



M'laaru (Suing By His Next Friend Jerusha Kanario Mwenda) v Maingi & 4 others (Environment & Land Case 325 of 2017) [2024] KEELC 13683 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13683 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 325 OF 2017
CK NZILI, J
DECEMBER 4, 2024**

BETWEEN

SAMUEL M'IMAINGI M'LAARU (SUING BY HIS NEXT FRIEND JERUSHA KANARIO MWENDA) PLAINTIFF

AND

**MARTIN MURIITHI MAINGI 1ST DEFENDANT
LAND REGISTRAR, MAUA LAND REGISTRY 2ND DEFENDANT
TABITHA KANAINI MAINGI 3RD DEFENDANT
EZEKIEL MUTURA MANYARA 4TH DEFENDANT
CICILIA MWOTIANIA MUTHIAINE (SUED AS THE LEGAL REPRESENTATIVE OF THE LATE EZEKIEL MUTHIANE MAINGI – DECEASED 5TH DEFENDANT**

RULING

1. The 5th defendant/applicant has moved the Court through a notice of motion dated 21.10.2024. She seeks dismissal of this suit and terms it incompetent and defective in law for lack of locus standi on the part of Jerusha Kanorio Mwenda, who is suing as the next friend of Samuel Maingi Laaru.
2. The 5th defendant equally seeks that the next friend produces before the Court the subject during the next hearing of the matter. The application is based on the grounds on the face of the application and in the supporting affidavit sworn on 21.10.2024 by Cecilia Mwotiania Muthiane.
3. The applicant avers that she has discovered that the plaintiff's next friend has no authority to continue or proceed with the suit since the interim orders issued to her on 7.8.2017 in Milimani HCFA Misc Application No. 106 of 2017 are defective and cannot be relied upon by this Court. The applicant



- avers that the said orders were issued temporarily and lapsed by operation of law within one year from the date of issuance.
4. Equally, the applicant avers that she and other family members have never seen the subject plaintiff/respondent for the last eight years, and should this defective suit be sustained by the Court, the subject ought to be produced in court. The order is attached as an annexure marked CMM "1".
 5. The applicant also avers that on the face of the said order, it is defective in substance and form and cannot pass the test of a proper order to be relied on by this court since the next friend is not party to it, the order was issued in 2014 yet the suit was filed in 2017 and it was to last for one year in line with Order 40 Rule (6) of the Civil Procedure Rules.
 6. The applicant avers that it is in the best interest of justice to grant the order sought; otherwise, it was morally wrong and unfair for the next friend to hide her father-in-law for 8 years from them and cannot tell whether he is worse, his health has improved or is worse and the exact condition he is in today.
 7. The applicant avers that the subject is equally entitled to a right to access his family members which the next friend has deprived him of the last eight years. Additionally, the applicant avers that the subject, being elderly, is equally entitled to access his immediate family members whom the next friend has deprived him of without any legal basis.
 8. Similarly, the applicant avers that the application is merited, and the plaintiff will not suffer any prejudice if the orders sought are granted. The rest of the defendants support the application. The respondent opposed the application through a preliminary objection dated 22.10.2024 that:
 - i. The court has no jurisdiction to strike out or declare as null and void the order made on 7.8.2017 in Nairobi H.C Family Division Milimani Court Misc Application No. 106 of 2017 in the matter of M'Maingi M'Lauru.
 - ii. The application is made in the wrong Court.
 - iii. The practice of the Environment and Land Court court is to refer to the relevant court, be it the family division or any other division of the high Court, for issues that call for determination by another division of the High Court.
 9. With leave of court parties canvassed the application by way of both oral and written submissions. The applicant relied on written submissions dated 23.10.2024, which she also highlighted in open court she submitted that under Order 40 Rule (6) of the Civil Procedure Rules, an interlocutory injunction issued shall lapse after 12 months unless otherwise ordered by the Court. In this case, the 5th applicant submits that the interlocutory order issued lapsed after 12 months of its issuance or 7.8.2017, by operation of the law and does not need to have been set aside.
 10. The applicant submitted that the order was issued pending hearing and determination of the application on 3.10.2017 and since the said application has never been prosecuted or the order extended, the order could not have gone beyond 2018 and hence lapsed.
 11. The applicant submitted that it was now 8 years, and the plaintiff had never bothered to make right the orders. Therefore, the orders made on 7.8.2017, having lapsed; the suit herein has no ground or foundation to stand upon. Further, it was submitted that the suit was dangling in the air for want of locus standi; it has no root and hence lacks a lifetime to continue upon. In the circumstances, the applicant urged the court to dismiss or strike out the suit with costs.
 12. It was submitted that Order 40 Rule 6 of the Civil Procedure Rule is meant to deal with litigants who obtain temporary orders and use them to delay expeditious hearings of matters before the Court.



- Further, it was submitted that this section of the law is for the purpose of preventing injustice against parties where orders were obtained against them.
13. Additionally, the 5th defendant/applicant submitted that the provision is meant to deal with characters such as that of the plaintiff who obtained orders and dumped the suit never to kick off; hence, there was a need to cure the excess of such a litigant.
 14. As to the production of the subject before the court, the 5th defendant submitted that since 2017 the next friend has wholly refused to produce the subject before the court or avail the family members access to him despite several requests made to the Court. The 5th defendant submitted that it was unfair to both the subject and his family members, who had never seen their father and his children, respectively. The 5th defendant submitted that the excesses of the next friend were intentional with a view of punishing other family members and which conduct the Court should not entertain.
 15. The 5th defendant/applicant submitted that it was proper for the subject to be availed to be seen by both the court and the other family members to ascertain if his health has improved or not; otherwise, it will cast doubt on the status of the subject whom the plaintiff purports to be acting on his behalf.
 16. Similarly, the 5th defendant/applicant submitted that instead of providing the court with a confirmed or an extended order to sustain the suit, the plaintiff had filed a preliminary objection dated 22.10.2024, which is not only misplaced but also misconceived, since it seems to be addressing a different application from what is before the court, for striking out or dismissing the suit for want of locus standi.
 17. According, the 5th defendant/applicant submitted that the preliminary objection is raised on a false belief that the current application is challenging the orders made in Milimani Application No. 106 of 2017. Yet, the applicant is merely alleging that the order no longer exists by operation of law as referred to and quoted in the said orders.
 18. The 5th defendant submitted that the plaintiff has not attempted to demonstrate to this court whether she still has a valid authority to proceed with the suit and instead assumes that the court should search around and find her authority to prosecute the matter and then proceed with the hearing of the suit.
 19. The 5th defendant submitted that it is for the litigant to point to the Court to the law or the fact that she seeks to rely upon, especially where the two are apparent. In this case, the order issued on 7.8.2017 was dead in law, lacking life to give to the suit or the next friend, for it has never been reviewed or extended since 3.10.2017. In the absence of such evidence, the 5th defendant urged the court to find it has no means or basis to sustain the suit for lack of locus standi, hence stripping the Court of the jurisdiction to entertain the suit any further.
 20. In his oral highlights of the written submissions, Mr. Thangicia learned counsel for the 5th defendant, urged the court to find that Order 40 Rule (6) Civil Procedure Rules is in the mandatory term that a temporary order subsists for only 12 months and lapses automatically. In this case, it lapsed on 8.8.2018, for it was self-terminating. Learned counsel submitted that the law does not contemplate anyone seeking to vacate such orders once they lapse by operation to the law.
 21. Learned counsel urged the court to find the preliminary objection a non-starter and misadvised for addressing an imaginary application, other than whether the order lapsed terminated or became a nullity after one year.
 22. Again, learned counsel submitted that what the court should address is the question of whether or not the orders issued on 7.8.2017 died after one year, and if yes, then the court need not excavate into the facts in the mental health cause. Learned counsel urged the Court to exercise its vast inherent powers to order for the subject to be availed in the best interest of justice. Learned counsel urged the Court



to find that a preliminary objection can be raised at any stage, and in this case, the 5th defendant has done so in the interest of justice.

