REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 60 OF 2017

DAMARICE NJERI KANIARU...PLAINTIFF

VERSUS

DANIEL MBUGUA MWANGI...1ST DEFENDANT

FLORENCE WAMBUI MBUGUA...2ND ·DEFENDANT

AND

TITUS KAMANJA KANIARU....INTENDED SUBSTITUTED PARTY/APPLICANT

RULING

1. By a Notice of Motion application dated 12th March 2021 and supported by an affidavit of even date, the Applicant herein approached the court seeking the following orders:

> **i. That the Honourable Court be pleased to substitute the Plaintiff herein with hers on Titus Kamanja Kaniaru as she is aged and senile;**
>
> **ii. That the said Substituted Party Titus Kamanja Kaniaru to take over the prosecution of this suit to its conclusion;**
>
> **iii. That the costs of this application be provided for.**

2. The Applicant's prayers are grounded on the premises set out in the supporting affidavit as follows:

> a. The annexed affidavit of the Intended Substituted Party/Applicant duly filed herein;
>
> b. That the Plaintiff herein filed this suit in 2017 and the same has been pending since then;
>
> c. That the Plaintiff herein who is the mother of the Intended Substituted Party/Applicant was born in 1928 and has been sick, aged and now senile and cannot be able to prosecute this suit;
>
> d. That since litigation must come to an end, it would only be mete and just that, I be substituted in her place to enable full determination of the suit.

3. The Applicant's application is opposed. The 2nd Defendant filed her replying affidavit on 26th April 2021. She avers that no medical record or report has been given to court to demonstrate that the Plaintiff is suffering any mental hardship or that she is medically unfit to protect her interests. She further avers that the proposed substitution would greatly prejudice her case as she is likely to lose the opportunity to cross examine the Plaintiff at trial.

4. By consent the Parties agreed to canvass the application by way of written submissions. The Applicant filed his submissions on 27th May 2021. He largely reiterates the contents of the notice of motion and supporting affidavit. He submits that the Plaintiff is now aged 93 years old as demonstrated by her identification card, and has been suffering ill health as depicted in the filed treatment notes. He further submits that he is fully conversant with the facts of the case and is able to prosecute the case on his mother's behalf. The Respondents did not file their submissions as agreed.

5. The court has considered the notice of motion application, rival affidavits and the Applicant's submissions.

It is the Applicant's case that the Plaintiff is prevented by old age and senility from conducting the prosecution of this case. The Applicant has attached the Plaintiff's copy of identification card which puts her age at 93 years. He has also attached some medical reports which although pointing to the Plaintiff's frail health (mostly in relation to her lungs) do not certify that she is laboring under mental ill health.

The question of whether or not a litigant is competent to testify in court is provided for under **Section 125 of the Evidence Act**, **Cap 80**. The Section provides as follows:

> '(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.
>
> (2) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.' (Underline, mine)

Order 32 Rule 14 of the Civil Procedure Rules, 2010 *is also instructive on the subject:*

> '**[Order 32, rule 15.] Application of rules to persons of unsound mind.**
>
> 15. The provisions contained in rules 1 to 14, SO far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.' (Underline, mine*)*

From the above provisions, it is clear that the question of fitness to testify in court is a matter that rests, not on the opinion of the Applicant, but upon the inquiry of the court. The rationale for this position was given in Court in the case of ***M MM –V- A M K [2016] e KLR*** as follows:

> "This principle is designed to protect people who lack capacity to make particular decisions, but also to maximize their ability to make decisions, or to participate in decision-making, as far as they are able to do so.

These are: -

> a. A person must be assumed to have capacity unless it is established that he/she lacks capacity.
>
> b. A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success.
>
> c. A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.
>
> d. An act done, or decision made, under the above rule for or on behalf of a person who lacks capacity must be done, or made, in his/ her best interests.
>
> e. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action."

Further, the procedure to be followed by a person seeking to substitute a litigant on the basis of mental ill health is provided for under **Section 26 of the Mental Health Act, Cap 248** as follows:

> '**26. Order for custody, management and guardianship**
>
> (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.'

In ***ELC case no 520 of 2012 Eldoret, Isaac Kipkemboi Chesire & 4 others versus Joseph Kimitei Kwamboi & 3 others and Rose Cheruiyot Rono & 3 others interested parties***, a litigant (2nd defendant) had suffered a stroke thus impairing his mental faculties. The court invoked the provisions of the mental health act and stated that "*The law on management of an estate of a mentally ill person is enshrined in the mental health Act. Orders for the appointment of a person to manage the estate of any person suffering from mental disorder are provided for under section 26 of the mental health act*". The court further ruled that an application for guardian ad litem is to be made by the court which is defined as the High Court under section 2 of the Act. The court stated thus *"This court finds that it has not been established that Matilda Sawe is the guardian ad litem of the estate of John Malan Sawe hence the application for substitution is not well founded…."*.

From the foregoing, the application for substitution by the Applicant is made prematurely and can only be granted once the court has had opportunity to examine the Plaintiff. Should upon its enquiry the court finds that she is prevented from having conduct of the suit by reason

of mental disorder, the Applicant will only be allowed to substitute the Plaintiff upon obtaining guardian ad litem over her estate.

The upshot of the analysis above is that the application is dismissed, with costs to be borne by the Applicant.

RULING READ, SIGNED AND DELIVERED PHYSICALLY AT KERUGOYA THIS 23RD DAY OF JULY, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Asiimwe holding brief for Kahigah

2. Respondents/Advocate – absent

3. Kabuta – Court clerk.