**Najeno v Serwanga**

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 29 March 1974

**Case Number:** 45/1971 (41/75)

**Before:** Allen Ag J

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*[1] Probate and Administration – Succession – Succession Act applies to all persons.*

*[2] Civil Practice and Procedure – Defendant – Substitution for dead defendant – Grant of probate or*

*letters necessary.*

**JUDGMENT**

**Allen Ag J:** This is a second appeal against the judgment of a magistrate which was reversed by the Chief Magistrate. The suit concerned land at Kabowa village which the appellant claimed from a woman called Najeno who died on 9 February 1970 before the first appeal was heard. On 30 May 1970 the then Chief Magistrate dismissed the appeal on the ground that the appellant was dead and she had not pursued her appeal which had been filed on 16 October 1969, before her death. Mr. Sengoba then applied on 17 July 1970 to substitute the deceased’s daughter Manjeri Namusazi for that of the appellant and, on 24 August 1970, the Chief Magistrate rescinded the order of his predecessor and revived the appeal under s. 101 of the Civil Procedure Act and he ordered that Namusazi should be made a party under O. 21 r. 3 although he did not specify on which side. The appeal was eventually heard and allowed in favour of Namusazi. Mr. Sendege for the appellant submitted that the daughter Namusazi had no locus standi and the Chief Magistrate ought not to have added her as a party merely because of her affidavit and that of her advocate, Mr. Sengoba. In addition the Order referred to by the Chief Magistrate, O. 21 r. 3, concerned the death of a plaintiff whereas Najeno was the defendant. He rightly pointed out that O. 21 r. 4 (1) was the correct one for replacing a dead defendant. It reads as follows: “(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.” The expression “legal representative” is defined in s. 2 of the Civil Procedure Act as: “a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.” In the Law Reform (Miscellaneous Provisions) Act (Cap. 74) the expression “personal representative” is used. S. 13 (7) reads as follows: “Subject to the provisions of this Act, the personal representative of a deceased person shall have the right to prosecute or defend any cause of action which has by virtue of this section survived for the benefit of or against the estate of such deceased person.” In s. 2 of the same Act “personal representative” is defined as: “(*a*) in the case of a deceased person to whom the Succession Act applies either wholly or in part, his executor or administrator; (*b*) in the case of any other deceased person, any person who, under law or custom, is responsible for administering the estate of such deceased person.” S. 3 (1) of the Succession Act, as amended by Decree 22 of 1972 defines personal representative as: “the person appointed by law to administer the estate or any part thereof of a deceased person.” Under S.I. 181 of 1966 the original Order exempting certain classes of people, including Africans, from the operation of the Succession Act was revoked. It was therefore applicable to the deceased respondent Najeno in 1970 when the application was made to substitute her daughter’s name or, perhaps, join her as a party. In his affidavit dated 17 July 1970 Mr. Sengoba referred to Namusazi as the legal representative of the deceased. Namusazi in her affidavit of 30 March 1970 called herself the successor in title of the deceased in respect of the buildings and Kibanja in dispute. Apart from her affidavit there was no other document or evidence to support her claim to be the successor in title. There was no original or certified copy of a grant of letters of administration and nothing to show that she had any authority to act or to refer to herself as the personal or legal representative of the deceased. S. 264 of the Succession Act provides that: “After any grant of probate or letters of administration, no person other than the person to whom the same has been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, until such probate or letters of administration has or have been recalled or revoked.” Mr. Kawere for both the respondent and Namusazi contended that his firm of advocates had handled the case right from the start with authority to represent the respondent, and that the Chief Magistrate was correct to allow the appeal to proceed in the way in which he did. However, I cannot see that it matters which advocates were involved. What is important is whether or not Namusazi could properly be referred to as the legal or personal representative. On the facts before me I cannot find that she was so entitled and until she could produce satisfactory proof, by showing the relevant grant, then the first appeal could not properly be heard. She therefore had no locus standi in the Chief Magistrate’s Court. I am of the opinion that the Chief Magistrate acted wrongly in proceeding to hear the appeal in his court and that his judgment and decree are therefore null and void since the appellant in that court was dead and there was no legal representative before him. I, therefore, do not consider that it is necessary for me to consider the merits or otherwise of this appeal as far as the land dispute itself is concerned. Accordingly, this appeal is allowed and I set aside the judgment and decree of the Chief Magistrate. The position now is that the trial magistrate’s judgment stands and there is an unheard appeal against it subsisting in the Chief Magistrate’s Court. It is up to the legal or personal representative of the deceased to take the next step if he or she is interested in pursuing this matter. I award costs in this appeal and in the Chief Magistrate’s Court to the appellant. *Order accordingly.*

For the appellant:

*J Sendego*

For the respondent:

*P Kawere*