



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**Civil Case 26 of 2003**

**SAMSON K. NYAMWEYA.....PLAINTIFF**

**V E R S U S**

**SAMSON NYAMBATI NYAMWEYA.....DEFENDANT**

**(FORMERLY ELD HCCC NO.37 OF 2003)**

**R U L I N G**

On 9/7/2007 this case came up for hearing. During that session, the plaintiff was represented by Mr. Samba advocate, whilst the defendant was absent.

After perusing the Affidavit of Service sworn on 4<sup>th</sup> March 2007, the court permitted the plaintiff to prosecute the suit, notwithstanding the absence of the defendant. The reason for that decision was that the court was satisfied that the defendant had been duly served with a Hearing Notice.

According to the affidavit of service, the defendant had been served personally, by one Archibald Wekesa Nyukuri, a court process server. Mr. Nyukuri stated on oath that the defendant was pointed out to him, by Mr. Samba, advocate for the plaintiff.

This court had accepted the personal service on the defendant as being good, because on 15/11/2006 the Hon. Karanja J. had directed that the defendant be served directly, after it transpired that Mr. Mainye who had been on record as the advocate for the defendant, had been struck off the roll of advocates.

The affidavit of service indicated that the defendant was served on 2/3/2007.

On 23/7/2007, this court handled another case being ANDREW ACHOKI MOGAKA Vs SAMASON NYAMBATI NYAMWEYA & ANOTHER KITALE HCCC. NO.49 OF 1997. In that case, Mr. Samba was acting for the plaintiff, whilst the 1<sup>st</sup> defendant was represented by Mr. Minda advocate, who was holding brief for the firm of Kasamani & Co., Advocates.

When it transpired that the defendant herein was also the 1<sup>st</sup> defendant in that case, and as he was therein represented by a guardian ad litem, I felt compelled to ascertain the reason for that development. The reason why I felt that compulsion is because it struck me as odd that the defendant had been personally served in this case, whereas in that other case he had to be represented by someone else.

A perusal of the record of the proceedings in HCCC NO. 49/97 revealed that on 13<sup>th</sup> April 2006, Alice Nyambati who is the wife to the 1<sup>st</sup> defendant sought to have the said defendant declared to be a person of

unsound mind, who was thus unfit to participate in those proceedings.

In her affidavit, Alice Nyambati stated that the 1<sup>st</sup> defendant was sickly and bedridden. She said that her said husband had become incoherent and had completely lost lucid moments. Apart from that, the 1<sup>st</sup> defendant was said to be over 100 years of age, and was suffering from high blood pressure as well as high blood sugar levels.

As a result of the 1<sup>st</sup> defendant's medical condition coupled with his advanced years, his wife expressed the view that he was unable to reasonably participate in the court proceedings, as it would be unfair and unjust to make adverse orders against a party who had no capacity to defend himself.

Having been served with the application, the parties to that suit signed a consent letter dated 25/10/2006, which was in the following terms; -

“ BY CONSENT : -

(i) ALICE NYAMBATI be appointed the guardian at litem to SAMSON NYAMBATI NYAMWEYA a person of unsound mind who is incapable of protecting his interests herein.”

That order was a follow-up to yet another consent order, which had been recorded on 19/6/2006, declaring the 1<sup>st</sup> defendant to be of unsound mind who was therefore unfit to participate in the court proceedings.

Mr. Samba advocate had represented the plaintiff in court on 19/6/2006, when the 1<sup>st</sup> defendant was declared to be of unsound mind. Also, the firm of Samba & Co., Advocates were signatory to the consent letter dated 25/10/2006, which was actually drawn up on the letter head of that law firm.

In view of those facts, I am disturbed a great deal that Mr. J.O. Samba advocate should nonetheless have caused the defendant herein to be personally served with the Hearing Notice. To my mind, once the defendant had been declared to be unsound mind, and thus a person incapable of protecting his interests, in *HCCC NO.49/97*, the plaintiff herein was obliged to satisfy this court that subsequent to that declaration, the same said person nonetheless had legal capacity to protect his interests in this suit.

To my mind, the order appointing *Alice Nyambati* to be the guardian ad litem to *Samson Nyambati Nyamweya* cannot be deemed to have been limited to only the *HCCC NO.49/97*. I say so because I believe that a person cannot be of unsound mind in one case, yet be of sound mind in another case.

As Mr. Samba advocate was well aware of the defendant's mental status, I believe that he ought not to have had the defendant served personally. The question is, why did not Mr. Samba cause the process server to serve the hearing notice upon *ALICE NYAMBATI*, the defendant's guardian ad litem?

Unless the plaintiff's advocates can persuade me as to the legal competence of the service on the defendant, I propose to set aside all the proceedings which took place in this case on 9/7/2007.

Dated and Delivered at Kitale, this 24<sup>th</sup> day of July 2007.

FRED A. OCHIENG

JUDGE