

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1476 of 2005

MARGARET NYOKABI KAHIHU

JOHN KAMUYU
KAHIHU.....PLAINTIFF

VERSUS

SAMUEL MUKUHA NJUKI.....
DEFENDANT

R U L I N G

Before me is an application by way of Notice of Motion dated 13th October 2008 and expressed to be brought under Order XXXI Rule 3 and 15 Order XXI Rule 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act in which the Applicant **GEORGE NJUKI MUKUHA** seeks orders:

- (1) That he be appointed Guardian ad Litem for the Defendant herein for the purpose of this suit.
- (2) That there be a temporary stay of execution pending the hearing of this application.
- (3) That there be a temporary stay of execution pending the hearing and determination of an intended application to set aside the consent order recorded in court on 15th April 2008.

The application is based on the grounds as stated in the body of the Notice of Motion. The application is also supported by an affidavit sworn by the Applicant in which he avers: that he is the eldest son of the Defendant herein hence competent to swear this affidavit; that the Defendant has for over 5 years now been suffering from mental problems associated to alcohol dependency ; that due to previous dependency on alcohol the Defendant developed serious mental problems which included loss of memory, incoherence talking to himself, urine and fecal inconstence; that as a result of this the Defendant was taken to Kenyatta National Hospital for treatment and later, was transferred to Mathari Hospital for mental treatment; that the Defendant's condition has continued to deteriorate and he has now developed physical ailment as a result of which he is now bed ridden; that the Defendant is not capable of communicating coherently or properly represent himself in the suit due to the history of alcoholism and mental illness and hence a guardian ad litem ought to be appointed on his behalf; that the suit is in respect of LR No

DAGORETTI/RIRUTA/1868 in which the Defendant is the registered owner and the Applicant has no interest adverse to that of the Defendant and that the Plaintiffs in this case have obtained a decree herein and are in the process of obtaining a Land Board Consent to start surveying the land in order to subdivide and transfer the same.

The application is opposed by the Plaintiffs on the ground that the order sought cannot be granted because there is a decree and judgment on record and therefore there is no suit pending.

It is submitted on behalf of the Plaintiff that the Defendant was represented by an advocate who with full instructions from the Defendant recorded a consent judgment and there is no evidence to the contrary.

The suit having been concluded through a consent order which was recorded by an advocate who had full instruction to act for the Defendant I agree with the Plaintiff that the order sought is not tenable. Once cannot apply to be joined in a suit which is already concluded.

Accordingly the Applicant's notice of motion dated 13th October 2008 is dismissed with costs.

Dated and delivered at Nairobi this 23rd day of June 2009.

J. L. A. OSIEMO

JUDGE