REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. NO. 13 OF 2020

NICKSON MUTINDA KIUNGA...PLAINTIFF

VERSUS

NGURU NDUMA..DEFENDANT

PETRONILA SYOMBUA..APPLICANT

RULING

A. INTRODUCTION AND BACKGROUND

1. By a plaint dated 13th June, 2020, the Plaintiff sued the Defendant seeking, *inter alia*, specific performance of certain agreements for sale of 4 acres out of Title No. Mbeti/Gathuriri/3444 (*the suit property*), an alternative prayer for refund of the purchase price paid and general damages for breach of contract. It was contended that on diverse dates between 2015 and 2018 the Plaintiff bought and paid for 4 acres to be excised out of the suit property but the Defendant had failed to transfer the said 4 acres despite demand.

2. Simultaneously with the filing of the plaint the Plaintiff filed a notice of motion dated 13th June, 2020 under **Section 68 of the Land Registration Act, 2012 and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act (Cap. 21)** seeking an order of inhibition to preventing any dealings with the suit property pending the hearing and determination of the suit. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 13th June, 2020.

3. The gravamen of the Plaintiff's application was that despite full payment of the purchase price, the Defendant had defaulted on the agreements for sale by failing to transfer the 4 acres to him. He, therefore, sought an interim order of inhibition to preserve the suit property pending the hearing and determination of the suit.

B. THE DEFENDANT'S RESPONSE

4. The Defendant filed a replying affidavit sworn on 29th July, 2020 in response to the application for interim orders. He conceded that he had entered into sale agreements for the sale of 3 acres out of the suit property to the Plaintiff between 2015 and 2016. He, however, disputed that there was any agreement for the sale of additional one acre to the Plaintiff. He contended that he merely borrowed Kshs.150,000/- from the Plaintiff to enable him cater for his medical expenses which amount was to be refunded at a later date.

5. The Defendant further stated that he was unable to transfer the 3 acres to the Plaintiff because of a caution lodged against the suit property by his wife and children who had apparently objected to the sale. He further stated that he was ready and willing to transfer the 3 acres to the Plaintiff once the caution was removed. He annexed a copy of a plaint in *Siakago PMCC No. 77 of 2017 – Nguru Nduma v Petronilla Syombua Nguru* in which he had sued his wife seeking removal of the said caution.

C. THE APPLICANT'S APPLICATION

6. During the pendency of the said application for interim orders, the Applicant, who is the Defendant's wife, filed a notice of motion dated 24th July, 2020 expressed to be brought under **Order 1 Rule 10 and Order 32 of the Civil Procedure Rules (*the Rules*), Section 26 of the Mental Health Act (Cap. 248) and Section 13 of the Matrimonial Properties Act, 2013** seeking the following orders:

> *(a) Spent*
>
> *(b) This Honorable Court do grant leave to the Applicant to be appointed the guardian ad litem on behalf of the Defendant in this*

suit.

(c) That this Honorable Court do allow the Defendant's child, one Daisy Mutheu to be an interested party in this suit.

(d) That this Honorable Court do nullify the agreements between the Defendant and Plaintiff as they are void.

(e) That this Honorable Court do compel the Plaintiff to accept refund of the monies from the void contracts.

(f) Cost be in the cause.

7. The said application was based upon the 20 grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Petronila Syombua on 24th July, 2020. The Applicant contended that the Plaintiff had entered into sale agreements with the Defendant who was a person of unsound mind. It was contended that in 2013 and 2018 the Defendant suffered a stroke which affected his mental facilities. It was further contended that the Defendant had sold portions of the suit property to the Plaintiff at a gross undervalue. It was further alleged that the Plaintiff was grossly negligent in dealing with a person he knew to be of unsound mind hence the sale agreements in issue should be declared null and void.

D. THE PLAINTIFF'S RESPONSE

8. The Plaintiff filed a lengthy replying affidavit sworn on 7th October, 2020 in opposition to the Applicant's said application. He stated that when he purchased the initial 2 acres out of the suit property in 2015, the agreement was concluded in the presence of the Applicant at the Defendant's house in Nairobi. The Plaintiff further contended that in 2016 he bought an additional one acre from the Defendant and that he took possession of the 3 acres and constructed a permanent house where he has been residing for 5 years without any complaint or objection from the Applicant. He pointed out that the Applicant had never before contested the sale for the alleged unsoundness of mind of the Defendant.

9. The Plaintiff further contended that he purchased the 4th acre in 2018 upon the request of the Defendant and that the Applicant was fully aware of the transaction and that she received part of the purchase price. The Plaintiff annexed a copy of a transaction statement showing payment of at least Kshs.30,000/- to the Applicant. The Plaintiff asserted that the Applicant also witnessed the payments to the Defendant on account of the fourth acre in 2018.