23. Mr. Njindo, learned counsel for the 1st defendant, supported the application by the 5th defendant/applicant. It was submitted that the plaintiff has not denied that the basis of the suit is the interim order issued to the next friend on 7.8.2017, which, on the face of it, she was appointed as an interim manager.
24. Further, Learned counsel posed the fundamental question as to whether the law anticipated a situation where an interim manager is appointed on behalf of a subject without a gazette for anyone opposed to the appointment to come out.
25. Learned counsel submitted that it is only after the procedure set out under the *Mental Health Act* is followed that a manager is appointed. Learned counsel Mr. Njindo submitted that the plaintiff's next friend did not follow the law and solely relied on an interim order, which, in his client's view, falls short of a validly appointed manager with the requisite powers, since the application has never been prosecuted, orders reviewed or extended hence was a nullity under the law.
26. Equally, learned counsel submitted that this court has jurisdiction to determine the issue of locus standi. Learned counsel drew the court's attention to a scenario where a party is given ex parte leave to institute a suit, leaving the Court with powers to interrogate such leave at a later hearing of the suit.
27. Miss Kirera, holding brief for Mr. Gitonga and Mr. Juma for the rest of the defendants, supported the 5th defendant's/applicant's application. Mr. Juma submitted that the life of an interlocutory injunction cannot exceed 12 months unless it is extended on a sufficient cause or reason.
28. In this suit, learned counsel submitted that the plaintiff/applicant did not seek an extension of the interim orders and therefore, was incapable of sustaining the suit for lack of capacity to sue. Learned counsel relied on *Law Society of Kenya vs Commissioner of Land and Others Civil Case No. 464 of 2000*, where the court held that locus standi means the right to be heard in a cause in a court of law.
29. Learned counsel submitted that the plaintiff/respondent has no mandate since the interim orders expired. In the absence of a satisfactory explanation that the interim order was extended, the 2nd defendant urged the court to find that it has no jurisdiction to entertain the next friend who lacks the mandate to sue or sustain the suit.
30. The plaintiff/respondent relied on written submissions dated 23.10.2024. The plaintiff/respondent submitted that an examination of the prayers sought by the 5th defendant/applicant and the grounds make it abundantly clear that the application is for the review of the order made by Hon. L. J Farah Amin on 7.8.2017 and has nothing to do with the environment, occupation and title to land but has everything to do with the health of the plaintiff/respondent and the alleged staleness of the order made.
31. The plaintiff/respondent submitted that jurisdiction is everything, and without the same, the Court must down its tools as held in *Owners of Motor Vessel Lillian "S" Caltex Oil (K) Ltd (1989) eKLR*.
32. The plaintiff submitted that the facts to these issues are to be found in the application and the record of this Court.
33. It was submitted that the next friend was appointed as an interim manager under Section 27 of the *Mental Health Act* any aggrieved party by the said order must move the court that issued the order. Therefore, any party such as the 5th defendant/applicant, based on the grounds set out in the application, should have moved to the Court that made the order but not to transform this Court as capable of reviewing, setting aside, or vacating the order or determining what is in the best interest of



- the subject as opposed to the family division of the High Court, which is contrary to Article 162 2 (b) of *the Constitution*.
34. The plaintiff/respondent submitted that the only option and the best practice for this court is to refer a matter such as this one to the Court that has jurisdiction to handle it. Reliance was placed on Kajiado ELC No. 502 of 2017 Francis Nganga Mundi vs Engineer Wanjohi & others.
 35. Further, the plaintiff submitted that going by the bundle of documents filed in this suit documents therein demonstrates vividly the said situation as regards the health of the plaintiff/respondent and dealing with his properties; hence, the application herein belongs to the family division of the High Court and not this court.
 36. The plaintiff/respondent submitted a preliminary objection is a pure point of law argued on the presumption that all the facts pleaded by the other side are correct and not based on the exercise of judicial discretion and do not require any ascertainment of facts through the evidence as held in Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors (1969) E.A 696.
 37. The plaintiff/respondent submitted that the court, in this instance, has no jurisdiction to entertain the application and should not strike out the pleadings but refer the particular dispute for determination by the proper Court as held in Tanta & others vs. AG and others (2015) eKLR and *Mary Wangui Karanja & another vs Rhoda Wairimu Karanja & another NRB ELC Suit No. 83 of 2010*.
 38. Learned Senior Counsel Dr. Kamau Kuria urged the court to find the application incompetent; the defendants should have moved to the family division of the High Court to address the issues that they were now raising. Learned counsel submitted that the order annexed as CMM "1" was made in the family division under the *Mental Health Act*, and therefore, this court has no jurisdiction to hear and determine matters or issues outside its constitutional and statutory mandate as to the status of the mental health of the subject. Learned Senior Counsel submitted that courts should act collaboratively.
 39. In the alternative and assuming the court has jurisdiction to entertain the application, learned Senior Counsel submitted that the law and the burden of proof as held by Odunga J as he then was in *Chripines Otieno Caleb vs AG & another* (2014) eKLR the person who applied has the burden of proof.
 40. Learned Senior Counsel submitted that what the applicant is challenging is an interim order made which, until the issuing Court vacates or varies it, this court should act as if the order is valid in the absence of any law showing that the family division of the High Court could not make such interim orders.
 41. Learned Senior Counsel submitted that the inherent powers of this court were set out in *Malcolm Bell vs Daniel Toroitich Arap Moi & another* (2005) eKLR and *Peter Gatirau Munya vs Mwenda Kithinji & 2 others* (2014) eKLR case to do justice and enforce property rights, which include making orders in the interest of justice.
 42. Further, learned Senior Counsel submitted that if the defendants felt aggrieved by the interim orders, they should have moved the court that issued them instead of raising issues herein from the bar.
 43. Learned Senior Counsel submitted that the supporting affidavit to the application falls short of giving the history of the suit. The plaintiff urged the Court to be guided by *Chripine Otieno Caleb's* case, especially where a party failed to substantiate the application by showing that the interim order was stale or expired.
 44. Learned Senior Counsel submitted that evidence of expiration, vacation, and the staleness of the interim order was not before the court yet he who alleges must prove. Learned Senior Counsel



