



Ndirangu alias Rose Wanjiru Mugwanja v Njoroge (Environment & Land Case 62 of 2018) [2024] KEELC 6487 (KLR) (1 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6487 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 62 OF 2018**

AK BOR, J

OCTOBER 1, 2024

BETWEEN

**ROSE WANJIRU NDIRANGU ALIAS ROSE WANJIRU
MUGWANJA PLAINTIFF**

AND

GRACE WANGARI NJOROGE DEFENDANT

RULING

1. Through the application dated 12/06/2024, the firm of Mahida & Maina Co. Advocates sought leave to come on record for the Defendant after judgment and stay of execution of the ruling delivered by this court on 13/05/2024. In addition, it sought to have this court find that the Defendant is a person incapable of protecting her interests due to mental infirmity upon conducting a judicial inquiry; and as a consequence of this, to have the Defendant's sister, Margaret Wanja Njoroge, appointed as the Defendant's guardian ad litem. Flowing from the foregoing and in view of the Defendant's mental infirmity and consequent lack of capacity to protect her interests, it is contended that the court ought to declare the judgment delivered on 05/05/2022 as irregular and have it set it aside so that the suit can be heard de novo.
2. In the alternative, the Defendant sought stay of execution of the ruling delivered by this court on 13/05/2024 together with the judgment delivered by the Hon. Mr. Justice Y.M. Angima on 05/05/2022 pending hearing and determination of Civil Appeal No. E138 of 2022.
3. The application was made on the grounds that vide the ruling delivered on 13/05/2024, this court issued an order for the forceful eviction of the Defendant from the suit land within 30 days, which period lapsed on 12/06/2024. The other ground is that on 06/12/2022, the Defendant exercised her right of appeal against the judgment delivered on 05/05/2022, which is yet to be determined.



4. The Applicant contended that the Defendant stood to suffer substantial and irreparable loss and damage stay was not granted because the Defendant was allocated the suit property in 1996 and had constructed a house on it where she lives to date. That if the eviction were carried out, she would be left destitute, homeless and would be constrained to wander in the streets which will cause her mental health to deteriorate thereby exposing her to danger. It was stated that in her lucid moments, the Defendant cultivates the suit land and planted various crops that sustain her. Further, that she planted trees on the land in 1997 which would be exposed to wastage and reckless cutting if she is evicted from the suit land.
5. The Applicant claimed that from the outset of these proceedings, the Defendant had been mentally sick and was incapable of protecting her interests in the suit. That owing to her mental capacity, she was unable to properly defend her suit as evidenced by her failure to file documents. Further, that the court record indicated that the Defendant was a violent person and did not understand the nature of the case before court. It was also contended that the judgment was irregular for being in breach of Order 32 of the Civil Procedure Rules. Additionally, it was contended that the Defendant was not able to comprehend the nature and effect of the ruling of 13/05/2024 to the extent that she even refused to sign the affidavit in support of the present application based on her misapprehension that the document was intended to dispossess her of the suit land as well as the misapprehension that everyone including the court, had colluded against her to dispossess her of her land.
6. The other ground was that despite the Plaintiff's claim from the Settlement Fund Trustees (SFT) being in respect of plot no. 2689, the court went ahead to award the Plaintiff Plot No. 2630 whose title had been issued to the Defendant. That owing to the Defendant's mental status, she could not mount any defence on those inconsistencies resulting in an apparent error on the face of the record.
7. The other ground was that it would be a serious miscarriage of justice if the judgment were allowed to stand in a suit which proceeded against a person who was incapable of protecting her interests without the appointment of a guardian ad litem. It was emphasised that the Plaintiff trespassed onto the suit property and had not been on it continuously for 12 years. The Applicant contended that if the orders for eviction were granted, it would sanitize the Plaintiff's acts of trespass as against the Defendant's right to the suit property. Further, that the Plaintiff who resided elsewhere in her other properties and who had not been using the suit land would not be prejudiced in any way if the court granted stay of execution. It was also urged that the Defendant had a good case on appeal with a high probability of success and that the appeal would be rendered nugatory if the court does not grant the orders sought.
8. Margaret Wanja Njoroge swore the supporting affidavit and deposed that she was the sister of the Defendant. She averred that the Defendant suffered from mental infirmity and was incapable of managing her affairs, which is why she seeks to be appointed as her guardian ad litem. She added that the Defendant's family was ready to provide security as the court may order for the performance of the order which may ultimately be binding including depositing the title over the suit land.
9. In her replying affidavit, the Plaintiff averred that execution of the ruling delivered on 13/05/2024 had already been implemented and there was nothing to stay. The Plaintiff further stated that vide a ruling dated 12/10/2022, the Court of Appeal declined to stay the judgment delivered by Mr. Justice Y.M. Angima on 05/05/2022 making this application res judicata. She also contended that this court was functus officio and could not set aside the judgment delivered on 05/05/2022 because the Defendant had exercised her right of appeal.
10. The Plaintiff deposed that when the application for eviction was filed, the Defendant instructed Martin Gathumbi & Co. Advocates to defend the application and swore the replying affidavit. The Plaintiff questioned how the Defendant could have instructed her previous advocate if she did not



