



Kenneth & another (Both Suing as Legal Representatives and Beneficiaries of the Estate of the Late Joel Kiprotich Kiget) v Kositany & 2 others; Kositany (Applicant) (Environment & Land Case 24 of 2019) [2025] KEELC 5259 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5259 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 24 OF 2019
LA OMOLLO, J
JULY 10, 2025**

BETWEEN

**ROTICH KIPRONO KENNETH 1ST PLAINTIFF
CATHERINE CHELANGAT KIGET 2ND PLAINTIFF
BOTH SUING AS LEGAL REPRESENTATIVES AND BENEFICIARIES OF THE
ESTATE OF THE LATE JOEL KIPROTICH KIGET**

AND

**JOHN KOSITANY 1ST DEFENDANT
THE LAND REGISTRAR, BOMET COUNTY 2ND DEFENDANT
HON. ATTORNEY GENERAL 3RD DEFENDANT**

AND

CHEPKIRUI KOSITANY APPLICANT

RULING

Introduction.

1. This ruling is in respect of the Applicant’s Notice of Motion application dated 10th December, 2024. The application is expressed to be brought under Order 32 Rules 3 & 15 and Order 51 Rule 1 of the Civil Procedure Rules.
2. The application seeks the following orders;
 - a. That this Honourable Court be pleased to appoint Chepkirui Kositany as guardian ad litem of the 1st Defendant, John Kositany.



- b. That the said Chepkirui Kositany be made a party to this case in place of the 1st Defendant, John Kositany.
 - c. That costs of this application be in the cause.
3. The application is based on the grounds on its face and the supporting affidavit of one Chepkirui Kositany sworn on 10th December, 2024.

Factual Background.

4. The Plaintiffs/Respondents commenced the present proceedings vide the Complaint dated 21st March, 2019 where they seek the following orders;
- a. A declaration that the cancellation of the name of the deceased in the parcel No. Kericho/Kapsimbiri/814 and both registrations of Tittles, (sic) Kericho/Kapsimbiri/1062 and Kericho/Kapsimbiri/1063 in the register is illegal, null, void and fraudulent and the registration should be cancelled.
 - b. A declaration that that registration of the 1st Defendant in a property belonging to the deceased person, intestate, without complying with the land law as to obtain his consent and consent from land control board is a fraud hence the register should be rectified to reinstate the name of Daniel Kositany Kilel. (sic)
 - c. An order of mandamus compelling the 2nd Defendant to rectify the register and reinstate the name of the deceased Daniel Kositany Kilel.
 - d. Costs of this suit and interest thereon.
 - e. Any other such relief as this Honourable Court may deem appropriate.
5. The 1st Defendant filed a Statement of Defence dated 7th May, 2019 wherein he denies the averments in the Complaint and seeks that the Plaintiffs/Respondents suit be dismissed with costs.
6. The 2nd and 3rd Defendants/Respondents entered appearance and as at the time of writing of this ruling, they had not filed their Statement of Defence.
7. The application under consideration came up for hearing on 11th December, 2024 which hearing was adjourned to 5th February, 2025.
8. On 5th February, 2025 the hearing of the application was adjourned to 19th February, 2025 when the Court conducted an inquiry as to the extent of mental infirmity of the 1st Defendant.
9. The Court further issued directions that a medical report be furnished to Court before a ruling on the application could be made.
10. On 18th March, 2025, the matter was mentioned to confirm filing of the medical report and on 6th May, 2025, the application was reserved for ruling.
11. It is also important to state that on 11th December, 2024 counsel for the Plaintiffs/Respondents appeared in court and stated that he was not opposed to the application. It is further important to mention that counsel for the Plaintiffs/Respondents was present during the inquiry.
12. The 2nd and 3rd Defendants neither attended the inquiry nor filed any response to the application.



The Applicant's Contention.

13. The Applicant contends that she is the daughter of the 1st Defendant. She goes on to state that the 1st Defendant suffers from dementia and mild cognitive impairment due to his advanced age.
14. She also contends that she is advised by Counsel that it is necessary that a guardian ad litem be appointed so as to protect the interests of the 1st Defendant.
15. She further contends that she has consented to be appointed as guardian ad litem of the 1st Defendant. She adds that she has no interest in the matters in controversy in this suit and she is therefore fit to be appointed as his guardian ad litem.
16. The applicant ends her deposition by stating that it is in the interest of justice that she be made a party to the present suit so that the matter can proceed for hearing and determination.
17. The Applicant also filed a Supplementary Affidavit sworn on 26th March, 2025. She deposes that on 17th March, 2025 the 1st Defendant underwent a medical examination by Dr. Praxides E. Pessah a consultant Psychiatrist at the Brooklyn Medical Center, Bomet.
18. She deposes that the said psychiatrist prepared a medical report.
19. She ends her deposition by stating that the psychiatrist found that the 1st Defendant cannot be relied upon to make executive decisions and therefore there was need to appoint a guardian ad litem to assist him in this suit.

Analysis and Determination.