- submitted that there is a wrong assumption that the Civil Procedure Act is the only available law to be invoked in isolation and other rules or laws in so far as the appointment of an interim manager under the Mental Health Act, yet the Constitution is supreme.
45. Equally, Learned Senior Counsel urged the Court to find that there is no competition between courts of equal status, and therefore, this court can transfer the application to Nairobi for determination or, in the alternative, the applicant to move to the said court for review or variation of the said order.
 46. Learned Senior Counsel urged the court to dismiss the application or, in the alternative refer the application to the appropriate Court instead of striking out the suit. Reliance was placed on *Kautha vs AG (2015) eKLR*.
 47. On production of the subject, learned Senior Counsel submitted that Professor Amuga, who testified on behalf of the subject, told the Court the health status of the subject. Equally, it was submitted that the next friend had invited in vain the family members and extended an opportunity to visit the subject, all of which options the family did not take advantage of. Learned Senior Counsel submitted that the defendants were showing disrespect to the subject instead of filing an appropriate application before the proper court.
 48. In a rejoinder, Mr. Thangicia advocate for the 5th defendant/applicant submitted that an order that is dead and which has not been reviewed or extended remains dead. Learned counsel submitted that the plaintiff could not have it both ways to say that the court cannot review and, at the same time, invoke the inherent powers to issue any other order to sustain the suit.
 49. Learned counsel submitted that the court cannot transfer an incompetent or defective matter to another court. Regarding the preliminary objection, learned counsel submitted that a preliminary objection does not need historical facts or evidence to be sustained as the plaintiff has invited the court; otherwise, it would not be a pure point of the law as per *Mukhisa Biscuit (supra)*.
 50. Additionally, Learned counsel submitted that the 5th defendant/applicant has discharged the burden of proof since the plaintiff/respondent has admitted that her orders were interim to last for a certain period. Learned counsel submitted that it was upon the plaintiff to show that she still has the locus to sustain the suit eight years down the line. Learned counsel submitted that in the absence of a replying affidavit, the preliminary objection and the law cited would not help the next of kin who relies on a dead order to sustain the suit in the absence of evidence of its extension, or confirmation.
 51. Learned counsel submitted that the 5th defendant/applicant is not expected to do so for the plaintiff who has not brought before the court rival evidence to contradict her position that the next of kin has no locus standi. Learned counsel submitted that the application is not challenging the proceedings before the family division of the High Court but lack of locus standi. The court has carefully perused the pleadings in this matter and the evidence so far availed before it by the parties since this matter is at the defense stage.
 52. The issues calling for my determination are whether the plaintiff's next friend has locus standi and, secondly, whether this court has jurisdiction to determine the issue of locus standi or it should refer it to the court that issued the interim order in the first instance.
 53. Locus standi or legal capacity goes to the root of the suit and jurisdiction. Without locus standi, the suit is fatally defective. Locus standi and jurisdiction are preliminary issues and should be raised at the earliest opportunity possible. However, they can also be raised at any stage of a suit. In *Bank of Africa (K) Ltd & others vs. TSS Investment Ltd & 2 others (Civil Appeal E055 of 2022) (2024) KECA 410 (KLR) (26th April 2024 (Judgment)*, the court elaborated on the jurisdiction of the ELC court under the Constitution and Section 13 ELC act and 150 of the Land Act.



54. Further, the court said that the validity of the 1st & 2nd respondents' claims was dependent on the nature of their interest in the suit properties. The Court cited *Alfred Njau & others vs City Council of Nairobi (1983) EKL*R the locus standi means a right to appear in court, and a person without locus standi has no right to appear or be heard in court. The court held that the 1st & 2nd respondents had neither a right nor interest on account of contractual or other legal rights, as tenants recognized under section 24 of the *Land Registration Act*, to be entitled to any reliefs under Sections 96 (3) and 103 (1) & 4 of the *Land Act*.
55. In this suit, the plaintiff, the subject herein is said to be mentally sick. He brought the suit through his daughter, the next friend, pursuant to an interim order, which she produced as P. Exh No.8. It was obtained in a suit filed on 3.8.2017, in the High Court of Kenya at Nairobi as Family Division No. Misc 106 of 2016 as described in the amended amended plaint dated 2.3.2020. The next friend swore the verifying affidavit on 2.3.2020, averring to be the next friend appointed by the plaintiff as guardian and manager of the subject's suit properties under the *Mental Health Act*, pursuant to an order dated 7.8.2017. On the face of the exhibit, the application was supposed to come for an interparty hearing on 3.10.2017.
56. The next friend in paragraphs 6B, C, D, E & F of the amended amended plaint is before this Court claiming that there were fraudulent and illegal transactions undertaken against the suit properties belonging to the subject, contrary to the rights and duties bestowed upon her by the said court order as vested properties under her by the defendants among them, a son, a wife (now deceased) and a daughter in law to the subject, the 1st and 5th defendants.
57. Further, the next friend avers that in August 2016, the plaintiff could not transfer any of his properties to anybody, including the 5th defendant's/applicant's late husband, over Mombasa Block XVIII/32 and Njia/Kiegoi/348. The next friend avers that the 1st, 3rd, and 5th defendants/applicant defied the interim court order dated 7.8.2017 and illegally sold and transferred the properties mentioned above to the 5th defendant, who continues to collect rent from the Mombasa property.
58. In paragraphs 13, 14, 15, 22, 23, 24, and 25 of the amended amended plaint, the next friend avers that the order made on 7.8.2017 prohibited the other members of the family from dealing with the parcels of land belonging to the plaintiff, the defendants disobeyed the order a contempt application had been filed on 7th and 3rd October 2017 which were partly heard, and some parties were committed to civil jail.
59. The next friend avers that upon service with the interim order, the 1st defendant devised a fraudulent scheme to dispose of L.R No's. Njia/Kiegoi/176 and Njia/Ciamwendwa/3460, yet the plaintiff had no mental capacity to dispose of the land, and equally, on 7.9.2017, he could not deal with L.R No's. njia/Ciamwendwa 2317 and 3460.
60. The next friend prays for a declaration that the 1st defendant could not be registered as the owner of the suit land or transfer them to third parties such as the 4th defendant, the 5th defendant's/applicant's late husband's title be canceled. She equally prays for the invalidation of all the transactions on title deeds for the suit parcels that occurred while the subject was mentally unstable generally and, in particular, after the interim order was issued vesting the properties on her. She wants the properties to revert in the subject's name and to be under her management. The defendants have all denied the allegations by way of statements of defense and a counterclaim.
61. It is not in dispute that the next friend had testified before this Court and produced several exhibits, such as the application at the family division, a ruling both at the High Court and in the Court of Appeal. The order was also produced as P. Exh No. (2) the petition as P. Exh No. 3 notice of motion as P. Exh No. 4 contempt of court proceedings as P. Exh No. 6 application in Nairobi as P. Exh No. 7 & 8.



