



REPUBLIC OF KENYA



**Kamanza v Musyoki (Miscellaneous Application E016 of 2023)  
[2023] KEHC 4142 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4142 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
MISCELLANEOUS APPLICATION E016 OF 2023**

**RK LIMO, J**

**MAY 10, 2023**

**BETWEEN**

**JUSTUS MWANIKI KAMANZA ..... APPLICANT**

**AND**

**ALEXANDER MWAKA MUSYOKI ..... RESPONDENT**

**RULING**

1. Before this Court, is an application dated April 3, 2023 in which the applicant seeks orders to appoint Alexander Mwaka Musyoki as Guardian ad Litem of Sukali Musyoki in respect to Environment and Land Case No. 16 of 2021. The application is premised on the High Court (Practice and Procedure) Rules, Rule 3(2), Order 32 Rule 15 of the [Civil Procedure Rules](#) and Section 26 of the [Mental Health Act](#), cap 248 Laws of Kenya.
2. The applicant seeks the following orders.
  - a. Spent
  - b. Spent
  - c. That this court do appoint Alexander Mwaka Musyoki as a Guardian ad Litem of Sukali Musyoki, the subject herein, in respect of Environment and Land Case No. 16 of 2021 to enable Alexander Mwaka Musyoki address the court as per Order 7 Rule 1 of the [Civil Procedure Rules](#).
  - d. That an Order do issue to adjudge that the Subject/1<sup>st</sup> defendant is not fit to defend herself in respect of Mwingi Environment and Land Case No. 16 of 2021 due to her mental illness.
  - e. That Costs of this application be in the cause.



3. The application is supported by the affidavit of Justus Mwaniki Kamanza and is premised on the following grounds;
  - a. The applicant and the subject plaintiff are the 1st defendant in Mwingi Environment and Land Case No. 16 of 2021 respectively.
  - b. The respondent herein, is a son to the subject Sukali Musyoki who is the 1st defendant in ELC case in Mwingi Case No. 16 of 2021.
  - c. The subject was taken to Machakos Level 5 Hospital for mental assessment and checkup and was confirmed to suffer from psychopathology on September 7, 2022.
  - d. The subject/1st defendant in the present suit Mwingi ELC 16 of 2021 is suffering a condition of the mind (Psychopathology) and thus incapable of defending her interest in the suit.
  - e. By virtue of the said mental condition, unsoundness of mind or mental infirmity, the subject/1st defendant in Mwingi ELC 16 of 2021 is incapable of protecting their interest when suit or being sued.
  - f. The said Alexander Mwaka Musyoki is the son of the subject/defendant in Mwingi ELC Case No. 16 of 2021.
  - g. There is imminent need for Alexander Mwaka Musyoki to be authorized to conduct this matter on behalf of the 1st defendant in the interest of justice.
4. The Respondent has opposed the above application on inter alia, the fact that this court lacks jurisdiction to deal with the application because the issues arising touch on environment and land and by dint of article 165 (5) of the *Constitution* of Kenya.

This court directed the parties to canvas that issue on jurisdiction first as a preliminary point so that this court can determine whether it has jurisdiction to deal with the merits of the prayers sought.
5. The Respondent's objection to this application being canvassed in this court is primarily based on the fact that the substantive prayer being sought, (that is appointment of guardian ad litem) relates to a civil suit pending at Environment and Land Court before subordinate court in Mwingi. It is the respondent's view that the mandate of this court do not extend to matters touching on land and his contention is that the application ought to be canvassed at the Environment and Land Court.
6. On the other hand, the applicant contends that this court has jurisdiction pointing out that his application is brought under section 2 of the *Mental Health Act*.

According to him that Act gives this Court jurisdiction to deal with any issue arising from that Statute.
7. He further contends that the issue in his application is not about land or dispute over land but the mental state of one of the parties in the dispute pending at Environment and Land Court. He further argues that, the application before Court does not go into the merits of the dispute pending adding that this court is seized to deal with administration of estates of deceased persons and appointments of administrators to act on behalf of deceased persons and therefore, in the same way, it should also handle appointment of guardian ad litem where necessary.
8. As observed above, this application is brought under Order 32 Rule 15 of *Civil Procedure Rules* and Section 26 of the *Mental Health Act*.