comprehend or understand the nature of the application. She went further to state that the Defendant testified during the trial and had a good comprehension of the issues.

11. That in any event, there were no medical records attached to the application to suggest that the Defendant had a mental infirmity. She maintained that the grounds of mental infirmity were an afterthought meant to frustrate the course of justice. She averred that she planted the matured trees on the land and had been in occupation of the land since 1986 until 2018 when the Defendant trespassed on the suit land.
12. Margaret Wanja Njoroge filed a supplementary affidavit in which she averred that the trees which the Defendant planted in 1997 were assessed to be aged between 24 and 27 years. She added that the Court of Appeal did not determine the issue of stay in the ruling dated 12/10/2022 due to the fact that the Learned Judge of Appeal was sitting as a single judge. She went on to explain that owing to the hostile nature of the Defendant, she had refused to be subjected to a medical examination hence the prayer to have this court conduct its independent judicial inquiry to confirm the Defendant's inability to defend her interests. Ms. Njoroge explained that the Defendant instructed her former advocates in her lucid moment and that subsequently, her mental condition had deteriorated.
13. The court directed parties to file written submissions. It was submitted on behalf of the Defendant that Lady Justice F. Sichale JA stated in her ruling that the prayer for stay of execution was declined because she could not issue such orders while sitting as a single judge of the Court. Further, that what is sought is orders for stay of execution of the ruling delivered by this court on 13/05/2024 and the judgment delivered on 05/05/2022 which had not been canvassed at the Court of Appeal. She was emphatic that the doctrine of the res judicata did not apply.
14. The Applicant referred to the proceedings conducted before the Environment and Land Court and the affidavit of service which showed that the Defendant was hostile in support of the argument that the Defendant was a person incapable of protecting her interests and that the proceedings were taken against a person who was not capable of protecting her interest making the resulting judgment irregular for want of compliance with Order 32 of Civil Procedure Code.
15. The Applicant relied on MMM vs AMK (Miscellaneous Civil Application 51 of 2015) [2016] KEHC 4741 (KLR) (13 June 2016) (Ruling) where it was stated that the court should hold a judicial inquiry and may seek the assistance of medical experts. It was submitted that there was need for the court to question the person to see whether he was of unsound mind or unfit to protect his interests. The Defendant referred to another decision where the court followed the procedure in prescribed in the MMM vs AMK case and conducted an inquiry to determine whether the Respondent was capable of protecting his interests. The Applicant maintained that the court was mandated to send the Defendant to a doctor to carry out an independent assessment. The Applicant reiterated that the proceedings in this suit were conducted and a judgment obtained against a person who was incapable of protecting her interests due to mental infirmity.
16. The Plaintiff submitted that the Applicant only brought up the issue of mental infirmity after she was denied stay of execution by the Court of Appeal and an order for her eviction issued in this suit. She maintained that the Court of Appeal Judge declined to stay execution. She added that if this court were to consider the issue of stay yet it is the prerogative of the Court of Appeal to determine whether or not the appeal was arguable, it would embarrass the Court of Appeal bench which will finally determine the appeal.
17. The Plaintiff urged that residing on the suit land could not be a ground for stay. The Plaintiff questioned why the Applicant indicated that she had an appeal with high chances of success yet at the same time was seeking to have this case start de novo on grounds that she is suffering from mental



infirmity. The Plaintiff submitted that if the suit were to start de novo after the Defendant had testified and was cross-examined, this court would be sitting on appeal or reviewing its own decision. She maintained that her argument that the Defendant testified and had a good comprehension of the issues had not been disputed or refuted. The Plaintiff concluded that the Applicant should seek legal redress from the Court of Appeal.

