



Mwanthi (Sued as the Legal Representative of the Estate of the Late Alex Musau Mbai) v Mbai & another (Both Suing as the Legal Representatives of the Estate of John Mbai Kavoi) (Environment and Land Appeal E020 of 2023) [2024] KEELC 13513 (KLR) (2 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13513 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E020 OF 2023
CA OCHIENG, J
DECEMBER 2, 2024

BETWEEN

WINFRED MUTINDI MWANTHI APPELLANT
SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
ALEX MUSAU MBAI

AND

ESTHER MBINYA MBAI 1ST RESPONDENT
THOMAS MUTUKU MBAI 2ND RESPONDENT
BOTH SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOHN
MBAI KAVOI

(Being an Appeal from Ruling of Honourable Ole Keiwua K. D (CM delivered on 5th April, 2023 in Kangundo Chief Magistrate's ELC Suit No. E35/2021)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the 3rd May, 2023, the Appellant appealed against the Ruling delivered by Hon. Ole Keiwua K. D (CM). The genesis of this Appeal is the Ruling in the Chief Magistrate's Court at Kangundo in CMELC No. 35 of 2021 by the Hon. Ole Keiwua (CM), delivered on 5th Day of April, 2023 where the trial court allowed the 1st Plaintiff Esther Mbinya Mbai to be substituted with one Kamene Mbai.
2. The Appellant being dissatisfied with the whole of the said Ruling filed a Memorandum of Appeal dated the 3rd May, 2023 which contains the following grounds: -



1. That the Learned Magistrate erred both in law and fact in not finding that the purported applicant Kamene Mbai was neither a party in the lower court nor an administrator of the estate of John Mbai Kavoi – deceased, in which capacity the suit therein was brought.
2. The Learned Magistrate erred both in law and fact in not finding that the purported application was premised under Order 32 Rule 15 yet the purported applicant’s annexure KM2 did not talk of unsoundness of mind or mental infirmity and the said letter was clearly not from a psychiatrist.
3. The Learned Magistrate erred both in law and fact in not finding that the provisions of Order 32 Rule 15 relied upon did not give the court powers to adjudge a person as of unsound mind which is the preserve of the High Court under sections 2 and 26 of the *Mental Health Act* (as amended by the Mental Health (Amendment) *Act No. 27 of 2022*) and no inquiry into soundness of mind or mental infirmity of the 1st Plaintiff has ever been done.
4. The Learned Magistrate erred both in law and fact in failing to give reasons for his decisions on all the above germane issues raised.

Reasons wherefore, the Appellant prays for the following Orders from this Honourable Court:

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- a. That the Appeal be allowed.
 - b. That the trial court’s Ruling be quashed and/or set aside.
 - c. That costs be awarded to the Appellant both for the Appeal and below.
 - d. Any other or further relief as the court may deem fit and proper to grant in the circumstances.
3. The Appeal was canvassed by way of written submissions.

Submissions

Appellant’s Submissions

4. The Appellant in his submissions contend that Kamene Mbai is neither a party herein nor an administrator of the Estate of John Mbai Kavoi – deceased, in which capacity the suit in the lower court was brought. He argues that the purported lower court application was premised under Order 32 Rule 15 of the Civil Procedure Rules, yet the purported Applicant’s annexure KM2 did not talk of any unsoundness of mind or mental infirmity and the said letter at the lower court is not from a Psychiatrist. Further, Order 32 Rule 15 of the Civil Procedure Rules does not give the lower court powers to adjudge a person as of unsound mind, which is a preserve of the High Court. He reiterates that the lower court lacked jurisdiction to replace an administrator of an Estate and to issue the Grant Ad Litem sought.

Respondents’ Submissions

5. The Respondents in their submissions provided a background of the Appeal herein and contended that the trial Magistrate was right in appointing Kamene Mbinyia as a guardian to Esther Mbinyia Mbai. They argued that the court has a wide discretion to interpret Order 32 of the Civil Procedure Rules and relied on Section 63(e) of the *Civil Procedure Act*, Articles 50 and 159 (2) (d) of *the Constitution* including various authorities. They sought for the Appeal to be dismissed with costs.