- By a ruling dated 8.3.2018, the Court found the citees guilty of contempt of Court. In a ruling by the Court of Appeal dated 4.11.2022, the 5th defendant and her mother-in-law sought a stay of execution of the said ruling in the Court of Appeal (NRB) Civil Application No. E101 of 2018. They had also sought leave to appeal out of time. The notice of motion was dismissed for non-attendance.
62. From the exhibits described above, none of the parties in this suit have told the Court whether the petition dated 3.8.2017, which was produced as P. Exh No. (3) was heard and determined. In particular, the plaintiff did not tell the court if final orders were issued declaring the plaintiff as a person who has a mental disorder under Cap 248 and appointing her as the next friend as guardian with consequential orders of placing the subject properties on the next friend for management.
 63. Other than the interim order made on 7.8.2017 pending hearing and determination of the application, which ideally was as a stop-gap measure, the plaintiff/respondent did not produce as part of her exhibits a final order or ruling determining the mental status of the subject and confirming her locus standi in this suit, which is what the application before this court is all about.
 64. The 5th defendant/applicant and the rest of the defendants take the view that the next friend relies solely on the interim order that has lapsed by operation of law to seek substantive and profound reliefs against them without the capacity to sue. On the other hand, the plaintiff takes the view that this court lacks jurisdiction to reopen or determine the issue of the legality of an interim order issued by a family division of the High Court under the *Mental Health Act*.
 65. A court's jurisdiction flows from either *the Constitution* or legislation or both. A court of law can only exercise the jurisdiction conferred by the two or both. A court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.
 66. Jurisdiction to entertain a suit is not a procedural technicality. It goes to the very heart of a matter. Without jurisdiction, a court downs its tools. A court's jurisdiction cannot be expanded through judicial craft or innovation or through the consent of parties as held in Owners of Motor Vessel Lillian "S" vs Caltex Oil (K) Ltd (supra) and S.K Macharia & another vs. K.C.B (K) Ltd (2013) eKLR.
 67. Article 162 of *the Constitution* provides for the system of Court in Kenya. The ELC High Court and Employment and Labour Relations Court occupy the same plane as per Article 162 (2) of *the Constitution*. Under Article 165 (5) of *the Constitution*, the High Court has no jurisdiction whatsoever on matters that fall under the ELC and ELRC mandate under Article 162 (2) thereof since those courts have exclusive mandates for matters for which they were established.
 68. Jurisdiction means authority in which a court has to decide matters that are litigated before it or to take cognizance of the matters presented to it in a formal way for its decision. See the matter of Interim Independent Electoral Commission (2011) KCSC IKLR eKLR and Republic vs Karisa Chengo & 2 others (2017) eKLR.
 69. In determining whether the court has jurisdiction courts may look at the predominant test as held in Suzanne Achieng Buttler and others vs Redhill Heights Investment Ltd & another (2016) eKLR as the purpose of the transaction, subject matter or issue before it. See Lydia Nyambura Mbugua vs DIB (K) Ltd & another (2018) eKLR.
 70. Further, in Cooperative Bank of Kenya Ltd vs. Patrick Kangethe Njuguna & another (2017) eKLR and courts held that land connotes the surface of the land and or the surface above it and or below it, setting for the predominant purpose test in determining the mandate of the ELC court vis a vis that of a High Court on the environment and land cases as opposed to a commercial dispute related to land used as a commodity for sale which fall under the high Court.



71. In Kenya Tea Growers Association and two others vs the NSSF Board of Trustee and 13 others (Petition E004 and E002 of 2023 (consolidated (2024) KESC 3 (KLR) (21st February 2024 (Judgment) at issue was whether the ELRC had jurisdiction to determine constitution validity of the NSSF Act 2013.
72. The Supreme Court of Kenya went on to determine whether, within the scheme of the jurisdiction virements effected by *the Constitution* between the High Court and the two specialized courts, the latter can determine the constitutional validity of a statute and if that power was ousted in the Karisa Chengo case (supra). The court said that stripping the court of such authority would leave it jurisdictionally hamstrung, which the framers of *the Constitution* did not intend. The court emphasized that the courts established under Article 162 of *the Constitution* have original and exclusive jurisdiction to hear and determine applications for redress of denial, violation, or infringement of rights and fundamental freedoms and, by extension, the constitutional validity of statutes on matters falling on their respective mandates. The court cited *Desai vs Warsaw* (1967) E. A 351 that proceedings conducted by a court without jurisdiction as well as the awarded judgment or orders arising therefrom are a nullity.
73. As to the manner of collaboration among courts of equal status in *Robert Alia Onyango vs C.S in Charge of Health & others* (2017) eKLR, the court held that jurisdiction under Article 165 of *the Constitution* is limited and therefore, a court cannot assume a supervisory role and stay proceedings pending before a coordinate superior court or stop the execution of orders issued by that superior court or otherwise in taking such a step a court would be exercising a jurisdiction it does not have and which is excluded. See *Peter Nganya Mudiruri vs Credit Bank Ltd & others* (2018) eKLR.
74. In *Kenya Hotel Properties Ltd vs AG & others* (2020) eKLR, the court said that a High Court under Article 163(b) of *the Constitution* cannot supervise superior courts or make orders to quash or annul or direct a Court of Appeal to reopen and re-hear a concluded appeal. The court said that any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing.
75. The court said that it matters not how strongly a court feels about a matter, how impassionate it may feel, or how motivated it may be to correct a perceived wrong and that without jurisdiction, it would be embarking on a hopeless adventure to nowhere.
76. On abuse of the process of Court in Kenya Section of the ICJ vs AG & others (2012) eKLR, the Court said the concept has to do with the motive behind the guilty party's action and with a perceived attempt maneuver the court's jurisdiction in a manner incompatible with the goals of justice or an unlimited range of conduct by a party that may more clearly point to an instance of abuse of the court process.
77. The 5th defendant/applicant in her application asks this court to find and hold that the foundation upon which the next friend stood to find standing to sue before this court through an interim order issued by a sister court crumbled after a year and has never been reconstructed for eight years by way of an extension review or re-issuance or reconfirmation of the order. On the other hand, the plaintiff/respondent urges and warns the court not to tamper with the legality, appropriateness, or validity of the said order; otherwise, it will be against the good order of collaboration by courts of equal status and the judicial chemistry of our courts under *the Constitution*.
78. In *Bellevue Development Co. Ltd vs Gikonyo & others KCB & other* (interested party) (Civil appeal No. 239 of 2018) (2018) KECA 330 (KLR) (21st September 2018) (Judgement) the trial court had held that an inquiry into the complaints over judgment, lawfulness or good faith basis of their decisions and conduct could not be reviewed otherwise, it would be a nullity by a judge of concurrent jurisdiction to supervise fellow judge. See *Kombo vs AG* 1995 – 1988 1 E.A 168 and *Civicon Ltd vs Kenya Revenue Authority & another* (2014) eKLR.



