



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 1476 OF 2005**

**MARGARET NYOKABI KAHIHU**

**JOHN KAMUYU KAHIHU.....PLAINTIFFS**

**VERSUS**

**SAMUEL MUKUHA NJUKI.....DEFENDANT**

**RULING**

This is a Notice of Motion under Orders 32 Rules 3 and 5 and Order 21 Rule 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders that,

1. This court do review the order issued by Justice Osiemo in this matter and the applicant Samwel Njenga Mukuha be appointed guarding ad litem for the defendant herein for the purpose of this suit.
2. That there be a temporary stay of further proceedings pending the hearing of this application *inter partes*.

3. The costs be in the cause.

The grounds advanced for this application are,

- a) That the defendant herein suffers from serious mental problems rendering him incapable of properly representing himself or conducting his case and is thus of unsound mind for the purposes of this suit.
  
- b) That beside the mental illness the defendant also suffers from physical ailments and is most of the time bed ridden and may find it impossible to attend court or his advocates for instructions.
  
- c) That the defendant herein is not capable of conducting this case personally or furnish the advocate with appropriate instructions.

There is an affidavit in support of the application sworn by Samuel Njenga Mukuha.

The plaintiff through counsel has filed Notice of Preliminary Objection to the effect that this application has been brought after two years of the said ruling and that the delay is inordinate. It is further stated in the objection that the order sought to be reviewed is not attached but above all, the suit is concluded and therefore the application is not tangible.

The affidavit in support of the application is also said to have been sworn by a stranger. Additionally, there are no grounds demonstrated by the applicant in line with the provisions of order 45 Rule 1 of the Civil Procedure Rules, 2010, for review. Finally that the application is an abuse of the civil procedure.

Counsel appearing for the parties made brief oral submissions which I have noted. The record before me shows that the suit herein was compromised by a consent order and, that judgment remains in place this court having refused to set it aside in its ruling of 22<sup>nd</sup> September, 2010. The ruling by Osiemo J, sought to be reviewed by the applicant herein was delivered on 23<sup>rd</sup> June, 2009. The orders sought therein are identical to the present application, only that the name of the intended guarding ad litem was George Njuki Mukuha. The learned Judge in dismissing the application said as follows,

**“The suit having been concluded through a consent order which was recorded by an advocate who had full instructions to act for the defendant I agree with the plaintiff that the order sought is not tenable. One cannot apply to be joined in a suit which is already concluded”**

The applicant herein has not presented any evidence to justify my departure from the ruling of Osiemo J

aforesaid. I accordingly agree with the learned judge that, this suit having been concluded, the appointment of a guardian ad litem at this stage is an exercise in futility. Accordingly the application is dismissed with costs to the plaintiff.

Orders accordingly.

*Dated, signed and delivered at Nairobi this 12<sup>th</sup> Day of July, 2011*

**A. MBOGHOLI MSAGHA**  
**JUDGE**