



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 242 OF 2005

LOGHAN NJENGA WAWERU.....PLAINTIFF

VERSUS

TERESIA NYOKABI KARANU.....1ST DEFENDANT

LAND REGISTRAR, NAKURU.....2ND DEFENDANT

RULING

1. By way of Notice of Motion under Section **3A of the Civil Procedure Act, Order 8 Rule 3 and Order 1 Rule 9** of the **Civil Procedure Rules** dated **13th June 2012**, **Anne Wanjiru Njenga** moved this court seeking the following orders:

- a. That the Plaintiff be substituted in this matter by the said Anne Wanjiru Njenga**
- b. The annexed plaint be marked as duly filed**
- c. That costs of this application be provided for**

2. The application is supported by the grounds on the face of the application as well as the supporting affidavit of Anne Wanjiru Njenga. She depones that she is the plaintiff's daughter and that the plaintiff is old, sickly and incoherent and would be unable to conduct this matter especially when giving oral evidence; that the plaintiff would suffer irreparable harm if this application is not granted while the defendants would not suffer any prejudice if the prayers are allowed.

3. The application is opposed vide the 1st defendant's Grounds of Opposition dated **26th September 2013** that the application is bad in law, inept and defective; mischievous, illegal and intended to mislead the court on the true position.

4. The 2nd defendant did not oppose the application. On **17th September, 2013** parties agreed to dispose the application by way of written submissions. The plaintiff's advocates did not file any submissions while the 1st defendant's advocates filed theirs on **22nd October, 2013**.

5. In their submissions, Counsel for the 1st defendant reiterated their grounds of opposition. They relied on **Order 8 Rule 3** stating that substitution could only be allowed with leave of the court where a mistake had been made, for instance, if the wrong plaintiff had instituted the suit.

6. They further relied on **Order 32 Rule 15** that the court must protect a person who cannot take care of his interests, but only on inquiry; that since no inquiry by the court had been conducted, the plaintiff in

the instant case, must be presumed to be of sound mind. They relied on the case of **John Patrick Macharia v Patrick Kahiaru Muturi (Nairobi Civil Case No 113 of 1999)**.

7. **Order 1 Rule 10 (2)** of the Civil Procedure Rules grants the court powers to substitute or add parties if it is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. In the instant case, substitution has been sought on the grounds that the plaintiff is old, sickly and incoherent and for that reason he would be unable to conduct himself in the trial effectively.

The question that comes to my mind is whether substitution can be allowed on these grounds.

8. In this case, the applicant has cited health concerns as the reason why she would wish to be substituted in place of the plaintiff. A Medical condition must be supported by medical records showing what ailment the plaintiff is suffering from and the extent of the illness or debilitating condition that would affect his capacity to participate in the rest of this suit. If old, sickly, incoherent and inconsistent in speech means that the plaintiff is having a mental disability then the procedure to be followed is clearly set out under **Order 32** of the Civil Procedure rules regarding suits by or against minors and persons of unsound mind.

9. The question of mental disability is one to be determined by the court under the Mental Health's Act. A person who wishes to manage the affairs of a person with mental disability may file a petition under **Section 28(1) of the Mental Health Act (No 10 of 1989)** which provides:

“The court may, upon application made to it by petition concerning any matter connected with a person suffering from mental disorder or with his estate, make such order, subject to this Part, regarding such application as, in the circumstances of the case, the court may think fit.”

Under Section 26, of the same Act, once such a petition is filed, 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 mental disorder by any near relative or by any other suitable person.

(2)

(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.”

10. Once a person, for instance, the applicant in the instant case has been appointed to act in the capacity of Guardian or Manager she can then **under Order 27 (I)** with orders of the court, **“have such general or special powers for the management of the estate as the court considers necessary and proper regard being had to the nature of the property whether movable or immovable, of which the estate may consist.....”**

11. It is my view therefore, that the applicant although having good intention, has not moved the court in the correct manner and should follow the laid down procedure for substitution in a case where her father is having a mental disability.

12. Consequently, I decline to grant the orders sought in the Notice of Motion dated **13th June, 2012** and

dismiss it with costs.

Dated, signed and delivered at Nakuru in open court this 3rd day of October, 2014.

L N WAITHAKA

JUDGE

Present

Fatma for the respondent

Ms Wambugu holding brief for Mr Mwangi for the plaintiff/Applicant

Emmanuel Maelo : Court Assistant

L N WAITHAKA

JUDGE