20. I have considered the Applicant's application, the affidavit in support of it and the supplementary affidavit. It is my view that the only issue that arises for determination is whether the application dated 10th December, 2024 has merit.
21. The Applicant is seeking to be appointed guardian ad litem of the 1st Defendant, John Kositany on the ground that he suffers from dementia and mild cognitive impairment.
22. Order 32 Rule 3(2) of the Civil Procedure Rules provides as follows;

“An order for the appointment of guardian ad litem may be obtained upon application in the name and on behalf of the minor or by the plaintiff.”
23. Order 32 Rule 15 of the Civil Procedure Rules provides as follows;

“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 mine]
24. In the judicial decision of *MMM v AMK* [2016] KEHC 4741 (KLR) the Court discussed the import of Order 32 Rule 15 of the Civil Procedure Rules as follows;

“24. Interpreting a similar provision under the Indian Civil Procedure Rules, the Court in *Balakrishnan v Balachandran*,²¹ held that the said rule 22 is intended to ensure that no man is adjudged a lunatic without proper enquiry, and that the Court should hold a judicial inquiry and it may seek the assistance



of medical experts. It was pointed out that the only safe course to adopt is to follow strictly the procedure prescribed in order XXXII, rule 15, Civil Procedure Code, and that if the precaution of a judicial inquiry is not observed, a man cannot be declared to be a lunatic (or unfit to protect his interests), and a guardian appointed for him on that basis. A decree passed or orders issued against a defendant in such a case must be considered to be an ex parte decree, and must be set aside. At page 461, the discussing (sic) the procedure to be followed by the Court in an application such as the one before me the learned Judge observed as follows:-

That procedure involves a judicial inquiry which consists normally of two parts:

- (1) questioning the lunatic (or the person in question) by the Judge himself in open Court, or in chambers, in order to see whether he is really a lunatic and of unsound mind (or unfit to protect his interests), and
- (2) as the Court is generally presided over only by a layman, to send the alleged lunatic to a doctor for report about his mental condition after keeping him under observation for some days..... When this elementary precaution of a judicial inquiry prescribed by law is not observed, I am afraid that the laws of this country will not allow a man to be declared a lunatic and a guardian appointed for him, on such basis." (Emphasis mine)

25. To me, the authoritative position stated by the Indian High Court in the above cited case represents the correct interpretation of order 32 rule 15 of the Civil Procedure Rules. The above rule contemplates a judicial inquiry. The words used in the rule are

"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"

26. This is an inquiry prescribed by the law under the said rule and as correctly interpreted in the above decision. Two stages must be complied with to satisfy the said rule (a) questioning the person by the Court and (b) medical evidence. The first part has not been complied with hence no inquiry has been held as provided under the said rule. My answer to issue number three is clear, order 32 rule 15 contemplates in (sic) inquiry by the Court."

[Emphasis mine]

25. In the above cited judicial decision, the Court held that before some guardian ad litem can be appointed under Order 32 Rule 15 of the Civil Procedure Rules, the Court must first conduct an inquiry on the party to confirm whether he is incapable of protecting and/or safeguarding his interests and secondly, medical evidence must be adduced.

26. On 19th February, 2025 the Court conducted an inquiry as to the mental capacity of the 1st Defendant. This was in open Court and in the presence of all counsel appearing in this matter.



27. The 1st Defendant stated his name and confirmed that he was accompanied to Court by his daughter Chepkirui, the Applicant. When he was asked whether he knew the 1st Plaintiff/Respondent, he denied knowing him but admitted that he knew the 2nd Plaintiff/Respondent.
28. When asked whether he knew anything about land parcel No's. Kericho/Kapsimbiri/1062 and 1063, the suit parcels, he stated that he could not remember anything about them.
29. When asked about land parcel No. Kericho/Kapsimbiri/814, he stated that he gave all his children their land. He could not remember the parcel number of the land he resides on and when he was asked about the number of brothers he had, he stated that he had five brothers.
30. He also stated that in his mother's house he had two brothers. He later retracted and stated that he is the only son in his mother's house while the other house had five sons.
31. When he was asked the names of his brothers, he stated that they kept changing their names and that they lived in different places.
32. When he was again asked whether he knew the 1st Plaintiff/Respondent, he turned to the Applicant and asked her whether she knew him.
33. The proceedings of the inquiry are part of the Court record.
34. From this inquiry this court observed that the 1st Defendant had no recollection of his relationship with the Plaintiffs/Respondents in this matter and neither was he aware of the issues in dispute. In my assessment, he may not be entirely capable of protecting his interests.
35. As regards medical evidence, the Applicant attached to her Supplementary Affidavit a copy of a Medical Report dated 17th March, 2025 by Dr. Praxides E. Pessah Consultant Psychiatrist. The following observations were made upon mental state examination of the 1st Defendant;

“...Patient was oriented in person sdaand time, not place.

Short term memory was very poor, full of confabulations and kept referring to the wife and signaling for assisted recall and reply to questions.

Long term memory- Implicit memory was intact. For explicit, episodic memory was poor, while semantic memory was intact.

Judgement was partially/fairly good.

Attention and concentration was poor.

Had no insight...

Very poor immediate recall memory and short term memory...”

36. The Psychiatrist made the following diagnosis and opinion in the report;

“Diagnosis.

Moderate Major Neurocognitive Disorder (Formerly referred to as Dementia) – Alzheimer's type...

Professional Opinion



John Kositany cannot be relied upon to make executive decisions given the nature and course of his illness and prevailing symptoms.”

37. As stated in the preceding paragraphs, this Court upon conducting an inquiry observed that the 1st Defendant may be incapable of protecting his interests.

38. The medical report on record supports this observation.

Disposition.

39. The upshot of the foregoing is that the Applicant’s application dated 10th December, 2024 is merited and it is hereby allowed in the following terms;

- a. Chepkirui Kositany is hereby appointed as guardian ad litem of the 1st Defendant; John Kositany.
- b. Chepkirui Kositany is hereby made a party in this suit as guardian ad litem of the 1st Defendant, John Kositany.
- c. Costs of this application shall be in the cause.

40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 10TH DAY OF JULY, 2025.

L. A. OMOLLO.

JUDGE.

In the presence of: -

Mr. B.K Langat for the Applicant and 1st Defendant.

The firm of Obando Koko for Plaintiff. Absent.

Miss Chepkemoi for 2nd and 3rd Defendant/Respondent.

Court Assistant; Mr. Joseph Makori.

