



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE 113 OF 1999**

**JOHN PATRICK MACHIRA .....PLAINTIFF**

**VERSUS**

**PATRICK KANIARY MUTURI.....DEFENDANT**

**RULING**

By a Sale Agreement dated 8<sup>th</sup> September 1989 the defendant agreed to sell his piece of land known as L.R. NO.12252/3 KAREN which I will refer to as the suit land to the plaintiff at purchase price of Kshs.2,625,000/=. At that time the suit land was mortgaged to the Kenya Insurance Corporation which had advanced a loan to the defendant and the defendant had offered the title of the suit land as security. The plaintiff assisted to cause the discharge of the suit premises by Kenya Insurance Corporation but still the defendant did not finalize the sale which necessitated the filing of this suit. Judgment was entered in favour of the plaintiff and specific performance was ordered out of the purchase price, a balance of Shs.739,120.50 was unpaid and the same was deposited in court by the order of the court.

By a Notice of Motion dated 15<sup>th</sup> April 2005 and filed on 14<sup>th</sup> July 2005, the defendant brought this application as a person of unsound mind suing through his best friend **JULIA NYOKABI MUTURI** (wife) for the orders that the balance of the purchase price of Shs.739,120.50 deposited in court to be released to Julia Nyokabi Muturi and that accounts be taken between the plaintiff and the applicant to ensure that the agreed purchase price of Shs.2,650,000/- has been accounted for. The application is based on the ground that the defendant is unwell and requires urgent medical attention; that the defendant started ailing in 1987 and his condition has drastically deteriorated since February 2005 hence the need for this application; that the plaintiff deposited a sum of Shs.739,120.50 for the benefit and on account of the defendant; that the plaintiff had indicated that he was opposed to the money being released without a court order; that the applicant's other means and resources have been completely deflated in treatment and upkeep of the defendant and that any delay in determining of this application may cost the defendant his life.

The application is supported by an affidavit sworn by Julia Nyokabi Muturi in which she avers that she is the wife of the defendant as well as his guardian; that the defendant is of unsound mind and she was authorized by this court to represent him in these proceedings and that the defendant is very sick and requires funds for his further treatment.

The application is opposed by the plaintiff who has filed a replying affidavit in which he avers that to

the best of his knowledge and recollection Julia Nyokabi is the wife of the defendant but not his guardian as deponed; that sometimes during the proceedings of this matter i.e. about 1999 and 2000 the defendant called in his office and informed him which information he verily believed to be true that his wife together with her sons had assaulted him knocking off the defendants four (4) teeth which conduct does not demonstrate happy marriage.

The parties by consent agreed to put in written submissions.

Mr. Mutua for the applicant submitted that the applicant is the defendant's own wife of 26 years who avers that the defendant is insane and she wants the money deposited in court on 23<sup>rd</sup> December 1999 by the respondent as the balance of the purchase price of the suit properly being LR NO. 12252/3 KAREN to be released to her. The respondent was ordered to deposit the money in court and then the court would order that the defendant's property be transferred to him by this court. The applicant further avers that she has now resolved to accept the money because she had hoped that her husband would recover and assist her to recover the said property from the respondent but his condition has continued to deteriorate until now she is forced to give up any hope of his recovery and accept the money as the only realistic and practical result and move on with life. The applicant further avers that the respondents opposition of the application is not realistic and asked the court to take into account the following facts into consideration-

- (1) The respondent does not claim the money.
- (2) The respondent has not brought any other claimant to this court.
- (3) The respondent has confirmed in paragraph 3 of his own affidavit that the applicant is the defendant's wife.
- (4) The respondent also confirms in paragraph 8 of his own affidavit that the applicant's family properly was transferred by this court and the applicant and her family evicted therefrom.
- (5) The plaintiff obtained title and full ownership of the defendant's property through exparte proceedings in this court.
- (6) Since the application herein was filed in July 2005 neither the defendant nor any other claimant has come to this court to lay claim of the money.

The respondent Mr. Machira appearing in person in opposition to the application raised a Preliminary Point in that the applicant lacks locus standi to make the application now before the court and therefore the application is incompetent and a nullity. Being a legal wife of the defendant alone does not qualify the applicant to act as a guardian ad litem in this suit. The applicant out to make an application for the court to assign her that responsibility. Mr. Machira further submitted that in another application dated 17<sup>th</sup> July 2000 and amended on 24<sup>th</sup> July 2000 a similar application was made by Julia Nyokabi Muturi in which prayer 3 sought an order that the defendant's wife be assigned guardian of the defendant by whom he may appear and defend the suit which application was rejected by Kuloba J in his ruling dated 7<sup>th</sup> November 2002.

