



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wainaina v Mucheru & another; Kamau (Applicant) (Environment & Land Case 327 of 2015) [2023] KEELC 16393 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16393 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 327 OF 2015  
LA OMOLLO, J  
MARCH 16, 2023**

**BETWEEN**

**BETH NYATHIRA WAINAINA ..... PLAINTIFF**

**AND**

**KAMAU MUCHERU ..... 1<sup>ST</sup> DEFENDANT**

**SEPTRO CONSULT LTD ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**ALLAN KARIUKI KAMAU ..... APPLICANT**

**RULING**

**Introduction**

1. This ruling is in respect of the Applicant’s Notice of Motion dated 26<sup>th</sup> September, 2022 seeking the following orders:
  - a. That this Honourable court be pleased to find that the 1<sup>st</sup> Defendant herein is incapable of protecting his legal interests due to memory lapse.
  - b. That the Applicant be appointed as guardian ad litem for the 1<sup>st</sup> Defendant.
  - c. That the cost of this application be provided for.

**Factual Background**

2. This suit was commenced by way of a Plaint dated 6<sup>th</sup> September, 2012 filed on 11<sup>th</sup> September, 2012. In the Plaint, the Plaintiff seeks the following orders:



- a. A declaration that the Proceedings, Award and Decree of the Naivasha Land Disputes Tribunal and the Naivasha Principal Magistrate's Court in NLDT No. 93 of 2008 and Misc. Civil Application No. 27 of 2009 respectively are null and void.
  - b. A declaration that Kenneth Wainaina Kago (deceased) is the lawful owner of Title Number Naivasha/Mwichiringiri Block 4/2386 and the said piece of land is his estate.
  - c. An injunction against the Defendants by themselves, their agents and/or servants from selling, charging, leasing out, trespassing into, dealing with and/or interfering with Title Number Naivasha/Mwichiringiri Block 4/2386.
  - d. An order that the Title Deeds of Title Number Naivasha/Mwichiringiri Block 4/2386 issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant be Nullified and cancelled and the register be rectified.
  - e. Costs and interests of the suit at court rates.
3. The 1<sup>st</sup> Defendant filed his Statement of Defence dated 11<sup>th</sup> October, 2012 wherein he alleges fraud on the part of the deceased. He contends that he was allocated the suit land after the Land dispute tribunal corrected the fraud that had been committed. He denied all the other allegations in the Plaintiff.
  4. The matter proceeded to hearing, the Plaintiff tendered evidence and closed her case on 2<sup>nd</sup> March, 2022. The hearing of the defence was scheduled for 21<sup>st</sup> July, 2022 and on that day the 1<sup>st</sup> Defendant, one Kamau Mucheru, began his testimony but was stood down.
  5. Counsel for the 1<sup>st</sup> Defendant/Applicant explained that the witness is 98 years old and she suspected that he was suffering from memory loss and might not be able to testify. She stated that she needed time to make a formal application to have someone testify on his behalf.
  6. Counsel for the Plaintiff had no objection to the prayers for an adjournment.
  7. My handwritten notes capturing the day's proceedings are in the following words;  

"I have observed and listened to the first few minutes of the witness' testimony and it is apparent that we will not be able to go very far with his testimony on account of his age and memory. The application to stand down the witness is allowed. Counsel for the 1<sup>st</sup> Defendant to file an appropriate application and/ or document to aid in getting the 1<sup>st</sup> Defendant's evidence on record."
  8. This is the background upon which the present application was filed.

## **Response**

9. The Plaintiff in opposition to the application filed her grounds of opposition dated 12<sup>th</sup> October, 2022. She raised the following grounds:
  1. That the application is premature as the Applicant has not complied with sections 26, 27 and 28 of the *Mental Health Act*. Alternatively, this Honourable court has not conducted an Inquiry under order 32 rule 15.
  2. That the application contains no medical evidence of mental infirmity or unsoundness of mind.



