



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO 35 OF 2013**

**R N O** (suing as guardian ad-litem and next friend to **D O M...PLAINTIFF**)

**VERSUS**

**MOSES CHOGE CHESIRE.....DEFENDANT**

**RULING**

***(Suit filed on behalf of a person said to be mentally ill; appointment of guardian made by subordinate court; under the Mental Health Act such appointment can only be made by the High Court; appointment being null and void; suit incompetent and struck out with costs)***

1. This ruling is in respect of a preliminary point that I asked counsels to address me on, and which touches on the capacity of the plaintiff, to institute this suit on behalf of a person who is said to be of unsound mind.
2. The suit as filed was commenced by way of plaint filed by one R N O who has stated that she has filed this suit on behalf of one D O M who is said to be of unsound mind. Prior to the filing of this suit, the said R N O appears to have filed a Miscellaneous Application in the Chief Magistrate's Court at Nakuru, being Miscellaneous Application No. 56 of 2012, through which she was appointed as guardian ad litem/next friend to D O M, said to be of unsound mind.
3. The point that I asked counsels to address me on, is whether R O in the circumstances above, was properly appointed as guardian ad litem/next friend to manage the estate of D O M. I asked counsel for the plaintiff to file an affidavit explaining the capacity of the plaintiff and satisfy me that the plaintiff has full capacity. Regretfully none was filed and the plaintiff has thus spurned the chance to give an explanation to court.
4. I will therefore take it upon myself to demonstrate that the plaintiff could not have been properly appointed as guardian ad litem/next friend to D O M. It will be observed that the appointment of R N O was made by the subordinate court. Orders for the appointment of a person to manage the estate of any person suffering from a mental disorder are provided for under Section 26 of the Mental Health Act, which is drawn as follows :-

*S. 26 Order for custody, management and guardianship*

- (1) The court may make orders—
- (a) for the management of the estate of any person suffering from mental disorder; and
  - (b) for the guardianship of any person suffering from DISIRmental disorder by any near relative

or by any other suitable person.

(2) Where there is no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate and guardian of any such person.

(3) Whereupon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.

5. It will be seen that the order is made by "the court". At Section 2, the same statute interprets "court" as "the High Court."

6. It follows that orders for the management of any property of a mentally disabled person can only be made by the High Court. R N O was appointed by the subordinate court which has no jurisdiction. Her appointment having been made by a court without jurisdiction, is therefore null and void. She cannot therefore purport to bring a suit to protect the estate of D O M, assuming that he is truly of unsound mind.

7. This suit is therefore a non-starter and I have no option but to strike it out it with costs. The costs thereof shall be paid by R N O. There are interim orders made herein but they must go together with the suit. They are all hereby vacated.

8. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 23rd day of April 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**In presence of:-**

Ms Njeri Muiruri for defendant

No appearance for M/s B W Mathenge & Co for plaintiff

Emmanuel Juma : CA

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**