Once an issue of locus standi is raised in a suit, it must be dealt with first before any other issue is considered.

The plaintiff's suit as filed is against one Patrick Kiniaru Muturi who is the legal husband of the applicant herein of 26 years. By a Notice of Motion dated 15<sup>th</sup> June 2005 and filed on 14<sup>th</sup> July 2005- the applicant Julia Nyokabi Muturi sought orders that the balance of- the purchase price of Kshs.739,120.50 deposited in this court be released to her; that accounts be taken between the plaintiff and the applicant to ensure that the agreed full purchase price of Shs.2,625,000/= has been accounted for and that costs of this application be provided for.

The application is based on the grounds that the defendant started ailing in 1987 and his condition has drastically deteriorated since February 2005 hence the need for this application, that the plaintiff deposited Kshs.739,120.50 for the benefit of and on account of the defendant, that the plaintiff had indicated that he was opposed to the money being released without a court order; that the applicants. Other means and resources have been completely deflated in treatment and upkeep of the defendant and that any delay in determining of this application may cost the defendant's life.

The application is also supported by an affidavit sworn by the applicant Julia Nyokabi Muturi in which she avers that she is the wife of the defendant herein and his guardian and she is fully conversant with the facts of this matter and hence competent to swear this affidavit.

The respondent, Mr. Machira is challenging her locus standi to bring this application. Mr. Machira submits that to the best of his knowledge Julia Nyokabi is the wife of the defendant Patrick Kaniaru Muturi but not his guardian and that the applicant has not applied and has not been allowed to act on behalf of the defendant. He further submitted that in another application dated 17<sup>th</sup> July 2000 and amended on 24<sup>th</sup> July 2000 a similar application was made by Julia Nyokabi Muturi inter alia praying (i.e. prayer 3) – that the Defendant's wife be assigned guardian of the defendant by whom he may appear and defend the suit. This application was premised inter alia on the ground that Patrick Kaniaru Muturi was a unsound mind. In a ruling delivered by the Honourable Mr. Justice Kuloba, J on 7<sup>th</sup> November 2002 the said application was dismissed and the judge stated inter alia as follows at page 17:

“A part from these substantive aspects, there are also fundamental procedural failures which go to the root of the whole matter. They include the applicant attempting to litigate in this case before she seeks and obtains an order to defend the suit as a guardian ad litem. If she seeks to replace the defendant on account of this alleged unsound mind, then it was incumbent upon her to enter this suit in accordance with the procedure prescribed for suits against persons of unsound mind.

**Order 31 of the Civil Procedure Rules is elaborated on that procedure. It is a safeguard against any person merely fouling, another as of unsound mind and unilaterally usurp the others right to protect his own interests.**

**The applicant has not attempted follow the prescribed process and she lacks the locus standi in this whole matter. She has not in the instant application satisfied the court on the propriety and justice of appointing her a guardian ad litem.”**

That being the position I agree with counsel that the applicant Julia Nyokabi Muturi lacks locus standi to bring this application. Be it as it may if the defendant has developed mental illness and as a result has become incapable of defending the suit she should apply formally for an order of the court to be allowed to take over the suit from the defendant as a guardian ad litem.

The rules of procedure do not allow her just to walk in and take over her husband's case without following the laid down procedure. She should apply and produce documentary evidence to prove that the defendant has developed mental illness and incapable to defending the suit and she will be appointed his guardian ad litem and take over the suit from him. Mr. Machira also raised the issue of resjudicata based on the said ruling of Kuloba J. The applicant's application was dismissed because of failure to comply with the procedure prescribed for suits against persons of unsound mind and hence the application was declared incompetent.

When a suit is dismissed for being incompetent, the applicant is at liberty to file a competent application. For the reasons stated above the applicants Notice of Motion dated 15<sup>th</sup> June 2005 and filed on 14<sup>th</sup> July 2005 is struck out for being incompetent. The applicant is at liberty to file a competent application.

The respondent is awarded costs of this application.

Dated and delivered at Nairobi this 22<sup>nd</sup> day of February 2007.

**J.L.A. OSIEMO**

**JUDGE**