



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC CASE NO. 8 OF 2018 O.S**

**FRANCIS BUNDI JOH .....PLAINTIFF**

**VERSUS**

**JOSEPHINE NYAKERU GIKUNJ .....DEFENDANT**

**RULING**

1. By an application dated 25.11.2021, the applicant seeks: -

- a) Leave to file the instant application on behalf of JNG a person suffering from a mental disorder by virtue of an order issued in **Nyeri Misc. Cause No. E009 of 2021** and upon leave the court to issue,
- b) A temporary prohibitory injunction against the land registrar Meru and the plaintiff/respondent barring the former from registering and transferring charge or any other encumbrance and against the latter from in any way whatsoever, dealing with **L.R No. Ntima/Igoki/3485**.
- c) An order setting aside or varying or reviewing the judgment dated 16.4.2020 for want of capacity of the defendant.
- d) Upon issuance of prayer (c) above, the court do order for the unconditional reinstatement of the main suit and leave for the applicant to file her pleadings on priority basis.

2. The application is supported by an affidavit of Bilha Wamuyu Gikunju sworn on 21.11.2021.

3. The grounds upon which the application is made are that the court had ordered for substituted service of the summons through a newspaper advertisement; the suit was heard ex parte after the service of the summons; the reason for not filing a defence was that the defendant had been suffering from a mental illness whereof on 11.11.2021, the applicant was appointed an interim guardian or manager of his estate as per the attached court order and medical reports marked **BWG 1 – 3** respectively which sickness started in 2016.

4. Further, the applicant avers the defendant had no capacity to be sued hence had a defence raising triable issues otherwise the estate of the deceased would suffer immensely.

5. Additionally, the applicant averred in furtherance of the rules of natural justice and fair hearing, it was necessary for this court to allow the application.

6. The application is opposed by the plaintiff through a replying affidavit sworn on 2.12.2021 for being vexatious, contrary to law and without merits.

7. The first ground raised by the respondent is that the appointment of a guardian was made in November 2021 while the suit was filed in 2018 and there has been no explanation why the issue of guardianship was not taken up in 2016 when dementia was discovered hence the application is brought with a design so as to have this matter brought back to court after its hearing and conclusion. The 2<sup>nd</sup> issue is that there has been no explanation why there was no action taken over a year after judgment was delivered.

8. The plaintiff avers he has been in occupation for more than 20 years and has undertaken various developments which have not been controverted by way of a draft defence.

9. In a further affidavit sworn on 18.1.2022, the applicant averred that guardianship proceeding could be instituted any time and given the

status of the subject, judgment was irregularly entered for lack of capacity to be issued and that they only discovered about the case in August 2021, while attempting to erect a perimeter wall at the suit property.

10. Parties herein filed written submissions dated 24.1.2022 and 27.1.2022 respectively.

11. The applicant submits that under **Order 32 Rule 5 and 15 of the Civil Procedure Rules**, the court should allow the prayer to come on record in place of the subject given the guardianship order attached to the application. Reliance was placed on *NK (Suing as next friend of JKK –vs- KNR & 2 Others [2018] eKLR* so that the subject may exercise her Constitutional right to access justice and fair hearing as was held in, *Richard Ncharpi Leiyagu –vs- Independent Electoral Boundaries Commission & 2 others [2013] eKLR*.

12. Regarding a prayer for injunction, the applicant submits that she has met the threshold in *Giella –vs- Cassman Brown Ltd [1973] E.A 358 and Mrao Ltd. –vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR*, *Pius Kipchirchir Kogo –vs- Frank Kimeli Tenai [2018] eKLR*, *Kenya Electricity Transmission Co. –vs- Kibotu Ltd [2019] eKLR*, *Nguruman Lt. –vs- Jan Bonde Nielsen & 2 Others [2014] eKLR*.

13. As to whether there was service of summons, it is submitted the subject at the time was out of the country in the United States seeking medical attention and that had the respondent done due diligence, he would have learned he was out of the country hence the absence. Reliance was placed on *Abraham Kiptanui –vs- Delphis Bank Ltd & Another, Yamko Yadpaz Industries Ltd –vs- Kalka Flowers Ltd [2013] eKLR*, *Mbogo & Another –vs- Shah [1968] E.A, Pangaea Holdings Ltd –vs- Hacienda Development Holdings Ltd [2012] eKLR*.

14. On the other hand, the respondent submits he followed the law in seeking for his rights in line with *Mtana Lewa –vs- Kahindi Ngala Mwaqandi [2015] eKLR* and that given the decision, he was entitled to enjoy the fruits of his judgment which is now threatened by the unlawful acts of the applicant and urged the court to disallow the application guided by the holding in *Paul Gitonga Wanjau –vs- Gathuthi Tea Factory Co. Ltd & 2 Others [2016] eKLR*.

