



**Miradi Ujenzi Consultancy v Gontier; Kenya Commercial Bank (Garnishee)  
(Civil Case E002 of 2024) [2024] KEHC 9496 (KLR) (5 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9496 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL CASE E002 OF 2024  
WA OKWANY, J  
AUGUST 5, 2024**

**BETWEEN**

**MIRADI UJENZI CONSULTANCY ..... PLAINTIFF**

**AND**

**GHISLAINE THERESE GONTIER ..... DEFENDANT**

**AND**

**KENYA COMMERCIAL BANK ..... GARNISHEE**

**RULING**

1. The Plaintiff herein, Miradi Ujenzi Consultancy, sued the Defendant seeking, *inter alia*, orders for the payment of the total sum of Kshs. 35,120,186/= being the balance due and owing by the Defendant to the Plaintiff in respect to consultancy services allegedly offered by the Plaintiff to the Defendant at the Defendant's request.
2. The Plaintiff's case was that sometime in January 2020, the Defendant contracted it to offer consultancy services in various counties namely; Nyamira, Kisii, Kericho, Bomet, Kisumu and Homa-bay.
3. The Plaintiff contended that it performed its part of the bargain but the Defendant refused/neglected and/or failed to pay for the said services.
4. Interlocutory judgment, in default of appearance, was on 3<sup>rd</sup> June 2024 entered against the Defendant following her failure to enter appearance or file a defence. The Plaintiff immediately thereafter instituted garnishee proceedings against the Defendant and on the same date, 3<sup>rd</sup> June 2024, garnishee order nisi was issued to restrain any debiting of the Defendant's account No. 1106692314 held by the garnishee at their Kenya Commercial Bank Sarit Centre Branch.



5. The granting of the garnishee order nisi precipitated the filing of the application dated 12<sup>th</sup> June 2024 which is the subject of this ruling.

### **Application**

6. The Judgment Debtor/Defendant filed the application dated 12<sup>th</sup> June 2024 seeking the following orders: -
  1. Spent.
  2. That this Honourable Court be pleased to issue a temporary order for stay of any further proceedings up to and including the Garnishee Application dated 3/06/2024 pending the Hearing and Determination of this Application;
  3. That this Application be heard and determined on or before the 13<sup>th</sup> day of June 2024 before the inter-partes hearing of the Garnishee proceedings;
  4. That the Honourable Court be pleased to set aside and/or void the Judgment in Default of Appearance herein, the Decree and Certificate Costs issued both issued on 3/6/2024 with all consequential orders thereof be discharged.
  5. That this Honourable Court be pleased to strike out the suit filed on 15/05/2024 as the Applicant has no capacity to be sued as she has been declared by the High Court of Kenya to be a person suffering from mental disorder as per section 26 of the [Mental Health Act](#), Cap 248, Laws of Kenya, therefore wrongly sued in the suit;
  6. That the pleadings filed in the suit be deemed as void ab-initio and hereby struck out on account of being drawn and filed by a firm and/or persons not licensed and/or accredited to practice law within the Republic of Kenya;
  7. That the court subsequently strikes out the suit filed on 15/05/2024 in its entirety as the pleadings offend Civil Procedure and are marred by stark irregularities and illegalities;
  8. That this Honourable Court do make such directions as may be necessary under the [Advocates Act](#) on the conduct of the firm purporting to act in the name and style of Maneo & Company Advocates and any such persons and/or individual purporting to act with and/or in the name of Maneo & Company Advocates to protect the integrity of the practice of law.
  9. That cost of this Application be borne by the Respondent.
7. The application is supported by the Affidavit of the Defendant's Legal Guardian and Manager Mr. Ferdinand Lois Selwyn Gendron and is premised on the following grounds: -
  - a. The Decree-Holder/Respondent herein has illegally and/or irregularly obtained judgment in Default of Appearance and extracted a decree and certificate for the amount of Kshs. 36,081,938.00 all dated 03/06/2024.
  - b. That the Respondent has further obtained an Order Nisi restraining any debiting of account number 1106692314 held at Kenya Commercial Bank through Garnishee proceedings instituted before this Honourable court causing untold financial hardship to the Applicant.
  - c. That the said Garnishee proceedings are due for inter-partes hearing on the 13<sup>th</sup> day of June 2024;



