



**Ndavi v Kimanthi (Environment & Land Case 147 of 2014)
[2023] KEELC 22159 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22159 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 147 OF 2014
CA OCHIENG, J
DECEMBER 13, 2023**

BETWEEN

KALUNDU MULWA NDAVI PLAINTIFF

AND

SIMON MUTUA KIMANTHI DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion dated the 26th May, 2023 brought pursuant to sections 1A, 1B and 3A of the [Civil Procedure Act](#) as well as Order 51 Rule 1 of the [Civil Procedure Rules](#). The Plaintiff seeks the following Orders:
 1. This Honourable Court be pleased to grant leave to substitute the Plaintiff with her Granddaughter Felistus Mutono Ngei.
 2. That the substitution herein is limited to this suit only.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Felistus Mutono Ngei where she deposes that she is the granddaughter of the Plaintiff who is 97 years old and has problems both on the issue of memory and communication. She explains that this suit being a land matter was filed nine (9) years ago and they stand to be gravely prejudiced unless their grandmother is substituted since she is unable to testify. She avers that no prejudice will be occasioned by any party if the Plaintiff is substituted.
3. The Defendant opposed the instant application by filing a replying affidavit where he deposes that the said application offends the provisions of Order 1 Rule 10 as read with Order 1 Rule 25 of the [Civil Procedure Rules](#) as it is frivolous, vexatious, based on misconception of the law and amounts to a gross abuse of the court process. He contends that the deponent Felistus Mutono Ngei is not named as an applicant herein. He explains that he is a Kamba by birth and very conversant with the Kamba language and was in court on 2nd May, 2023 when the Plaintiff was testifying in Kikamba language



indeed confirming that she sold the suit portion of land wherein he occupies but her Counsel alleged that she has memory loss. He insists that the Plaintiff is his neighbour whom she knows very well to be of sound mind as he interacts with her and recently she went through catechism class in their local church and was baptized. He argues that the attached medical report which is a mere letter is a sham and no credential for the purported medical practitioner has been provided. He reiterates that the aforementioned letter states that the Plaintiff is unwell yet this has never been brought up in court nor the issue of mental infirmity ever raised. He contends that the Plaintiff has failed to attached a copy of her national Identity Card in the instant application. He made reference to the provisions of Order 32 Rule 15 of the Civil Procedure Rules and sections 2 and 26 of the [Mental Health Act](#). He states that he will be highly prejudiced by the intended substitution.

4. The parties did not file submissions to canvass the instant application.

Analysis and Determination

5. Upon consideration of the instant Notice of Motion application including the respective affidavits, the only issue for determination is whether the Plaintiff should be substituted with Felistus Mutono Ngei as a witness.

6. Section 35(1)(b) of the [Evidence Act](#) stipulates that:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

While Section 125(1) of the [Evidence Act](#) provides that:

All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause

7. The Plaintiff claims she is unable to testify due to age, dementia and mental health. She annexed a letter dated the 25th May, 2023 from one Dr. G. N Muema confirming the said doctor has been attending to her for several years and she suffers from Senile Dementia plus occasional memory lapse. I note except the letter, there were no medical records furnished to court to confirm the Plaintiff's mental infirmity. Further, the deponent averred that the Plaintiff is 97 years old but never availed her National Identity Card. The [Mental Health Act](#) has clear provisions on procedures a party should adhere to, in instances of proving one's mental infirmity.
8. In the case of [BKT v John Kimeli Birech & another](#) [2020] eKLR, the Court while dealing with an issue of the Plaintiff's mental health and inability to testify observed that:

No evidence of compliance with the provisions of Section 26 of the [Mental Health Act](#) has been availed by the Applicant for the court to be called upon by the applicant to conduct an inquiry as to the Plaintiff's mental infirmity or deposition. Prior to the withdrawal of the suit, the Plaintiff appeared personally in court and prosecuted his case after taking an oath confirming his soundness of mind. This was only four months prior to the Plaintiff authoring the letter withdrawing the suit and transferring the parcel to the Defendant. It should also be noted that none of the medical records attached to the application have any relation to the plaintiff's alleged mental infirmity. No medical report has been availed to show



that as at the time of withdrawal of the suit and transfer of the property, the plaintiff was of unsound mind and totally incapacitated to the effect of making decisions that he did not understand. The discharge summary from St. Luke's Hospital does not state that plaintiff is of unsound mind and that is totally incapacitated.'

9. While in the case of *Isaac Kipkemboi Chesire & 4 others v Joseph Kimitei Kwambai & 7 others* [2016] eKLR the court held that:

the import of this section is that the order for guardianship ad litem is to be made by "the court" which is defined at Section 2, as the High Court. It follows that orders for the management of any property of a mentally disabled person can only be made by the High Court. This court finds that it has not been established that Matilda Rose Sawe is the guardian ad litem of the estate of John Malan Sawe hence the application for substitution is not well founded."

10. It is worth noting that the Plaintiff is the one who made the application seeking to be substituted with her granddaughter. Further, on the 2nd May, 2023, the Plaintiff even appeared in court as a witness and testified and it is only during cross examination that the issue of her mental infirmity was raised.
11. Based on the facts as presented while associating myself with the decisions cited and legal provisions quoted, I find that the issue of the Plaintiff's mental infirmity has not be proven to enable the court substitute her with her granddaughter. Further, by dint of section 26 of the *Mental Health Act*, this Court is devoid of jurisdiction to deal with the issue of making a determination of a guardian ad litem for the Plaintiff's estate.
12. In the foregoing, I find the Notice of Motion application dated the 26th May, 2023 unmerited and will disallow it.

Costs will be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 13TH DAY OF DECEMBER, 2023

CHRISTINE OCHIENG

JUDGE

