



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**E.L.C. NO 24 OF 2014**

**FORMERLY E.L.C.373 OF 2013**

**BERNARD MBUTI KANG'OROTI.....PLAINTIFF**

**VERSUS**

**NJAGI GIKUNGI .....1<sup>ST</sup> DEFENDANT**

**LUCY WANJIKU MAGONDU.....2<sup>nd</sup> DEFENDANT**

**RULING**

**Introduction**

Mr Bernard Kithu Njagi through his counsel has filed this notice of motion dated 14<sup>th</sup> January, 2014, in which he seeks the following orders from the court:

1. That Njagi Gikungi, the 1<sup>st</sup> defendant, be substituted in this suit by Bernard Kithu Njagi.
2. That the cost of this application be provided for.

The notice of motion is based on the grounds set out therein in which it is stated that the first defendant is sick and is suffering from senile dementia . This mental condition of the first defendant disables him the ability of following the court proceedings. In addition to the grounds set out in the notice of motion, the application is supported by the sworn affidavit of Bernard Kithu Njagi dated 14<sup>th</sup> January, 2015.

The application of the applicant on behalf of the first defendant is unopposed by the plaintiff/respondent.

**The Case for the First Defendant/Applicant**

This is an application of Mr Bernard Kithu Njagi on behalf of the first defendant, who happens to be his father. According to the notice of motion, the first defendant is sick and has senile dementia. It is further stated that he is not mentally fit to follow court proceedings. And for that reason, he cannot testify in a court of law. The applicant is his son, who says that he is very conversant with all matters relating to this case.

Furthermore, the applicant's son has stated that it is only fair and just that he be substituted in place of his father. The report of doctor J.N. Thuo, who is a Consultant Psychiatrist is that he examined the first defendant in respect of his mental status. According to this doctor, the first defendant has senile dementia which in the doctor's opinion makes him mentally unfit to follow court proceedings. The doctor has concluded that the first defendant cannot testify in a court of law.

Unfortunately, the age of the first defendant is not stated in the report, which I consider to be an important part of the report. It is for these reasons that the applicant seeks to be substituted in place of his father.

### **The Case for the Plaintiff/Respondent:**

Counsel for the plaintiff/respondent does not oppose this application. And for that reason, they have not filed any replying affidavit and the accompanying submissions.

### **The Applicable Law:**

The law that governs this case is found in *Order 32 of the 2010 Civil Procedure Rules. Rule 15 of Order 32* 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 sue”.***

It is clear from the provisions of that rule that this court is required to conduct an enquiry as to the alleged mental unsoundness or mental infirmity of the first defendant, before allowing the son to be substituted in his place. The purposes of the substitution is to enable the son to prosecute and protect the interests of the first defendant in this suit.

Furthermore, according to the case of *J. v. J. 1952 (2) All E.R 1129*, a respondent to a petition is entitled to have the suit dismissed, if it could be shown that there are reasonable grounds for supposing that the petitioner was capable of managing her own affairs. In that English case, the petitioner through the next friend filed a petition for nullity and stated that the petitioner was a person of unsound mind although there was no finding to that effect by the person conducting the enquiry.

The issue of the petitioner's unsoundness of mind was challenged by the respondent. The court held that the respondent was entitled to challenge the suit and apply for its dismissal if it could be shown that there was reasonable ground for supposing that the petitioner was capable of managing her own affairs.

The court went further to order a further enquiry by way of taking additional evidence to determine the unsoundness or soundness of the mental status of the petitioner. The English case clearly indicates that there is need for medical evidence before a person is found to be mentally unsound for purposes of substitution.

### **Issues for Determination:**

In the light of the affidavit evidence and the annexed medical report together with the affidavit of Bernard Githu Njagi the following are the issues for determination:

1. Whether or not the applicant has met the threshold for the grant of an order for substitution.
2. Who should pay for the costs of this application.

### **Evaluation of the Affidavit Evidence, Findings and the Law:**

I have carefully considered the affidavit evidence and the annexed report of doctor J.N. Thuo and I find that the first defendant is senile. I also find that he is not incapable of following court proceedings. And for that reason, he cannot testify in a court of law. This evidence is unopposed. I therefore find that the application has met the evidentiary threshold for the grant of the order for substitution. Senility on the part of his father has been established by medical evidence.

### **Verdict and Disposal Order:**

In the light of the foregoing matters, I hereby make the following orders:

1. Bernard Githu Njagi is substituted in place of the first defendant in terms of prayer number 1 of the notice of motion.
2. The costs of this application will be costs in cause.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this....17<sup>th</sup> ..... day of **FEBRUARY,..2015**

In the presence of the plaintiff and in the absence of both defendants and their counsel

Court clerk Mr Muriithi

Right of appeal under Order 43 Civil Procedure Rules of 2010 explained to the parties.

**J.M. BWONWONGA**

**JUDGE**