9. Order 32 Rule 15 of Civil Procedure Rule stipulates as follows: -
- “The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be 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”
10. Section 26 of Mental Health Act provides for Order of Custody and Guardianship as follows: -
- i. The Court may make Orders;For the management of the estate of any person suffering from mental disorder; andFor the guardianship of any person suffering from a mental disorder by any near relative or by any suitable person.
  - ii. Whether 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.
  - iii. 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 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.
11. Jurisdiction is a crucial matter in any proceedings and is donated either by statute or the constitution. It is what gives a court or tribunal authority to entertain and decide any matter placed before it.
- The Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR expressed itself as follows on the question of jurisdiction;
- “A Courts jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a court of Law has jurisdiction to entertain a matter before it, it not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively. *In this matter of Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011, Where the Constitution exhaustively provides for the jurisdiction of a Court of Law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of Law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of Law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”
12. The first question in light of section 26 which gives the “court” power to make any such orders outlined thereunder, including appointment of guardian ad litem, is,



## What is Court?

13. Section 2 of the [Mental Health Act](#) defines “Court” as the High Court.
14. Article 165(5) on the other hand provide;
  - “(5) The High Court shall not have jurisdiction in respect of matters;
    - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
    - (b) falling within the jurisdiction of the courts contemplated in article 162 (2).”
15. The Courts contemplated in article 162(2) are those with the status of the High Court to hear and determine disputes relating to Employment and Labour Relations and the environment and the use and occupation of, and title to, land. article 162(3) further provides that: Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
16. The [Environment and Land Court Act](#) at section 13 provide as follows as to the jurisdiction of the ELC Court;
  - i. The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the [Constitution](#) and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  - ii. In exercise of its jurisdiction under article 162(2)(b) of the [Constitution](#), the Court shall have power to hear and determine disputes
    - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources
    - b. relating to compulsory acquisition of land;
    - c. relating to land administration and management
    - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
    - e. any other dispute relating to environment and land
17. The substantive issue in the subject application herein, is whether there is basis to appoint guardian ad litem as contemplated by section 26 of [Mental Health Act](#).
18. Section 2 of the Act defines “person suffering from mental disorder” as follows;

“A person suffering from mental disorder” means a person who has been found to be so suffering under this Act and includes a person diagnosed as psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse.”
19. The [Mental Health Act](#) provides for the care of persons who are suffering from mental disorder, custody of their persons and for the management of the estate of such persons. Section 26 provides for custody, management and guardianship and stipulates as follows;
  - a. The court may make orders;



- i. for the management of the estate of any person suffering from mental disorder; and
- ii. for the guardianship of any person suffering from a mental disorder by any near relative or by any other suitable person.
  - a. 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.
  - b. 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.

20. Order 32 Rule 15 of the *Civil Procedure Rules* provides

“that 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 reasons of unsoundness of mind or mental infirmity to be incapable of protecting their interests when suing or being sued.”

21. Therefore, for the orders being sought in this application to be granted, it has to be established that;

- a. The defendant has been adjudged to be of unsound mind or
- b. The Court upon enquiry has found the Defendant to be incapable of protecting his own interests due to unsoundness of mind or mental infirmity.

22. This court is alive to the procedural steps provided under *Mental Health Act* that might be taken before a person is appointed guardian ad litem. However, that is an issue to be canvassed at the hearing of this application. Suffices to state this court does not find that the appointment of guardian ad litem in itself has anything to do with a dispute over the use and occupation of land as contemplated under article 162(2) of the *Constitution* of Kenya or article 165(5) of the *Constitution*.

23. I agree with the applicant’s contention that the appointment of guardian ad litem is not any different from appointment of an administrator as stipulated under *Law of Succession Act* cap 160 to deal with estates of deceased person including stepping into the shoes deceased persons in a suit.

24. This court is well seized with the requisite jurisdiction to deal with the application dated April 3, 2023 as provided for under section 2 as read with section 26 of the *Mental Health Act*. The Preliminary Objection raised is overruled and I direct the parties to take directions on the main application. Costs in cause.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 10<sup>TH</sup> DAY OF MAY, 2023.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**