79. In *Kenya Hotels Properties Ltd vs AG & others* Petition 16 of 2020 (2022) KESC 62 KLR 7th October 2022 (Judgment), the court reiterated that the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers in equal and competent jurisdiction much less those courts higher than themselves. The court cited S.K Macharia (supra) that courts must operate within their constitutional limits. The court said that under the principle of finality in litigation, it was intolerable that parties could be allowed to approach courts to reconsider final orders made in judgment by a superior court in the hierarchy of courts and to have such final judgment reopened.
80. Having set the constitutional, statutory, and interpretative mandates of courts of equal status, the dispute before this court is solely based on a cause of action said to have occurred during the period when the subject was suffering from mental illness and immediately after the next friend was appointed on 7.8.2017 to act as the interim manager of the subject.
81. Parties are bound by their pleadings. The suit by the subject, as pleaded by the next friend, substantially revolves around the mental capacity of the subject and, by extension, the status of the next friend to litigate on behalf of the subject to seek on his behalf invalidation of land transactions undertaken in favor of or by the defendants without the capacity of the subject to execute the requisite legal documents. The court is asked to hold, find, declare, and invalidate the acts of the defendants in dealing with the suit properties as fraudulent, invalid, and nullities amounting since the subject was suffering from mental illness and could not undertake those transactions and therefore, the title deeds held or in the names of some of the defendants and are as a result invalid and nullities.
82. The defendants, on the other hand, have pleaded and testified that all the transactions complained about were lawfully, regularly and procedurally undertaken by the subject since he was in a reasonable mental frame at the time.
83. The legislative regime governing mental health was discussed by the Supreme Court of Kenya in *MMG vs Tribunal* appointed to investigate the conduct of the Hon. Lady Justice MMG, Judge of ELC Petition 10 of E013 of 2022 (2023) KESC 73 (KLR) (12th September 2023) (Judgment). The court said that section 2 of the *Mental Health Act* defines mental illness as a person diagnosed by qualified mental health practitioners who have a mental illness. The Court said that the Act was silent on the resultant effect on the mental capacity of persons with mental illness. Drawing from comparative law in other jurisdictions, the Court cited *Heart of England NHCS Foundation Trust vs JB* (2014) eKLR EWCOP 342 that there is a system of legal protection under the *Mental Health Act* 2005 (UK) which empowers the Court of Protection to authorize actions that would be in the best interest of the incapacitated person including interim measures where such power to intervene only arises after it has been proved that the person concerned lacked capacity and that people lacking capacity still have rights and that their freedom of action is as important to them as it is to anyone else. The Court cited *Re MB (Medical Treatment)* 1997 EWCA Civ 3093 that every adult is presumed to have the capacity which presumption can be rebutted.
84. Further, the court cited *Halsbury's Laws of England* page 75 that expert evidence does not relieve the Court from the obligations of forming its judgment as the ultimate arbiter of whether the subject is, in fact, unable to decide as held in *Local Authority vs A* (2010) EWCOP 1549 66; *CC vs STCC* (2012) EWCOP 2136, (62) and *London Borough of Islington vs QR* (2014) EWCOP 26 (84).
85. The court listed guidelines to follow in matters that involve an assessment of mental capacity, among them that mental illness does not necessarily equal mental incapacity, a qualified personnel must diagnose mental incapacity includes but is not limited to a person's inability to make a decision understand information about a decision remember information, use the information to make a decision or communicate a decision. The court held that a court must consider the diagnosis by a



qualified professional and medical expert evidence to assess whether, on a balance of probabilities, the illness impacts on the performance of work by the mental illness. Further, the Court observed that where a person is deemed to lack mental capacity, any interference with their fundamental right or freedom must be the least restrictive possible.

86. The fundamental question raised herein by the parties is whether this Court, in exercising its constitutional duty to determine whether the next of kin is properly before this Court to agitate the cause of action as raised, would be usurping or arrogating powers or sitting on appeal review or determination of the orders given by a sister court, hence acting contrary to the law, practice and *the Constitution*.
87. Learned Senior Counsel Dr. Kamau Kuria, on behalf of the plaintiff, urges this court to refrain from not only entertaining but also determining the notice of motion, whose issues ought to go to the family division of the High Court, which has exclusive jurisdiction on mental health issues.
88. Unfortunately, the plaintiff/respondent has not drawn to this court to that law, which says that every time an issue of capacity to sue based on mental health is raised the court has to down its tools and make a reference of the issue to the High Court. The High Court has no jurisdiction to hear and determine matters of capacity to enter into the sale and transfer of interests or rights in land. The High Court cannot invalidate land transactions on account of fraud based on the lack of capacity of the landowner to transact.
89. In *Kamanza vs Musyoki* (Misc Application E018 of 2023 (2023) KEHC (4142) (KIR) (10th March 223) (ruling) an application had been filed to Alexander Mwaka Musyoki as guardian ad litem of Sukali Musyoki in respect to a Mwingi PMCC ELC case no. 16 of 2021, under Order 32 Rule 15 Civil Procedure Rules and Section 25 of the *Mental Health Act*. A preliminary objection was raised on jurisdiction under Article 165 (5) of *the Constitution*. The court held that to appoint such a person under the Act where the court under Section 2 is defined as the High Court has nothing to do with a dispute over the use and occupation of land as contemplated under Articles 162 (2) and 165 of *the Constitution*. The Court held it had jurisdiction under Sections (2) & 26 of the *Mental Health Act* to do so.
90. In *Nickson Mutinda Kiunga vs. Nguru Nduma & another* (2020) eKLR, the Court observed that an order for the guardianship of a person who is said to be of unsound mind by reason of mental disorder, can only be made upon a petition being filed and heard under Section 28 of the *Mental Health Act*. In the absence of material evidence on record to demonstrate compliance with that procedure, a copy of a guardianship order made by a competent court under Section 26 of the Act or under Order 32 Rule 15 Civil Procedure Rules, the court dismissed the application. See also *Re BWG mental* (2021) eKLR.
91. In the *MMM vs AMK (Misc Civil Application 51 of 2015/2016 KEHC (4741) (KLR) (13th June 2016)* (ruling), the Court looked at the procedure to follow being judicial inquiry and medical inquiry as contemplated by Order 32 Rule 15 of the Civil Procedure Rules. In the absence of such an inquiry, the court said that such orders could be challenged. The court, in the interest of justice ordered for the subject to be produced in court to satisfy the requirements of the law.
92. In *Re SWM (patient)* (2022) eKLR, the Court held that the authority to manage the affairs of an estate of a patient is donated by Section 27 of the *Mental Health Act*. As held in *Re NMK* (2017) eKLR, the court said that the three factors must be met, namely, medical evidence, the fitness of the guardian or manager to be appointed, and satisfaction that the proposed manager will utilize her powers for the benefit of the subject.



