

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 349 of 2009

KENYA COMMERCIAL BANK LTD..... PLAINTIFF

VERSUS

ANN KAJUJU CHARLES alias

ANN KAJUJU MAGONDU & 28 OTHERS.....DEFENDANT

RULING

The plaintiff sued, among other defendants, the 24th, 25th and 26th defendants. According to the plaintiff, the 24th, 25th and 26th defendants (*hereinafter referred to as the said defendants*) were minor children of the 1st defendant. In its plaint, the plaintiff sued the said defendants through their mother and guardian ad litem, the 1st defendant. By its notice of motion dated 19th May 2009, among the prayers sought by the plaintiff, was a prayer seeking the appointment of the 1st defendant as the guardian ad litem of Daphne Kawira (*a minor*) (*the 24th defendant*), Elizabeth Wanjiku (*a minor*) (*the 25th defendant*) and Leah Wanjiru (*a minor*) (*the 26th defendant*). The application is predicated upon the provisions of **Order XXXI Rule 1** of the **Civil Procedure Rule** and is supported by the annexed affidavit of Aloys Okari Ombui. The application is opposed. The said defendants filed notice of preliminary objection in opposition to the application. They stated that the application offended the provisions of the **Civil Procedure Rules** as no notice to prosecute such an application had been lodged nor a verifying affidavit filed. The said defendants were of the view that the application was made in bad faith as it sought to correct the fatal mistake in pleading the existence of a guardian ad litem when there was none. The advocate for the said defendants, Wandugi Karathe swore a replying affidavit in opposition to the application. He reinforced the grounds put forward by the said defendants in opposition to the application.

At the hearing of the application, I heard the submissions made by Mr. Mutua for the plaintiff. He urged the court to allow the appointment of the 1st defendant as the guardian ad litem of the said defendants. He submitted that the proposed guardian ad litem was the biological mother of the said defendants and therefore she ought to be so appointed to protect the interest of the said defendants who are minor children. He brushed off the objection by the said defendants to the application by stating that there was no legal requirement that a formal notice be first served to the person intended to be appointed as guardian ad litem before a formal order appointing him as guardian ad litem can be made. He further submitted that there was no requirement that a different verifying affidavit, other than the affidavit sworn in support of the application should be sworn in such an application. He maintained that service of the pleadings to the intended guardian ad litem was adequate notice for the purposes of the rules. He reiterated that the 1st defendant and the said defendants would suffer no prejudice if the order is made. He urged the court to allow the application so that the matters in dispute may be determined on its merits.

Mr. Wandugi for the said defendants opposed the application. He submitted that the plaintiff should not be permitted to sever the present prayer from the other prayers in the main application. He maintained that the plaintiff had made fatal error by enjoining the 24th, 25th and 26th defendants in the suit before it had made an appropriate application in court for the appointment of guardian ad litem in

respect of the said minor defendants. He submitted that under the rules, the application seeking the appointment of a guardian ad litem must be supported by a verifying affidavit by the proposed guardian ad litem that he does not have any interest in the matter. He reiterated that such an applicant ought to issue notice to the proposed guardian ad litem before he can be brought as a party in the proceedings. He urged the court not to allow the plaintiff to regularize its unlawful act of enjoining the said defendants in these proceedings before the court had issued a formal order.

I have carefully considered the rival arguments made by counsel of the parties to this application. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff made an appropriate case for the appointment of the 1st defendant as the guardian ad litem for the 24th, 25th and 26th defendants. The procedure for the appointment of guardian ad litem in suits instituted against minors and persons of unsound mind is provided for under **Order XXXI of the Civil Procedure Rules**. Under **Rule 3(1)** of the said Order, where the defendant is a minor, the court on being satisfied of his minority, shall appoint a proper person to be guardian ad litem for such minor. An order for the appointment of such guardian ad litem may be obtained upon application made either in the name of the minor or by the plaintiff (**Rule 3(2)**).

The application is required to be supported by an affidavit verifying the fact that the proposed guardian ad litem has no interest in the matter in dispute that is adverse to that of the minor (**Rule 3(3)**). There is a requirement that before the order is issued by the court, the minor and the guardian ad litem be notified (**Rule 3(4)**). **Rule 4** sets out the persons who may be appointed guardian ad litem. I am of the view that the above rules are meant to protect the interest of minors who are involved in civil litigation. They are meant to guard against the possibility of the rights of minors being infringed. That is the reason why it is specifically provided that the person to be appointed guardian ad litem must not have an interest that is adverse to that of the minor. Further, such guardian ad litem must be notified and must consent to his appointment as guardian ad litem. The requirement that a party seeking to enjoin a minor in a suit should apply to the court for an appropriate order implies that this court has discretion to determine whether or not such a person can be appointed to be guardian ad litem. That discretion, obviously, will be exercised judicially.

In the present application, having evaluated the rival arguments of the parties herein, it was evident to this court that the plaintiff was compelled to move to the court under certificate of urgency to safeguard what it considers to be funds which were fraudulently withdrawn from its accounts. From the nature of the suit, and the application filed, it was obvious that the plaintiff could not have had the opportunity to seek leave of the court before it filed suit against the said defendants. There is no dispute that the 1st defendant is the biological mother of the 24th, 25th and 26th defendants. In the natural course of things, it would be expected that the 1st defendant would not object to being appointed as the guardian ad litem on behalf of her minor children. But litigation being what it is, the 1st defendant has chosen to throw the rule book at the plaintiff in a bid to scuttle the suit against the said defendants.

I think it is trite that rules of procedure are meant to serve the ends of justice and not serve as an impediment for the just attainment of the determination of a suit. In the present case, it is obvious that the 1st defendant was duly notified of the suit against the 24th, 25th and 26th defendants when she was served with pleadings in this case. She cannot plead that she had no notice of the proceedings against the said defendants. It is clear that her interest in the suit and that of the 24th, 25th and 26th defendants are not adverse to each other. In fact, from the pleadings it appears that the interest is the same.

I therefore hold that despite the plaintiff having not strictly observed the procedure provided by the rules, it has satisfied this court of the merit of its application. This court has jurisdiction to appoint a person whom it deems fit to be guardian ad litem where a minor has been sued. The court has discretion to appoint such person either on application by any party in a suit or on its own motion. In the present application, I hereby exercise my discretion and appoint the 1st defendant Ann Kajuju Charles alias Ann Kajuju Magondu to be the guardian ad litem of Daphne Kawira (24th defendant), Elizabeth Wanjiku (25th defendant) and Leah Wanjiru (26th defendant) for the purposes of this suit. Costs shall be in the cause.

DATED AT NAIROBI THIS 8TH DAY OF JULY 2009.

L. KIMARU

JUDGE