4 provides that where a suit survives death the legal representative of deceased shall be made a party. In the present case the appeal in existence can be finalized by a legal representative of deceased. It is not clear if the widow being in priority in taking a grant has done so. However she is the one entitled and there is no reason why she should not take a grant limited or otherwise to represent her husband in this appeal.

Rule 4 (3) Order 23 CPC is clear as to when time begins to run namely where no application is made within one year. In this case the application was made within one year and therefore the suit has not abated. It is not clear if the widow has a grant of representation yet.

I adjourn the application to enable a grant of representation to be filed.

Mention on 15/5/2006.

J. N. KHAMINWA

JUDGE

Notice to Applicant.

J.N. KHAMINWA

JUDGE