15. On the issue of setting aside or review of judgment, the plaintiff submits there is discretionary where there was a just case as held in *Patel –vs- E.A Cargo handling Services Ltd [1974] E.A 75 and Richard Murigu Wamai –vs- Attorney General & Another [2018] eKLR*.

16. It is submitted there had been inordinate delay which has not been explained.

17. On the element of substituted service, it is submitted leave to serve through substituted service was properly done and there has been no prove of date of exit and entry to Kenya in 2018 and that in any event, the newspaper advertisement knows no boundaries since it was also electronically available. Reliance was also placed on *Christopher Mwangi Munuhe –vs- Geoffrey Nasubo [2021] eKLR*.

18. The issues for determination in this application are: -

a) **If the applicant is entitled to be joined to as a party in this suit.**

b) **If the applicant has made a case for setting aside the default judgment.**

c) **If the applicant is entitled to order of temporary injunction.**

19. On the 1<sup>st</sup> issue, the applicant has brought before this court a guardianship order appointing her as a manager or guardian of the estate of the defendant. In *MGG –vs- Gateway Insurance Co. Ltd & 2 others [2020] eKLR*, the Court of Appeal held; the appellant lacked capacity to file the suit on behalf of her husband without seeking to be appointed a guardian ad litem or manager under the **Mental Health Act**. See also *NM –vs- M'Marete Ibutu & 8Others [2021] eKLR*.

20. Given the guardianship order, there is no doubt the applicant is incapable of defending his rights in this suit. I therefore proceed to grant leave for the applicant to join the suit in that capacity.

21. Turning to the 2<sup>nd</sup> issue, there is no doubt the plaintiff moved the court for substituted service of the originating summons after efforts to personally effect service upon the defendant were unsuccessful. A regular service was subsequently done through a newspaper advertisement.

22. The applicant has not denied that there was such service only to say she was out of the jurisdiction. There is no such evidence produced to indicate when he exited the jurisdiction and came back to Kenya.

23. In *Christopher Mwangi Supra*, the court in similar circumstances held an application where a regular judgment had been entered should be made under **Order 10 Rule 11 of the Civil Procedure Rules** and not under **Order 45 Rule 1 of the Civil Procedure Rules**.

24. In *James Kanyiita Nderitu –vs- Attorney General & another [2019] eKLR*, the Court of Appeal held that, where a regular judgment has been entered, the court may under **Order 10 Rule 11 of the Civil Procedure Rules** set it aside while taking into account factors such as the reason for failure to enter appearance, length of time since the entry of default judgment, if the defence raises triable issues, prejudice each party is likely to suffer and whether on the whole, it is in the interest of justice to set aside the default judgment.

25. The main reason given why the defendant failed to enter appearance was mental infirmity, travel for medication to the United States and non-service of summons.

26. On the first reason, there has been no medical reports to show at the time the suit was filed that the defendant was sick and or was unable

to offer any defence.

27. Secondly, the court is aware the defendant was only declared mentally unfit in November 2021. Before then, there is nothing to show he was undergoing any mental treatment at a recognized mental facility.

28. Thirdly, there is no evidence by way of stamped passports to prove the defendant was out of the county as alleged.

29. Fourthly, the service of summons was made through a newspaper with a wide coverage including electronic coverage. The applicant has not disputed that in the diaspora, such newspaper was not available in the internet.

30. Fifthly, the applicant has not attached a draft defence or response to the originating summons for this court to verify or assess the nature of the defence.

31. The delay from 2018, is also inordinate and unexplained.

32. The applicant has denied knowledge of the possession of the land by the respondents, save to say she had suspected him for fraud hence placed a restriction on the property on 23.11.2017.

33. If defendant was able to safeguard his interests a few months before the suit was filed on 6.3.2018, it is unconceivable that the applicant would turn around and allege he was sickly and incapable of defending her interest until over three years later and seek a guardianship order

34. The said search attached to the further affidavit also came so soon after the respondent had secured a search dated 15.11.2017.

35. In view of the foregoing, my finding is that the applicant has failed to demonstrate a prima facie case with a probability of success and that she stands to suffer any irreparable loss and damage not compensable by way of damage.

36. Similarly, given a regular decree issued by this court, the balance of convenience tilts against granting a temporary order of injunction and or inhibition order.

37. The application dated 25.11.2021 lacks merits save for prayer no (b) and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS**

**THIS 30<sup>TH</sup> DAY OF MARCH, 2022**

**In presence of:**

Mugane for applicant

**HON. C.K. NZILI**

**ELC JUDGE**