93. In *John Patrick Machira vs Patrick Kabiaru Maluvi C.C No. 113 of 1999*, the court observed that questions on one's mental health were a serious thing since everybody is presumed to be of sound mind unless and until the contrary is proved through credible evidence under Cap 248 to conclude the state of mind under the provisions of that Act.
94. Section 32 of the *Mental Health Act* provides for the powers of a manager. It is the said person who is mandated to execute any conveyance and instrument relating to any sale, mortgage, or other disposition of such person's estate as the court may order.
95. In *Mbuthia Mahcaira vs. Annah Mokuwa Ndwiga & another (2017) eKLR*, the court observed that a valid transfer cannot be upset by mere allegations by a third party that the appellant was of unsound mind without pleadings as such and offering testimony to that effect. The court cited Halsbury's Laws of England 4th Edition Vol. 17 page 13, that the legal burden of proof remains constant throughout a trial, being the burden of establishing the facts and contentions which will support a party's case and vests on a party deserving the court to take action by substantiating those allegations which is essential to his case.
96. The court said that the legal burden is discharged by way of evidence, which the opposing party has a corresponding duty of adducing evidence in rebuttal. The court observed that while both the legal and evidential burden initially rests with the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced, for it all depends on who would fail if further evidence is not adduced.
97. The court, in that appeal, held that the son of the appellant was supposed to obtain leave of the Court to act as guardian ad litem for the appellant upon satisfying stringent conditions set out under the provisions of the *Mental Health Act*.
98. The suit by the plaintiff/respondent revolves around the subject's mental status during the events leading to the cause of action. The question being raised by the defendants is whether the next friend has requisite powers to stand in for the subject under the law so as to prosecute the suit on behalf of the subject. It is the plaintiff/respondent who alleges that she has requisite documents bestowing her with such capacity under the relevant law. The defendants take the view that the next friend, other than obtaining the interim orders, did not prosecute her application to have the interim order confirmed, varied, and or affirmed so as to clothe her with the capacity to prosecute the suit.
99. Other than producing the interim order, the application for the same petition, contempt of court application, and the Court of Appeal ruling, the plaintiff/respondent has not produced any proceeding or a court decree obtained after the petition was heard and determined adjudging the subject as mentally unsound and appointing the next friend the manager of the affairs of the subject under Section 27 and 28 (1) of the *Mental Health Act* or Order 32 Rule 15 of the Civil Procedure Rules. See *MM vs. AMK (2016) eKLR* and *Hellen Mbinya Kingola vs HNO & another (2019) eKLR*.
100. In *Rosemary B. Koinange & five others vs Isabella Wanjiku Karanja and others (2017), eKLR* at issue was whether the deceased, who was suffering from Alzheimer's disease in 1994, had the mental capacity to make an elaborate will or transfer the shares to the 2nd appellant. The court said that cases must be decided on the issues on record.
101. It is the plaintiff/respondent who has pleaded the issue of mental capacity of the subject between 2014 and 2017, generally and in particular after the issuance of interim orders bestowing or vesting her with powers to be a manager of the suit parcels of land. The capacity of the subject to execute transfers to his suit land and the capacity of the next of kin to prosecute the suit and enforce the subject's rights



- exclusively are the central issues for determination before this court. It is the plaintiff and the next friend who want the court to find mental incapacity on the part of the subject and locus standi on the part of the next friend to institute and prosecute the suit on behalf of the subject.
102. The plaintiff/respondent has submitted that this court has no business to determine or inquire on the validity of the interim order for the jurisdiction to determine those issues fall elsewhere. Locus Standi touches on the jurisdiction of the court. It would not have been the intention of the framers of our Constitution that if an issue of locus standi is raised on the legality or apportionment of a letter of grant or interim order of guardianship, the court has to refer the issue to the court that issued the order or decree. He who alleges must prove.
 103. Mental capacity to execute valid land transactions falls under the jurisdiction of this court to determine, and not the family division of the High Court. The capacity to institute the suit on behalf of the subject said to be of sound mind is an issue that was pleaded by the next friend and which evidence has been led before this court. The defendants have questioned the said capacity based on an alleged expired interim order and unprosecuted petition, which under the law would have bestowed authority to sue and manage the affairs of the subject on the next friend. The easiest thing for the next friend was to avail the legal instruments issued to her at the family division of the High Court under Sections 26 and 27 of the [Mental Health Act](#) for this court to take judicial notice of.
 104. In RNO (suing as guardian ad litem and next friend of DOM vs. Moses Choge Chesire (2015) eKLR, a preliminary objection had been raised on the capacity of the plaintiff to institute the suit on behalf of a person who was said to be of unsound mind. He had obtained an order appointing him as a manager of the estate of the subject. None of the documents had been filed before the court. The plaintiff was given a chance to explain to the court the issue. The Court observed that such orders are made under Section 26 of the [Mental Health Act](#) by a high court and not a subordinate court. The court found the suit a non-starter.
 105. In Kibicho (suing through next friend and guardian ad Litem Jeremiah Wanjiru Kibicho) vs. Kibicho & another (ELC 182 of 2014) (2024) KEELC 833 (KLR) (2nd February 2024) Judgment, Mutungi J observed that the issue of whether the said Jeremiah Wanjiru Kibicho, purporting to act as guardian ad litem to Kibicho Migwi Kibicho was legally appointed and therefore legally empowered to institute the suit went to the jurisdiction of the court to entertain the suit for either way it was decided preliminarily, would have bearing on the other issues.
 106. The Court said that the appointment by the Court of a next friend under Section 26 of the [Mental Health Act](#), gives a person the capacity and or locus standi to represent a person who has a mental disorder and that a person on his own cannot appoint himself such a guardian ad litem. Since the plaintiff had failed to furnish any evidence that she had lawfully been appointed as guardian ad litem for her husband to enable her to institute the suit or exhibit an order having formally appointed her, the Court found that she could not purport to institute a suit to protect the subject's estate. The court found the suit a nullity and for striking out on account of incompetence and an abuse of court.
 107. In MGG vs Gateway Insurance Co. Ltd and others (2020), eKLR an application to strike the suit on lack of capacity to file it on behalf of the next friend and whether the friend had a right or interest in the shares of the 1st respondent, to ground her claim was allowed by the trial court, since she had not sought and obtained from the court an order appointing her as the manager of the estate of the husband. The wife had conceded that she had no direct claim of ownership of the subject matter of the suit to sustain it in her individual capacity.
 108. On appeal, the appellant had argued that the suit should not have been struck on technicalities; she had her independent rights as a wife to pursue the assets of her husband and that the trial court had



