



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 2534 OF 1994 (OS)**

**SIMON MWIRUTI J. MBUGUA.....PLAINTIFF**  
**V E R S U S**  
**JOHN KIHENJO KANGETHE.....1ST DEFENDANT**  
**JAMES MAMBO KANGETHE.....2ND DEFENDANT**

**R U L I N G**

This is an application under Order 23 Rules 1, 3 12 of the Civil Procedure Rules for substitution of Plaintiff with one Bernard Wamenju Kabuga as Plaintiff. The original Plaintiff died on 3.6.2002 but the Applicant says the cause of action survives and the suit has not abated hence the application for substitution but the Respondent/Defendant says the application is incompetent and defective and ought to be dismissed and that the cause of action does not survive.

Order 23 (1) of Civil Procedure Rules states that:

- “The death of a plaintiff or a defendant shall not cause the suit to abate if the cause of action survives or continues”

and Rule(3)(1) thereof says that where a Plaintiff dies and the cause of action survives the Court will cause “on application” made in that behalf, a legal representative of the deceased Plaintiff to be made a party and shall proceed with the suit provided the application is made within 1 year.

This is a suit regarding adverse possession of L.R. No. LIMURU/NGECHA/T.38. It is my belief that rights based on real property in favour of any person in a suit continues to exist against a legal representative of a deceased party to the suit. Normally it is personal actions like defamation that abate at death.

This is a case where there is no abatement and the application having been made timeously is proper. The points affecting the competence of the case can only be decided on evidence at a hearing.

Application is granted with costs.

DELIVERED at Nairobi this 25th day of July 2003

**A.I. HAYANGA**

**JUDGE**

**Read to Kithunyi for Applicant**

No appearance for Respondent

Court Ruling Read

**A.I. HAYANGA**

**JUDGE**