Analysis and Determination

6. Upon consideration of the Memorandum of Appeal, Record of Appeal and rivaling submissions, the only issue for determination is whether the lower court was seized with jurisdiction to appoint Kamene Mbai as the Guardian Ad Litem for Esther Mbinya Mbai, in Kangundo ELC Case No. 35 of 2021.
7. The background of this Appeal emanates from a Ruling dated the 5th April, 2023 in respect to an Application dated the 21st September, 2022 filed by the Applicant Kamene Mbai, brought pursuant to Sections 1A, 1B, 3, 3A, Rule 10 (3) and Order 32 Rule 15 of the Civil Procedure Rules. The prayers sought were as follows:-
 - a. That the subject herein, Esther Mbinya Mbai be and is hereby adjudged as a person suffering from immobility, paralysis and hemiplegia due to Cerebral Vascular Accident, further to her old age and as such she is incapable of protecting her interests in this suit herein.
 - b. That Kamene Mbai be and is hereby appointed to act as the Guardian Ad Litem of the Subject herein in Kangundo ELC Case No. 35 of 2021.
 - c. That the costs of this Application be provided for.
8. The Trial Magistrate after considering the said Application including the arguments opposing it, proceeded to allow it. This hence forms the fulcrum of the instant Appeal.
9. The key issue this court needs to decipher is whether the trial Magistrate had jurisdiction to appoint Kamene Mbai as Guardian Ad Litem of Esther Mbinya Mbai.
10. Section 2 of the *Mental Health Act* defines someone suffering from mental disorder as follows:-

“A person suffering from mental disorder” means a person who has been found to be suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and suffering from mental impairment due to alcohol or substance abuse.”
11. While Section 26 of the *Mental Health Act* states that:-
 - “1) The court may make orders— (a) for the management of the estate of any person suffering from mental disorder; and (b) for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person. (2) Where there is no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate and guardian of any such person. (3) Whereupon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.”
12. Further, from a reading of Section 2 of the *Mental Health Act*, the Court is defined as a High Court.



13. The Applicant in the lower court had claimed that due to a cerebral vascular accident and old age, the Plaintiff was immobile, no longer remembered anything nor could understand the contents of the lower court suit, which they had filed as the legal representatives of the Estate of John Mbai Kavoi. She annexed a letter (Medical Report) dated the 19th September, 2022 from one Ruth Nthambi, Facility in Charge, Nguluni Health Centre, confirming the Plaintiff (1st Respondent) was hypertensive since 2005, had been a patient at Kangundo Level 4 Hospital and Machakos Level 5 Hospital as well as Bishop Kioko Hospital. Further, that in 2017 she suffered CVA (Cerebral Vascular Accident), was hospitalized for three weeks, is immobilized and on home-based care.

14. I note except the aforementioned letter, there were no medical records or reports presented in court from any medical experts to confirm the mental incapacity of Esther Mbinya Mbai as required by law.

15. In the case of *BKT v John Kimeli Birech & another* [2020] eKLR, the Court while dealing with an issue of the Plaintiff's mental health and inability to testify held inter alia:-

“No evidence of compliance with the provisions of Section 26 of the *Mental Health Act* has been availed by the Applicant for the court to be called upon by the applicant to conduct an inquiry as to the Plaintiff's mental infirmity or deposition. Prior to the withdrawal of the suit, the Plaintiff appeared personally in court and prosecuted his case after taking an oath confirming his soundness of mind. This was only four months prior to the Plaintiff authoring the letter withdrawing the suit and transferring the parcel to the Defendant. It should also be noted that none of the medical records attached to the application have any relation to the plaintiff's alleged mental infirmity. No medical report has been availed to show that as at the time of withdrawal of the suit and transfer of the property, the plaintiff was of unsound mind and totally incapacitated to the effect of making decisions that he did not understand. The discharge summary from St. Luke's Hospital does not state that plaintiff is of unsound mind and that is totally incapacitated.”

16. Further, in the case of *Isaac Kipkemboi Chesire & 4 others v Joseph Kimitei Kwambai & 7 others* [2016] eKLR the court held that:-

“The import of this section is that the order for guardianship ad litem is to be made by “the court” which is defined at Section 2, as the High Court. It follows that orders for the management of any property of a mentally disabled person can only be made by the High Court. This court finds that it has not been established that Matilda Rose Sawe is the guardian ad litem of the estate of John Malan Sawe hence the application for substitution is not well founded.”

See also the case of *JWN v MWK* [2020] eKLR

17. It is worth noting that the impugned Application which formed the fulcrum of this Appeal was filed before the Magistrate's Court that proceeded to grant the orders as sought.

18. Based on the facts as presented including my analysis above, while associating myself with the decisions cited and legal provisions quoted, I find that the trial Magistrate erred by granting the impugned orders as the said court by dint of Sections 2 and 26 of the *Mental Health Act*, was devoid of jurisdiction to deal with the issue of making a determination of a guardian Ad litem for the subject Esther Mbinya Mbai in Kangundo ELC Suit No. E35/2021. Further, the trial Magistrate erred in granting the impugned orders since there was no substantive evidence presented to prove mental infirmity on the part of the subject (Esther Mbinya Mbai).



19. In the circumstances, I find the Appeal merited and will allow it and proceed to set aside the Ruling in the Chief Magistrate's Court at Kangundo in CMELC No. 35 of 2021 by the Hon. Ole Keiwua (CM), delivered on 5th Day of April, 2023.

20. The Appellant will have the costs of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 2ND DAY OF DECEMBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Odhiambo for Respondent

No appearance for Appellant

Court Assistant- Simon/Ashley