## Issues for Determination

10. The Applicant filed his submissions on 2<sup>nd</sup> November, 2022. He identified two issues for determination:
  - i. Whether these proceedings ought to have been initiated under the provisions of the *Mental Health Act*.
  - ii. Whether these proceedings are properly brought under the provisions of order 32 rule 15 of the *Civil Procedure Rules*.
11. On the first issue, the applicant relied on Section 2 and 28 of the *Mental Act* and submits that the 1<sup>st</sup> Defendant has not been found to be suffering from a mental disorder under the said Act. He however argues that the 1<sup>st</sup> Defendant is suffering from dementia an illness that affects older adults. He cited the case of *MMM v AMK* [2016] eKLR.
12. He submits that the 1<sup>st</sup> Defendant's condition falls under the provisions of order 32 rule 15 of the *Civil Procedure Rules*. The same provides for persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind to be incapable of protecting their interests when suing or being sued.
13. The Applicant submits that the said proceedings ought not to have been initiated under the provisions of the *Mental Health Act*.
14. On the second issue, he relied on the case of *Hellen Mbinya King'ola v HNO & another* [2019] eKLR. He submits that the 1<sup>st</sup> Defendant being incapable of protecting his interest, the court should hold an inquiry as provided under order 32 rule 15 of the *Civil Procedure Rules*. It ought to examine the 1<sup>st</sup> Defendant and make a decision on his state of mind and whether the same prevents him from safeguarding his interests. He relied on the case of *NAA v Seven Four Eight Air Services (K) Limited* [2019] eKLR.
15. In conclusion, he urges the court to allow the present application as it has met the threshold as provided for under order 32 rule 15 of the *Civil Procedure Rules*.
16. The Plaintiff filed her submissions on 1<sup>st</sup> November, 2022. She identified one main issue for determination:

The proper procedure for appointing guardian ad litem and whether the applicant has complied.
17. She argues that there are two schools of thought on these questions. This, she says, is drawn from an analysis of various High Court decisions. She submits that the first set of judicial decisions state that the proper procedure is to petition the High Court under section 28 of the *Mental Health Act* and then have the appointment of a guardian done under sections 26 and 27.
18. The Plaintiff cited the cases of *Re Estate of Des Raj Ghandi(deceased)* [2018] and *Loghan Njenga Waweru v Teresia Nyokabi Karanu & anor* [2014] eKLR. She submits that the court once satisfied that a person is suffering from mental disorder, appoints a manager who will have powers to manage the estate as directed by the court. She adds that it is only after such appointment that the guardian moves the court for substitution in the pending suit.
19. The Plaintiff submits that the second school of thought is that order 32 rule 15 provides for two categories of persons, the first is persons adjudged to be of unsound mind and the second is those who



though not so adjudged are found by the court on inquiry to be incapable of protecting their interests when suing or being sued.

20. She relied on the cases of *MMM v AMK* [2016] eKLR and *Hellen Mbinya King'ola v HNO & another* [2019] eKLR. She urges this court to be persuaded by this second school of thought and find that it is seized of jurisdiction to conduct an inquiry. She goes on to state that a finding contrary to this will have the effect of rendering the part of order 32 rule 15 that relates to inquiry otiose and the court will have effectively declined jurisdiction.

### **Analysis and Determination**

21. Upon perusal of the submissions, it is this court's view that the twin issue for determination is:
- a. Whether this court can and should find that the 1<sup>st</sup> Defendant is incapable of protecting his legal interest due to memory lapse
  - b. Whether the Applicant should be appointed as guardian ad litem for the 1<sup>st</sup> Defendant.
22. Order 32 rule 15 of the *Civil Procedure Rules* provides as follows:

“The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued”

23. In the case of *NM v M'Marete Ibutu & 8 others* [2021] eKLR the court held that:

“Section 26 of the *Mental Health Act* as read together with order 32 rule 4 envisages a situation whereby the court is moved by way of a Petition or an originating summons. The court is expected to undertake a judicial inquiry before making an order to appoint a guardian.”

24. Further in the case of ELC Appeal No. 100 of 2019 *Faith Kananu Akwalu v David Mwenda Maingi* [2022] eKLR the court held as follows:

“The procedure to appoint a guardian for the estate of a person adjudged to be lacking mental capacity, a party seeking such an order must file an originating summons and or a Petition before the High Court. An inquiry must be made and the person alleged to be of unsound mind has to appear before the court for such an inquiry.”

### **A. Whether this court can and should find that the 1<sup>st</sup> Defendant is incapable of protecting his legal interest due to memory lapse.**

25. This question seeks to provide answers on Jurisdiction and procedure. On jurisdiction, I am of the view that any court seized of a matter has jurisdiction to determine questions concerning mental infirmity of a party to proceedings when they come up during the pendency of a suit provided that they are relevant to the proceedings in question. A court may be moved by way of an and on application under the provisions of order 32 rule 15.
26. While giving a background to this application, I made reference to the hand-written notes of the proceedings of 21<sup>st</sup> July, 2022 which pointed out to the general observations made by this court in respect of the 1<sup>st</sup> Defendant and the difficulty that presented in the course of his testimony.