10. The Plaintiff pointed out in his affidavit that there was no mental assessment from a qualified medical practitioner on the mental state of the Defendant either at the time the sale agreements were made or at the present time. The Plaintiff further pointed out that the Defendant had instructed a Counsel in the instant suit and filed a replying affidavit stating that he was of sound mind and that he had confirmed the agreements for the sale of the first 3 acres out of the suit property.

11. It was the Plaintiff's contention that the Applicant had not demonstrated that the Defendant was a person of unsound mind within the meaning of the law and that she had not demonstrated legal grounds for the joinder of Daisy Mutheu as an interested party in the suit. The court was urged to dismiss the said application with costs.

E. DIRECTIONS ON SUBMISSIONS

12. When the Applicant's notice of motion dated 24th July, 2020 was listed for hearing on 30th September, 2020 it was directed that the same shall be canvassed through written submissions. The parties were directed to file and exchange their submissions within 14 days. The record shows that the Plaintiff filed his submissions on or about 21st October, 2020. However, the Defendant's and Applicant's submissions were not on record by the time of preparation of the ruling.

F. THE ISSUES FOR DETERMINATION

13. The court has perused the Applicant's notice of motion dated 24th July, 2020, the Plaintiff's replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the following issues arise for determination herein:

(a) Whether the Applicant has made out a case for appointment as a guardian ad litem of the Defendant.

(b) Whether the Applicant has made out a case for the joinder of Daisy Mutheu as an interested party.

(c) Whether the court should nullify the sale agreements between the Plaintiff and the Defendant.

(d) Whether the court should compel the Plaintiff to accept a refund of the purchase price.

(e) Who shall bear costs of the application.

G. ANALYSIS AND DETERMINATION

a. Whether the Applicant is entitled to be appointed as *guardian ad litem* of the Defendant

14. The court has considered the submissions and material on record on this issue. The application is primarily based upon **Order 32 of the Rules and Section 26 of the Mental Health Act. Order 32 Rule 15 of the Rules** stipulates as follows:

> **"The provisions contained in Rule 1 to 14 so far as they are applicable, shall extended 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."**

15. The real question for determination herein is whether the Defendant has been **adjudged** to be of unsound mind or whether he has been found upon **inquiry** to be incapable of protecting his interest by reason of unsoundness of mind or mental infirmity. So far as the court is aware, the primary legal regime for adjudication of such matter is the **Mental Health Act.** The Applicant herself has relied upon **Section 26 of said Act** which stipulates as follows:

> **"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.**
>
> **1. 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.**
>
> **2. 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."**

16. The court is further of the opinion that an order for the guardianship of a person who is said to be of unsound mind by reason of mental infirmity or mental disorder can only be made upon a petition being filed and heard under **Section 28 of the said Act**. **Section 28** stipulates as follows:

> **"1. 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 circumstance's of the case, the court may think fit.**
>
> **2.The Minister, the Public Trustee or a manager may take out, as a matter of course, an application in chambers for the determination of any question arising out of the management of any estate in respect of which an order has been made under this Part."**

17. There is no material evidence on record to demonstrate that the procedures set out in the Act has been observed. There is no indication that any petition was filed and determined in relation to the Defendant prior to the filing of the instant application. Applicant did not exhibit a copy of any guardian order made by a competent court under **Section 26 of the Act.**

18. The other alternative mechanism of appointing a guardian is through an inquiry as envisaged under **Order 32 Rule 15 of the Rules.** There is equally no evidence on record to demonstrate that such inquiry has ever been conducted by any competent court prior to the filing of the instant application. There is no record of any findings or results of such inquiry. The **Concise Oxford Dictionary (12th Edition)** equates the term 'inquiry' with 'enquiry' which is defined to mean "the act of asking for information" or "official investigation".

19. The court has noted that the Applicant has not requested the court to undertake any such inquiry. She has, instead, asked the court to directly appoint her as *guardian ad litem* without seeking to have an inquiry done and a finding made that the Defendant is incapable of managing his affairs and protecting his interests in the suit by reason of unsoundness of mind or mental infirmity. It shall not be necessary at this stage to venture into the mechanisms of conducting such inquiry since there is no prayer for an inquiry to be conducted in the instant application. The court is, however, inclined to accept the opinion of the High Court in the case of **Hellen Mbinya King'ola v HNO & Another [2019] eKLR** that a comprehensive judicial inquiry with the assistance of competent medical experts would be required. An inquiry bearing potentially grave consequences cannot be undertaken and concluded on the basis of written submissions alone.