- not seen the bigger picture that the property in the shares needed to be protected. The court observed that the jurisdiction of a court to strike out pleadings has been described as draconian such that the discretionary power is to be exercised sparingly so that no party should be driven from the seat of justice, without being accorded a fair hearing.
109. On the other hand, however, the court observed that it was unfair to drag a person to the seat of justice when the case brought against them was clearly a non-starter, and therefore, the exercise of the powers to strike out pleadings must balance these two considerations.
 110. The court observed that Order 2 Rule 15 of the Civil Procedure Rules allows the Court at any stage of proceedings to strike out or amend any pleadings disclosing no reasonable cause of action is scandalous, frivolous, vexatious, prejudicial, embarrassing or delaying or amounting to or otherwise an abuse of the court process. The Court observed that such a drastic measure in litigation was a remedy to be resorted to only sparingly and where a pleading cannot be salvaged by an amendment as held in *Cooperative Merchants Bank Ltd vs Fredrick Wekesa C.A No. of 1999. DT Dobie & Co. (K) Ltd vs Machina (1982) KLR 1*.
 111. The court, looking at the pleadings, held that the appellant should have filed proceedings under the [Mental Health Act](#) seeking to be appointed a manager and guardian ad litem before filing the suit and having not done so, he could not institute the suit; hence the trial court was correct to give effect to the law.
 112. As to whether the appellant had an independent cause of action against the respondent besides that of her husband, the Court held that such independent interests or rights over the shares had not been demonstrated.
 113. The Court held that there was no need to sustain the suit merely to subject the respondent to unnecessary expense and inconvenience in defending it.
 114. In *Sangora (suing on behalf of Hesbon Nyakiege Sangora alias Nyakiege Sangora & another vs Aliwa (suited on her own right and as Successor of the Estate of the late John Geko Makoria Aliwa & others (ELC 9 of 2019) (2023) KEELC 22652 (KLR) (3rd July 2023) (Judgment)*, evidence of strict compliance with Order 32 Rule 15 of the Civil Procedure Rules and 28 of the [Mental Health Act](#) by way of a guardian ad litem or an order of the Court outlining the inquiry in respect of the mental status of Sangora Nyakiege or adjudging him of being of unsound mind was lacking. The court said that the statutory provisions and roles were intended to ensure that no man is adjudged of unsound mind, without proper judicial inquiry with the assistance of medical experts.
 115. The plaintiff's learned senior counsel has urged this court to find that the mental status of the subject is not disputed, as medical reports were tendered before this court by his doctor, Professor Amayo.
 116. The court record does not reflect Professor Amayo testifying and producing court proceedings at the family division of the High Court, indicating if he attended any court to present evidence on the mental incapacity of the subject. PW 1, in her testimony, did not produce an order or decree confirming her appointment as manager of the subject's estate after the petition dated 3.8.2017 was heard and determined to finality as to the mental status of the subject.
 117. I take judicial notice that the next friend moved this Court using an order appointing her as interim manager and guardian. Authority to manage the affairs of an estate of a patient is donated by section 27 of the [Mental Health Act](#). Management of the subject estate is equally governed by Section 28 thereof. The next friend did not avail to the court of a subsequent order or decree that the family court made after the hearing of the petition. In *NM vs M'Marete Ibutu & others (2021) eKLR*, this Court observed that section 26 of the [Mental Health Act](#), as read together with order 32 Rule 4 Civil



Procedure Rules, envisaged a court to be moved by way of a petition or an originating summons so as to undertake judicial inquiry before making an order to appoint a guardian with the consent from the family members and that the subject must be submitted to the Court for inquiry. See also Faith Kananu Akwalu vs David Mwenda Maingi (2022) eKLR.

118. The 5th defendant/applicant has also taken the view that interim orders of injunction have a lifespan of 12 months and expire by operation of law. The interim order issued on 7.8.2017 is indicated as issued with an inter partes hearing. In *Mohamad Galot & 7 others vs. Inspector General of National Police Service and Others Galot Ltd & others (IP)* (2021) eKLR, the Court observed that any interim orders have a limited lifespan and cannot be enjoyed for an indefinite period. The court said that no party should be allowed to abuse the process of the court by obtaining ex parte interim orders of stay and sitting on the same for such a long period. By not obtaining the ex parte order and not being keen to prosecute their application, the Court took the view that it was not just and fair for such orders to remain in force.
119. In this suit, the 5th defendant/applicant has maintained that a part from the interim orders produced as P. Exh No. (2) the application for which they were obtained has never been prosecuted and the orders varied or confirmed. The plaintiff, in answer to the affidavit in support of the application, did not file a replying affidavit attaching the extended or confirmed order made pursuant to section 26 of the *Mental Health Act*.
120. In the *Car Importers Association of Kenya vs. County Government of Mombasa* (2021) eKLR, the court cited *Philip Tirop Kitur vs AG* (2018) eKLR where the court held that in the absence of a replying affidavit or oral evidence from the AG, the petitioners, affidavit, evidence stood unchallenged. The court said that the mere fact of the affidavits not being controverted raised a presumption that what was averred in the affidavit was factual evidence that was admitted.
121. Order 51 Rule 14 of the Civil Procedure Rules provides that anyone wishing to oppose an application may file grounds of opposition, a preliminary objection, and a replying affidavit. The plaintiff opposed the 5th defendant's/applicant's application by way of a preliminary objection.
122. A preliminary objection must be on a pure point of law. The plaintiff/respondent took the view that the Court lacks jurisdiction to entertain the application since it cannot determine the status, legality and validity of an interim order of guardianship issued by a court of competent jurisdiction.
123. The application before the court does not call the court to question the validity or appropriateness of the interim order of guardianship but whether the next friend has locus stand to prosecute the suit. All that the plaintiff/respondent and or next friend should have done is to avail a valid court order or decree issued pursuant to Section 26 of the *Mental Health Act*. Equally, the plaintiff was given an opportunity to explain through a replying affidavit to challenge or controvert the sworn averments that the interim order expired after one year, it was not confirmed, it is non-existent, and that she has no foundation to stand on. See *Daniel Kibet Mutai & others vs AG* (2019) eKLR, citing with approval *Peter O Nyakundi & others vs. P.S State Department of Planning Ministry of Devolution and Planning and another* (2016) eKLR.
124. In *Kennedy Otieno Opiyo & others vs Kengen* (2010) eKLR, the Court observed that grounds of opposition address only issues of law and no more and in no way respond to the issues sworn in replying affidavit which require countering or rebuttal so as not to be taken as accurate. In *Faustina Njeru Njoka vs Kimunye Tea Factory Ltd* (2022) eKLR, the court said that a preliminary objection and grounds of opposition. However, while they are means of opposing an application may not be used when one intends to deny allegations in an application, and the best way to deny such averments is through a replying affidavit. Further, the court observed that where a replying affidavit is not filed, in essence,



