

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 18 of 2002

RAEL KANARIO M’RWANDA PLAINTIFF

VERSUS

SALESIO M’RUTERE M’RITHARWA DEFENDANT

RULING

The plaintiff has instituted this suit against the defendant for a declaration that the latter holds parcels of land Nos. L.R. Nyaki/Nkabune/158 and 617 in trust for the former and an order directing the defendant to transfer both parcels of land to the plaintiff. The defendant has filed a statement of defence.

The hearing of the suit is pending. In the meantime, the plaintiff’s son, William Mwenda Rwanda has brought the present application seeking to be appointed as a guardian to tender evidence in court during the hearing on behalf of the plaintiff. He argues that the plaintiff is so advanced in age that she is unable to adduce evidence in court. Her age is given as 80 years and a copy of birth certificate exhibited.

The defendant in his replying affidavit has averred that the applicant is not seized of the full facts of the dispute and hence cannot be useful. That the plaintiff is strong and has been attending court. The defendant further states that the applicant is exerting pressure on the plaintiff to press on with the suit against her will.

I have considered these rival positions. The application is expressed to be brought under the provisions of section 3A of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules. I believe the correct provision in the matter is Order 31 Rule 15 of the Civil Procedure Rule which provides that:-

“15. 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 sued.”

(Emphasis supplied).

It has been deposed by the applicant that the plaintiff is unable to ventilate her case due to mental weakness by reason of her age. Although the applicant has said that the plaintiff is 80 years old, that alone does not make the plaintiff infirm. The applicant ought to have availed either a medical report on the mental status of the plaintiff or the plaintiff herself to be examined before the court for the court to ascertain whether she is capable of prosecuting her case.

This application for these reasons must fail and is dismissed with costs to the defendant.

Dated and delivered at Meru this 25TH day of January 2008.

W. OUKO

JUDGE