20. The court is thus of the opinion that the Applicant has failed to satisfy the legal requirements for her appointment as *guardian ad litem* of the Defendant. The court is of the opinion that the instant application was filed prematurely hence the Applicant shall be at liberty to seek similar orders in future upon complying with the relevant provisions of the **Mental Health Act and Order 32 Rule 15 of the Rules.**

b. Whether the Applicant has made out a case for the joinder of Daisy Mutheu as an Interested Party

21. The court has considered the material on record on this issue. The Applicant provided very scanty information on who Daisy Mutheu (Daisy) was and the nature of her interest, if any, in the suit property. Apart from stating that Daisy was the Defendant's 'child' nothing else was said of her. It was not stated whether she was of majority or minority age. It was not demonstrated what right, interest, or stake she had in the suit or suit property. It was not demonstrated that her presence was necessary for the purpose of effectively adjudicating on the issues

in controversy in this suit.

22. The factors to be considered in an application for joinder of an interested party in a suit were summarized in the case of **Kenya Medical Laboratory Technicians & Technologists Board & 5 Others v Attorney General [2017] eKLR** by Mativo J as follows:

> **"The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the petitioner. It is whether the intended interested party has *an identifiable stake, or a legal interest or duty in the proceedings.***
>
> > **A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights ..."**

23. Similarly, in the case of **Trusted Society of Human Rights v Mumo Matemu [2014] eKLR** it was held, *inter alia*, that:

> **"... an interested party is one who has a stake in the proceedings though he or she was not a party to the cause *ab initio*. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause."**

24. In the circumstances of the instant application it has not been demonstrated why Daisy should be joined as an interested party. The court is of the opinion that the Applicant has failed to demonstrate any of the grounds known to law for joinder of Daisy as an interested party. It cannot be the law in this country that whenever a defendant is sued in a land dispute, his children should be joined as interested parties as a matter of course. Accordingly, the court is not inclined to grant the prayer for joinder.

c. Whether the court should nullify the sale agreement between the Plaintiff and the Defendant

25. The Applicant contended that the sale agreements the subject of the suit should be declared null and void on the basis that the Plaintiff had contracted with a person who was of unsound mind. The court is of the opinion that the prayer for nullification of the said sale agreements is untenable for at least two reasons. First, the legality and validity of the agreements is the subject of the main suit which is pending hearing and determination. The question of the soundness of mind or otherwise of the Defendant at the material time is a matter falling properly within the sphere of adjudication in the main suit. It would be premature for the court to make conclusive findings on the issues in controversy through an interlocutory application.

26. The second reason is that at the moment, there is no evidence on record on the basis of which it may be concluded that the Defendant is of unsound mind or that he was of unsound mind at the time the impugned sale agreements were made. As indicated earlier in the ruling, there is no order adjudging the Defendant as of unsound mind under **Section 26 of the Mental Health Act.** Equally, there is no finding upon **inquiry** that the Defendant is unable to take care of his interests on account of unsoundness of mind or mental infirmity. In the circumstances, there is no legal basis upon which the court may grant the orders sought.

d. Whether the court should compel the Plaintiff to accept a refund of the purchase price

27. The court has considered the material and submissions on record. This is a peculiar prayer given that there is no pleading or affidavit on record claiming that the Plaintiff was offered a refund of the purchase price which he declined to accept. It is also peculiar because in his plaint dated 13th June, 2020 the Plaintiff has prayed for a **refund** of the purchase price together with interest thereon as an alternative prayer.

28. Be that as it may, this prayer is not tenable in view of the court's findings and holdings on the preceding issues. The issue of refund would not arise unless and until the issue of soundness of mind of the Defendant and the validity of the sale agreements in issue are conclusively determined at the opportune time. Accordingly, the court is not inclined to prematurely grant an order compelling the Plaintiff to accept a refund.

e. Who shall bear costs of the application

29. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21).** A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court finds no good reason why the successful party should not be awarded costs of the application. Accordingly, the Plaintiff shall be awarded costs of the application.

H. CONCLUSION AND DISPOSAL ORDER

30. The upshot of the foregoing is that the court finds no merit in the Applicant's notice of motion dated 24th July, 2020. Accordingly, the same is hereby dismissed in its entirety with costs to the Plaintiff.

It is so ordered.

RULING DATED and SIGNED NYAHURURU and DELIVERED via Microsoft Teams Platform this 18th of December, 2020.

In the presence of:

No appearance for the Plain tiff

No appearance for the Defendant

No appearance for the Applicant

Court Assistant - Carol

Y.M. ANGIMA

JUDGE

18.12.2020