18. The issue for determination is whether the court should grant the orders sought in the application dated 12/06/2024 brought under Order 9 rule 9, Order 32 Rules 1 to 15, Order 42 Rule 6 of the Civil Procedure Rules and Sections 3A and 63E of the [Civil Procedure Act](#).
19. The Applicant relied on the MMM v AMK case where the Mativo J (as he then was) prescribed the procedure to be followed in determining whether a person who though not adjudged to be of unsound mind, was incapable of protecting their interests by reason of unsoundness of mind or mental infirmity. The Learned Judge crafted a set of principles designed to protect people who lack capacity on their decision making based on Order 32 Rule 15 of the Civil Procedure Rules. These include: that a person must be assumed to have capacity unless it was established that he lacked capacity; a person is not to be treated as unable to make a decision unless all practical steps to help him or her do so have been taken without success; and that a person was not to be treated as unable to make a decision because he or she made an unwise decision.
20. The Learned Judge stated that Order 32 Rule 15 also applied to persons of weak mind and that where it was alleged that a party to a suit was of unsound mind, and the other party denied it, the court must hold a judicial inquiry and come to a definite conclusion as to whether by reason of the unsoundness of mind or mental infirmity, he was incapable of protecting his interests in the suit. The court found that the person had to be examined by the court and the court could consider the medical evidence. Since no inquiry had been conducted, the court concluded that the orders sought were premature.
21. The Applicant, who seeks to be appointed guardian ad litem for the Defendant deponed that she was the Defendant's sister but did not explain why she did not make this application before the ELC Judge heard and determined the suit. As the Defendant's sister, she would have known that the Defendant was incapable of protecting her interests over the suit land and the suit itself due to mental infirmity and should have intervened earlier.
22. The Defendant in this case is pursuing an appeal against the decision of the ELC Judge and in the alternative, has sought stay of execution against the ruling this court delivered on 13/05/2024 and the judgment delivered by the Hon. Mr. Justice Y.M. Angima on 05/05/2022 pending hearing and determination of Civil Appeal No. E138 of 2022. It would be difficult to address this issue conclusively without first determining whether by reason of mental infirmity, the Defendant was incapable of protecting her interests in the concluded suit as the Applicant contends in the present application.
23. Ideally, Order 15 Rule 15 of the Civil Procedure Rules should have been put into motion and the judicial inquiry conducted to establish whether the Defendant was incapable of protecting his interests when he was sued and not post the delivery of the judgment. The Plaintiff argued that the Defendant testified before the trial court and had a good comprehension of the issues. As Mativo J found in the MMM v AMK case, where it was alleged that a party to a suit was of unsound mind, and the other party denied it, the court must hold a judicial inquiry and come to a definite conclusion as to whether by reason of the mental infirmity, he was incapable of protecting his interests in the suit.
24. In this case, the proper course to be followed was for the Applicant to first argue the application for appointment of guardian ad litem and seek to have the court conduct the judicial inquiry to establish whether by reason of the mental infirmity, the Defendant was incapable of protecting her interests in



the suit. Once appointed guardian ad litem, she could apply to set aside the judgment of the ELC as well as the orders flowing from the Ruling of this court of 13/5/2024.

25. It is doubtful whether the Defendant can reasonably pursue her appeal in the Court of Appeal if she is indeed incapable of protecting her interests due to mental infirmity as the Applicant contends in this application. In this court's view, it will serve the interest of justice if a determination is first made regarding the allegation about the mental infirmity of the Defendant.
26. After considering the application dated 12/06/2024, the response together with the submissions of parties, the court makes the following orders:
 - a. Leave is granted to the firm of Mahida & Maina Co. Advocates to come on record for the Defendant after judgment.
 - b. The court will conduct an inquiry to determine whether the Defendant was capable of protecting her interests in these proceedings by reason of mental infirmity.
 - c. The Defendant will submit herself for a medical assessment by a doctor in a government hospital and a medical report is to be filed in court within the next 30 days.
 - d. Prayers 3,4, 5 and 6 of the application dated 12/06/2024 will abide the outcome of the judicial inquiry to determine whether the Defendant was incapable of protecting her interests in this case by reason of mental infirmity.
 - e. In the interest of justice, the court stays the order made on 13/5/2024 for the eviction of the Defendant from the suit land until the judicial inquiry is conducted to ascertain whether by reason of mental infirmity, the Defendant was incapable of protecting her interests when she was sued in this case and defended the suit.
 - f. Each party will bear its costs for the application.

DELIVERED VIRTUALLY AT NYAHURURU THIS 1ST DAY OF OCTOBER 2024.

K. BOR

JUDGE

In the presence of: -

Mr. Gakenia Gicheru for the Plaintiff

Ms. Esther Kibore for the Defendant