27. Order 32 rule 15 of the [Civil Procedure rules](#) is in *pari materia* with Order 32 rule 15 of the *Indian Code of Civil procedure*. Commenting on these provisions, Mulla at page 2288 of [Mulla on the Code of Civil procedure 15<sup>th</sup> edition, Volume III](#) states as follows;

A person may be adjudged to be of unsound mind under the *Lunacy Act* 4 of 1912. It has been held that the rule is applicable to persons who are adjudged to be of unsound mind and to others who are found by the court on inquiry to be incapable of protecting their interests. It does not apply to person who are merely alleged to be insane. The court must hold an inquiry. Proof of absolute lunacy is not necessary. It is sufficient if the mental infirmity is such as renders the lunatic unfit to protect his interest the enquiry ... under this rule is not the same as is contemplated under the *Lunacy Act*. But it is a judicial enquiry to be conducted with due observance of all the rules of procedure, and the court may seek the assistance of medical experts.(emphasis is mine)

28. The Applicant and Respondent both agree that this court has jurisdiction to make an enquiry into the mental capacity of the 1<sup>st</sup> Defendant. Their point of departure is on the procedure.

29. The decision in [Hellen Mbila Kingola v HNO & another](#) (2019) eKLR is useful in setting out the procedure for conducting such enquiry and the questions to be asked to aid the enquiry. The learned judge cited with approval the decision in [MMM v AMK](#) [2016]eKLR and stated thus;

(13) Having not been adjudged as mentally unsound by any court of law, this application would rest upon order 32 rule 15. This would cover persons who though not yet adjudged to be mentally unsound are found by the court after an inquiry to be incapable of protecting their own interests when suing or being sued on account of unsoundness of mind.

(14) I would rely on the decision of Hon Justice John Mativo as [MMM v AMK](#) [2016] eKLR, where in discussing the import of Order 32 Rule 15 held as follows: -

“Interpreting a similar provision under the *Indian Civil Procedure Rules*, the court in *Balakrishnan v Balachandran* [2] held that the said rule [22] is intended to ensure that no man is adjudged a lunatic without proper enquiry, and that the Court should hold a judicial inquiry and it may seek the assistance of medical experts. It was pointed out that the only safe course to adopt is to follow strictly the procedure prescribed in Order XXXII, Rule 15. Civil Procedure Code, and that if the precaution of judicial inquiry is not observed, a man cannot be declared to be a lunatic (or unfit to protect his interests), and a guardian appointed for him on that basis. A decree passed or orders issued against a Defendant in such a case must be considered to be an ex parte decree, and must be set aside. At Page 461, when discussing the procedure to be followed by the court in an application such as the one before me the learned judge observed as follows:- (emphasis is mine)

“That procedure involves a judicial inquiry which consists normally of two parts: (1) questioning the lunatic (or the person in question) by the Judge himself in open court, or in chambers, in order to see whether he is really a lunatic and of unsound mind (or unfit to protect his interests) and (2) as the Court is generally presided over only by a layman, to send the alleged lunatic to a doctor for report about his mental condition after keeping him under observation for some days. .... When this elementary precaution of a judicial inquiry prescribed by law is not observed, I am



afraid that the laws of this country will not allow a man to be declared a lunatic and a guardian appointed for him, on such basis." (emphasis supplied)