- the averments in the application are deemed uncontroverted and unchallenged, though the Court still retains the duty to consider the application on merits.
125. The plaintiff/respondent has further submitted that the proper forum to challenge the interim order is before the Court that issued the order and not this court if the said order aggrieved the defendants. As indicated above the order is the foundation of the plaintiff's suit.
 126. Out of the said interim order, the plaintiff/respondent obtained locus standi to file this suit. She equally obtained an injunctive order pending the hearing and determination of this suit. The 5th defendant/applicant has voiced concerns about the delay in prosecuting the petition to obtain the capacity to sue in this suit or the disposal of the application out of which the next friend obtained interim orders which she has used to keep the subject away from access by this Court and the rest of the family.
 127. In *Nilani vs Patel* (1969) E.A 341, the court observed that in every civil suit, it is the plaintiff/respondent who is in pursuant of a remedy and should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. If he fails to do so, the defendant must invoke the process of the court towards that end by either applying for its dismissal since every year that passes prejudices a fair trial for witnesses may die, documents may be mislaid, lost, destroyed, or memory fade. In *Hook vs Jewson Ltd* (1997) IB CLC 664, SCOH V.C the court observed that a judge must be careful not to allow application for interim orders to become a means of postponing the making of bankruptcy orders in circumstances where no apparent likelihood of benefit to the creditors form such postponement.
 128. In *DPP vs Justus Mwendwa Kathenge & others* (2016) eKLR, the Court observed that Order 40 Rule (4) Civil Procedure Rules was intended to alleviate abuse of the remedy of temporary injunctions and that where a suit in respect of which an interlocutory injunction has been granted and is not determined within 12 months from the date of the grant, the injunction is to lapse unless for some sufficient reason extended.
 129. In this suit, the next friend, armed with an interim order of guardianship, filed this suit and obtained interim injunctive orders against the defendants close to eight years ago. Asked to avail the confirmed order as a guardian and manager of suit properties and to be able to sustain the foundation before this court, the plaintiff/respondent asked this court to refer the questions to the court, which granted the orders to determine the issue.
 130. In *Apex Finance International Ltd & another vs. KACC* (2012) eKLR, the court cited *Goodwill & trust Investment Ltd & another vs Will & Bush Ltd Nigeria* SC No. 266 of 2005, that it is trite law to be competent and have jurisdiction over a matter proper parties must be identified before the action can succeed the parties must be shown to be proper parties whom rights and obligations arise from the cause of action attached. The court observed that the question of proper parties was an important issue that would affect the jurisdiction of the suit in limine, and therefore, when proper parties are not before the court, the court lacks jurisdiction to hear the said suit and to do so the court will be acting or perpetuating a nullity. In *Cornel L. Shisanya vs Ngambeni Nursery School & others* (2014) eKLR the court upheld a decision of the trial court striking the suit for lack of capacity to sue.
 131. From the case law discussed and looking at the cause of action as pleaded, this court is properly seized of the issue of capacity to sue and the issues of whether or not the next friend can prosecute the suit on behalf of the subject to seek for nullification of transactions alleged by the defendants to have been undertaken by the subject out of his free will and as lawfully and procedurally undertaken in law.
 132. The plaintiff pleaded through the next friend that the subject did not execute the transfers or authorize the same for he was not mentally stable. The court is the one called to hold and find that the subject was



not mentally capable of doing so. Those issues have not and were not filed before the family division of the High Court in 2017. Even if they had been filed there, still, the High Court lacks jurisdiction to hear and determine those matters.

133. Equally, this Court cannot cede jurisdiction to another court that has no such mandate. The subject properly invoked this Court's jurisdiction through the next friend armed with an interim guardianship order. The burden is on the next friend to establish on a balance of probability that the law governing the application for the prosecution of and acquisition of guardianship and management order was invoked, prosecuted and documents obtained by her and are valid before this court. This court, when asked to determine the issue, directed the plaintiff to file a response and address it on the question of locus standi.
134. Instead of answering the issues raised, including the status of the subject eight years down the line, the plaintiff/respondent opted to file no replying affidavit. She urged the court to defer those issues to the court that issued the orders for the determination of answers to the questions or issues. Cases belong to the parties. A party who comes to court must make full disclosure and avail all documents on capacity to sue. A party cannot blow hot and cold, probate and reprobate; Lord Russel of Killowen in *Evans vs. Bartkin* (1937) 2 ALL ER 649 observed that the doctrine of approbation and reprobation requires for its foundation inconsistency of conduct as where a man has accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit.
135. The plaintiff/respondent has pleaded that she can sue pursuant to a court order. When asked if the order has been extended, confirmed, or validated so as to find if she is properly before this court the plaintiff/respondent has urged the court to cease asking such questions. The plaintiff is simply blowing hot and cold.
136. She wants the court to find and hold that the defendants defied the interim order issued by a sister court and went ahead to transfer or deal with the suit parcels of land without her input as the trustee of the estate of the subject. The plaintiff/respondent has invoked the jurisdiction of this court to reverse the transactions since it happened after she was granted the capacity to be in charge of the suit land. In asking to be supplied with the requisite statutory orders clothing her with capacity under Section 26 of the *Mental Health Act* this court is not and does not intend to usurp any jurisdiction that does not belong to it under either statute or Constitution.
137. In *Alfred Njau vs NCC* (supra), the court of appeal said to say one has no locus standi means he cannot be heard, even on whether or not he has a case worthy of listening. See also *Otieno vs Ougo & another* (1982-1989) 1 KAR 2, *Morjaria vs Abdalla* (1984) KLR 490.
138. In this suit, the next friend has failed to prove the right to be heard or interest to sustain her standing to sue in a court of law. Such an issue is a point of law and goes to the jurisdiction of this court to entertain the claim. The plaintiff has urged the court to be guided by substantive justice so as to sustain the suit. In *Nicholas Arap Korir Salat vs IEBC & others* (2013) eKLR, the court held that Article 159 of *the Constitution* should not be used to provide succor or cover to parties who exhibit scant respect of the rules and timelines for such rules make judicial adjudication, fair, just, certain and even-handed and through them court give assurance that there is a clear method in the manner in which things are done so that the actions can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.
139. The 2nd prayer by the defendants is on why the subject should not be availed to the Court. In answer the plaintiff takes the view that this Court and the defendants have no business to subject the subject to such abuse; after all, Prof. Ameyo testified on his health status. The defendants have expressed fears that the next friend is not acting in the best interest of the subject and the family who have a right



to access each other and understand how his condition is. The next friend has not replied on oath to these allegations.

140. At the very least one would have expected the next friend to state the current health status of the subject and why it is impossible for his immediate family to access him.
141. The subject suit properties do not belong to the next friend but to the subject. The subject has equal rights before the law and the right to a fair hearing.
142. Asking whether the next friend has the capacity to represent the subject is within the rights of the defendants. The decision of the Supreme Court and guidelines to be followed in hearing and determining issues of capacity to sue revolving around the rights of people with a mental health condition include proper legal representation by those who claim to be appearing on their behalf.

The court is aware that striking out or dismissing a suit is a power to be sparingly used. See *D.T Dobie vs Muchina & another* (supra), *Paolo Muiri vs Gitau Batisa Muiri & another* 2000 eKLR the words of Lord Blackburn that it can only be exercised when or the moment uncontested facts appear. See *Metropolitan Bank vs Pooley* (1988) A.C 210, as cited in *Crescent Construction Ltd vs KCB Bank Ltd* (2019) eKLR. Section 13, 25 (1) of [Civil Procedure Act](#) on the defective suit, *Charles Mugane Njong'o & another vs Gucokaniria Kihato Traders & Farmers Co. Ltd & another* (2016) eKLR, the capacity to competently represent a person with a mental health condition is both a matter of law and fact. It is unfair to drag a person to a seat of justice when the case is a non-starter.

143. In the circumstances, I find that the application before the court is merited. The court holds and finds that the next friend has no locus standi to sustain the suit. It is dismissed with costs to the defendants. Having made a finding that the suit is incompetent, the second prayer will serve no purpose. It is declined. Any subsisting interim orders are vacated.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 4TH DECEMBER, 2024**

In presence of

C.A Kananu

1st defendant

Mwenda for S.C Dr. Kamau Kuria for the plaintiff

Kirera for Kinyua for 4th respondent

Thangicia for 5th defendant

Njindo for 1st defendant

Juma for 2nd defendant

HON. C K NZILI

JUDGE

