



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 501 OF 2001**

**IN THE MATTER OF THE ESTATE OF THE LATE JL (DECEASED)**

SNW.....SUBJECT

**AND**

LWM.....APPLICANT/INTENDED GUARDIAN AD LITEM

**RULING**

1. By way of a chamber summons dated 23/11/2018 **LWM** (applicant) seeks orders;

**a) Spent**

**b) Spent**

**c) THAT the court be pleased to conduct an inquiry to establish whether by reason of unsoundness of mind, mental infirmity, or diminished intellectual capacity the subject is incapable of protecting her own interest when suing or being sued.**

**d) THAT the court be pleased to appoint the applicant as guardian ad litem.**

**e) THAT the court be pleased to substitute the subject herein and the guardian ad litem do act on her behalf in all proceedings arising herein and in any other matter in any court including but not limited to testifying on her behalf on any claim touching on the deceased properties.**

**f) THAT the costs of this application be provided for.**

2. The application is premised on 4 grounds namely;

a) The subject filed an application seeking orders for revocation of grant for material non disclosure of the fact that she was cowife of the petitioner.

b) That at the point of giving instruction the subject was well and could actually defend her rights and interests.

c) That the subject has recently been diagnosed with Alzheimer's dementia a condition that has had her memory flawed thus incapable of remembering events and crucial facts concerning her matter or presenting her thoughts in a logical manner.

d) That an inquiry by this court needs to be done to determine whether or not the respondent is capable of protecting her own interest when suing or being sued and subsequently the court do appoint a Guardian *ad litem* to act on her behalf.

3. In support of the application is the affidavit of the applicant sworn on the 23<sup>rd</sup> November, 2018.

4. The court did allow an inquiry to establish whether by reason of unsoundness of mind, mental infirmity, or diminished intellectual capacity SNW (hereinafter, the subject) is incapable of protecting her own interest when suing or being sued. This was in accordance with the provisions of **Order 32** of the **Civil Procedure Rules** whereby by dint of **sub-rule 15** of the order, the procedures provided for in **rules 1 to 14** are to extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the court to be

incapable of protecting their interests when suing or being sued.

5. The inquiry was held on the 26<sup>th</sup> day of February, 2019. The subject was examined in chief and also cross-examined by counsels for other parties in this matter.

6. The subject said she does not know her actual age. She lives at Kirathimo with her sister and her child. She was married to one JL. She lives at the servant quarters. Her child goes to school at [particulars withheld] School and is in standard six (6).

She said she is in court since the children of TN started disputes. TN is a child of her (applicant's) sister. She said she knows LWM. The applicant stated she is the 4<sup>th</sup> born in their family.

7. None of the counsels on record had any questions for the subject when she was offered for cross examination.

8. Dr. Njau J. W. was called as a witness. He said he has practiced psychiatry for more than 20 years. He saw the subject on 12/7/2018.

9. Upon examination he concluded that the subject is a 68 year old lady who is suffering from Alzheimer's dementia, a progressive age related neurological disorder with onset in early sixties and is characterized by an irreversible progressive impairments of cognitive function consisting of global impairment of intellect manifested on difficulty with memory (inability to relate and recall information), reduced attention span, impaired judgment, inability to weigh, to reason out or think constructively.

She also suffers from a mood disorder (depression) characterized by feeling hopelessness, low energy, disturbed sleeps, low appetite and negative thoughts.

Therefore due to the above disorders in his opinion, she may not be capable of giving evidence in a court of a law.

10. I have considered the evidence adduced at the inquiry. The evidence of the subject is completely at variance with that of the doctor, Dr. Njau.

11. The subject appeared in court and looked physically fit and alert. The witness answered questions in a manner suggesting that her cognitive function was active and dependable. Indeed due to the flawless presentation, none of the 4 advocates appearing found the need to cross examine her.

12. The doctor's evidence seems to paint a totally different picture. The doctor avers that the subject suffers from Alzheimer's dementia characterized by impairment of cognitive function. He opines that she may not be capable of giving evidence in a court of law.

13. Expert evidence is always most obviously needed when the evaluation of the issues before court requires technical or scientific knowledge only an expert in that field possess.

14. In this inquiry, expert medical evidence is central in determining the issues at hand.

15. It must be borne in mind, however, that such expert opinion is not necessarily binding on the court. The decision of the Court of Appeal in **KIMATU MBUVI T/A KIMATU MBUVI and BROS vs AUGUSTINE MUNYAO KIOKO, Civil Appeal Number 203 of 2001 (2007) IEA 139** in spot on. The Court held;

**“Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”**

16. After considering the evidence of the expert alongside the evidence of the subject herself, I come to the conclusion that the subject is capable of protecting her own interests when suing or being sued.

17. Prayers 3 and 4 of the chamber summons dated 23/11/2018 are dismissed.

18. Each party to bear its own costs.

**Dated and Delivered at Nakuru this 28<sup>th</sup> day of February, 2019.**

**A. K. NDUNG'U**

**JUDGE**