30. In *Hellen Mbila Kingola* (supra), The Learned Judge also cites another decision from India i.e. *Ramanathan Chettiar v Somasundararn* in which an application under Order XXXII, rule 15 *Civil Procedure Rules* for the appointment of a guardian ad litem was filed on the ground that the Defendant became mentally infirm subsequent to the institution of the suit. The Court, instead of holding a regular judicial enquiry contemplated under rule 15 thought that it was sufficient to rely on the previous history of the litigation, and on the opinion it formed after looking at the Defendant, and eliciting answers to some questions. Pandrang Rao, J. held that there was no enquiry of the kind contemplated by law, and that the order must be deemed to be one in the irregular exercise of his jurisdiction. The learned Judge held that in the absence of a record of the questions and answers, it was impossible for the Court of revision to decide whether the conclusion arrived at on that particular aspect was justifiable and that the enquiry was un-judicial and unsatisfactory.
31. The Learned Judge in *Hellen Mbila Kingola* (supra) rightly observed that the decision in *Ramanathan Chettiar v Somasundararn* adds another necessary detail to the enquiry proceedings i.e. that the questions and answers in the inquiry must be recorded and must form part of the record.
32. The learned Judge goes on to cite the decision in *Duvvuri Rami Reddi v Duvvudu Papi Reddi and ors* [24] wherein the court summarises the principles that emerge from an analysis of various judicial decisions on the legal effect of order 32 rule 15. They are as follows:
  - a. Order 32, rule 15 places persons of unsound mind or persons so adjudged in the same position as minors for purposes of rules 1 to 14.
  - b. Order 32, rule 15 applies not only to a person adjudged to be of unsound mind, but also to a person of weak mind.
  - c. Where it is alleged that a party to a suit is of unsound mind and the other party denies it the court must hold a judicial inquiry and come to a definite conclusion as to whether by reason of the unsoundness of mind or mental infirmity, he is incapable of protecting his interests in the suit.
  - d. Mental infirmity may even be due to physical defects, if it renders him incapable of receiving any communication or communicating his wishes or thoughts to others.
  - e. Whether a person is of unsound mind or mentally infirm for the purpose of the rule and the event of the infirmity has to be found by the Court on inquiry.
  - f. Where the question of unsoundness of mind arises not only under Order XXXII, rule 15 of the *Civil Procedure Code* but is also one of the issues in the suit, the Court has ample jurisdiction to enquire into that question, and for that purpose seek medical opinion.
  - g. The enquiry should consist not only of the examination of the witnesses produced by either party, but also of the examination of the alleged lunatic by the judge, either in open court or chambers, and as Courts are generally presided over by lay-men, as a matter of precaution, the evidence of medical expert should be taken.
  - h. Of course, the opinion of a doctor as is the opinion of any other expert under the *Evidence Act*, is only a relevant piece of evidence.



- i. The Court may also compel the attendance of the alleged person before it, and to submit himself for medical examination. If the alleged person is in custody, the Court may direct the next friend or any other person having custody to produce him before the medical expert for examination.
  - j. Where the precaution of judicial enquiry is not observed, the person cannot be declared lunatic, and a guardian cannot be appointed for him.
  - k. When a person is adjudged as being of a lunatic or unsound mind irregularly and improperly; and notice was not served on him or a guardian alone was allowed to appear and defend the suit and decree was passed owing to the guardian not putting up a proper defence, the alleged lunatic can treat the decree against him as an ex parte decree and have it set aside under the provisions of the Civil Procedure Rules.
33. In the application, the Applicant has merely made allegation as to the extent of the 1<sup>st</sup> Defendant's mental infirmity and attached a copy of his National Identity, which states that he is 92 years old. Old age is not synonymous with mental infirmity. This court has no expertise on issues of mental health and would very much appreciate the production of a medical report to aid it in making an inquiry and reaching a correct finding. Medical diagnosis is essential and the applicant has failed to attach any.
34. In the absence of medical evidence, I am unable to make a finding that the 1<sup>st</sup> Defendant is unable to protect his legal interest on account of memory lapse.

**B. Whether the applicant should be appointed as guardian ad litem for the 1<sup>st</sup> Defendant.**

35. Taking into account my finding in (A), I find that the Applicant cannot, as yet, be appointed as guardian ad litem for the 1<sup>st</sup> Defendant.

**Disposition**

36. I find that the application dated 26<sup>th</sup> September, 2022 is premature as this court would first have to conduct an enquiry into the question of mental infirmity of the 1<sup>st</sup> Defendant before the Applicant can be appointed guardian ad litem. Consequently, the application is hereby struck out.
37. However, in order to meet the ends of justice and in order to enable this court wholly and effectively determine the issues at hand, and further in order to comply with order 32 rule 15, i invoke article 159 2 (b) & (d) of the Constitution of Kenya, 2010, section 3 & 13 (7) of the Environment and Land Court Act, section 1A, 1B & 3A of the Civil Procedure Act and issue orders as follows;
- a. The 1<sup>st</sup> Defendant shall be subjected to medical examination and a medical report filed before this court within 30 days from the date hereof.
  - b. The 1<sup>st</sup> Defendant shall be produced before this court within 14 days of filing of the medical report for purposes of an enquiry into whether due to mental infirmity he is incapable of protecting his interest in this suit.
  - c. The Plaintiff/ Respondent shall have costs of this application.
38. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16<sup>TH</sup> DAY OF MARCH, 2023.**

**L. A. OMOLLO**



## **JUDGE**

In the presence of:

Mr. Mutonyi for the Plaintiff

Njeri Njagua for the 1st Defendant

No appearance for the 2nd Defendant

Applicant represented by Njeri Njagua

Court Assistant: Ms. Monica Wanjohi