- d. That the said Judgment in Default of Appearance was issued despite the Respondent not effecting service of summons and pleadings on the Applicant therefore NOT accorded the opportunity to state their case;
- e. The Applicant herein was declared by the High Court of Kenya on 19/11/2021 to be a person suffering from mental disorder as per section 26 of the [Mental Health Act](#), Cap 248, Laws of Kenya, therefore has no capacity to be sued and as such wrongly sued in the present proceedings;
- f. That the said court appointed Fernand Lois Selwyn Gendron to be the Applicant's legal guardian;
- g. That the purported contract relied on in obtaining the said Judgment is fraudulent as the company at the time of the contract was not registered therefore lacked capacity to enter into a contract;
- h. That the actions of the Respondent are aimed at defrauding the Applicant who is a person suffering from a mental disorder;
- i. The suit offends Order 32 rule 5 of the [Civil Procedure Rules](#) and therefore every order made therein should be discharged with costs to the Applicant;
- j. In addition, the Pleat and all the pleadings in the suit are fatally defective as the law firm, Maneo & Company Advocates, who have drawn and filed the said pleadings are not a registered entirety and neither is there an advocate practicing in the name and style of Maneo & Company Advocates therefore the pleadings filed offend Order 2 rule 16 of the [Civil Procedure Rules](#);
- k. That the Respondent has purported to extract a Decree and Certificate of Costs which was tabulated without the costs being ascertained through taxation as is provided for under Section 94 of the [Civil Procedure Act](#);
- l. As such the Pleadings and the corresponding documents and orders issued are misconceived, lacking in merit and in toto incurably and fatally defective; the same constituted a gross abuse of the court process and cannot be sustained before this Honourable Court;
- m. As it stands, the whole suit is marred by illegalities and as such the judgment issued and all consequential orders are void ab initio;
- n. That the Order Nisi obtained by the Respondent on the strength of the irregular Judgment and Decree restraining any debiting of account number 1106692314 held at Kenya Commercial Bank threatens to deprive the Applicant of much needed funds used to cater for her day to day needs;
- o. That the Applicant in question is aged and mentally challenged and therefore requires round the clock care of which the said funds are critical;
- p. The Respondent has abused the court process and the guardian to the Defendant/Applicant is apprehensive that if the said Judgment is not set aside/voided and or discharged and the Order Nisi not lifted then the Plaintiff/Respondent will proceed with execution and thus allowing an illegality to trample upon well laid out Rules of Procedure;
- q. It is in the interest of justice that this application be allowed as prayed.



8. The Plaintiff/Decree Holder, opposed the application through the Replying Affidavit of the sole proprietor, Mr. Simon Peter Wainaina Njoroge, who avers that the default judgment entered against the Applicant was regularly and legitimately obtained following the Applicant's failure to enter appearance or file a defence despite proper service with summons to enter appearance and plaint.
9. He further avers that the Garnishee Application or purposes of securing the money owed by the Defendant and that the court correctly granted the Garnishee Nisi order to restrain any debiting of the Applicant's bank account. He states that his company was duly incorporated way back in 2017 and was operating under the said name up until 2021 when it transitioned to a Limited liability company.
10. He avers that the Judgment Debtor was of sound mind and capacity as at the time he entered into a contract with her in January 2020 which was way before the court declared her to be a person suffering from mental disorder.
11. He states that his Advocates law firm, Ms. Maneo & Co. Advocates, is a duly registered as business name under the Registration Business Names Act Cap 499 Laws of Kenya and that his advocate, Mr. Ronald Morara Ngisa, has taken out his current practicing certificate. He states that the instant application is calculated to delay his realization of the fruits of his judgment and that the Applicant's deponent lacks the locus standi to swear the supporting affidavit since he is not a party to the suit and did not seek leave to be enjoined in the suit as the Defendant's guardian. He faults the Applicant for failing to demonstrate that he has a defence that raises triable issues against the Decree Holder's case.
12. He contends that the Applicant does not deny that the Defendant owes the amount claimed in the Plaint.
13. The application was canvassed by way of written submissions which I have considered.

### **Analysis and Determination**

14. I have considered the pleadings filed herein, the parties' respective submissions, as well as the law and authorities that they cited. I have also considered the proceedings so far undertaken in the court record. I note that whereas many issues have been raised by both sides that would require this court's determination, the first issue that the court must determine is the applicant's locus standi to bring the instant application. I will consider the issue of locus standi first since its success or otherwise will determine the next cause of action that the court will take.
15. The gist of the Applicant's application is that she was wrongly sued, as a Defendant, in this case as she lacks the capacity to sue or to be sued having been declared a person suffering from mental disorder under section 26 of the [Mental Health Act](#). The Applicant added that, on 19<sup>th</sup> November 2021, the High Court appointed one Lois Selwyn Gendron to be her legal guardian.
16. The Respondent took issue with the fact that the supporting affidavit was sworn by a person known as Fernand Lois Selwyn Gendron, who did not have the locus standi to file any document for consideration as he was not a party to the suit. The Applicant's deponent, on the other hand, argued that he was the Applicant's duly appointed guardian and was therefore properly before the court.
17. I have perused the Judgment rendered in Nairobi High Court Family Misc. Application No. E169 of 2021 on 19<sup>th</sup> November 2021 wherein the Applicant was adjudged to be a person suffering from mental disorder under Section 26 of the [Mental Health Act](#) Cap. 248 of the Laws of Kenya. The court also rendered itself, in part, in the said judgment as follows: -

“b. That the Petitioner be hereby appointed as the legal guardian of the ward.



- c. That the Petitioner be hereby appointed Manager of the Ward’s estate under Section 28 of the *Mental Health Act* to manage her estate including any such description of moveable or immovable property, money, debts and legacies, power to execute, sign all deeds and instruments relating to or evidencing title or right to any property or giving a right to receive any money or goods.
  - d. that the Petitioner shall represent the Ward in Court proceedings.”
18. What emerges from the above decision is that while the Applicant was declared to be a person suffering from mental disorder on 19<sup>th</sup> November 2021, the consultancy agreement that is the subject of this suit was signed on 20<sup>th</sup> January 2020. It is therefore clear that the Applicant had the capacity to enter into the contract with the Respondent as at January 2020.
  19. One of the grounds that the Applicant listed for seeking orders to strike out the Respondent’s suit was that it was filed against a person who lacks the capacity to sue or be sued. The question which this court has to grapple with is how the Respondent could have known that the Applicant had been declared to be a person suffering from mental illness at the time he filed the suit.
  20. Courts have taken the position that the striking out a merited suit is a serious issue which a court exercising its inherent power must handle with utmost care and caution so as to ensure that it does not drive a deserving party out of the seat of justice. This is the position that was adopted in the case of *D.T. Dobie & Company (Kenya) Ltd v Joseph Mbaau Muchira & Another* [1980] eKLR where it was stated;
 

“If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it..”
  21. Taking guidance from the above cited case, I find that it will not be proper to strike out the Respondent’s suit on the basis that it was filed against a party suffering from mental illness when it has not been shown that the Respondent was aware of such illness. I find that the proper approach that the Applicant’s guardian/Ward should have taken is provided for under Order 32 Rule (5) and Rule (15) of the *Civil Procedure Rules*. The provision requires a Ward to file an application to represent the party who has been declared to be a person suffering from mental illness.
  22. My above finding takes me back to the issue of the locus standi of the Applicant’s guardian to file the instant application and to swear an affidavit in these proceedings before complying with the provisions of Order 32 Rules (5) and (15). The question which begs an answer is whether the instant application is properly before this court having been filed by a party who, by her own admission, lacks the capacity to sue or be sued. The scenario presented by the Applicant is that of a party who on one hand states that she lacks the capacity to sue and be sued and in the same breath, files an application to set aside the default judgment.



23. The importance of locus standi was discussed in the case of *Law Society of Kenya v Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, as follows: -
- “*Locus Standi* signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.
24. Similarly, in *Alfred Njau and Others v City Council of Nairobi* [1982] KAR 229, the Court held that: -
- “the term *Locus Standi* means a right to appear in Court and conversely to say that a person has no *Locus Standi* means that he has no right to appear or be heard in such and such proceedings”.
25. Locus standi is the right to appear before and be heard in a court of law without which even where a party has a meritorious case, he cannot be heard. Locus standi is so important that in its absence, a party has no basis to claim anything before the Court. In this case, the capacity to sue or to be sued can only be unlocked by an application for leave to appear/act on behalf of the Defendant.
26. Having found that the Defendant and her Ward lack the locus standi to institute the instant application, I find that the said application is not properly before this court and ought to be struck out. However, owing to the nature of this case, which involves a claim for a liquidated sum, and the fact that the Defendant is reported to be a person with mental illness, this court is of the view that it will serve the interest of justice to maintain the status quo currently prevailing in as far as the garnishee order nisi is concerned so as to grant the Defendant’s guardian/Ward an opportunity to regularize his appearance by amending its application to include a prayer for appear in the suit on behalf of the Defendant. For avoidance of doubt the garnishee order nisi shall remain in force until further orders of this court.
27. The costs of the application shall abide the outcome of the main suit.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 5TH DAY OF AUGUST 2024.**

**W. A. OKWANY**

**JUDGE**

