REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NUMBER E005 OF 2023

SAMUEL M'IMAINGI M'LAARU [Suing by his next friend

JERUSHA KANARIO MWENDA]……..…..PLAINTIFF

VERSUS

ABEDNEGO MATATA MIORO ……1ST DEFENDANT

INSPECTOR GENERAL OF POLICE…….2ND DEFENDANT

RULING

1. Before me is a Notice of Preliminary Objection dated 19.1.2026 lodged by the 1st defendant, brought pursuant to the provisions of **Order 32 Rule 15 of the Civil Procedure Rules, 2010.** For coherence, the 1st defendant's Notice of Preliminary Objection revolves around the legal issue of *locus standi*. The same is seeking an order for striking out the suit for want of *locus standi* on the part of the plaintiff.

2. It is critical to point out that the matter herein has substantially proceeded with some witnesses adducing evidence in court. Be that as it may, it behooves the court to pronounce itself on the subject Notice of preliminary Objection.

3. The advocates for the respective partes consented to canvass and dispose of the Notice of Preliminary Objection by way of written submissions. The court thereafter issued directions pertaining to the filing and exchange of the written submissions. In particular, the court circumscribed the timelines for the filing and exchange of the written submissions.

4. As at the time of crafting the ruling herein, only the 1st defendant had lodged submissions dated 12th February 2026; whereby same highlighted on one issue, namely; Whether the plaintiff has *locus standi* to lodge the instant suit.

5. The 1st defendant submitted that the plaintiff had moved the court *vide* **NAIROBI MILIMANI HCFA MISC. NO. 106 OF 2017** seeking orders to appointed as Guardian ad litem to one ***Samuel M'imaingi M'laaru***. That subsequently, upon the judge seized with the matter hearing the counsel for the parties, same issued an interim order issuing various reliefs inter alia an interim order that the Petitioner therein, also the next friend in the instant case be appointed interim manager and guardian to the subject. The matter therein was then slated for hearing on the 3rd October 2017 when the Guardian appointed and physicians being the doctors to the subject to appear before the said court for hearing.

6. For clarity, the order was issued on the 7th August 2017.

7. The 1st defendant submitted that the application *vide* **NAIROBI MILIMANI HCFA MISC. NO. 106 OF 2017** which sought to appoint the Next of friend herein is yet to be heard and determined and that according to the 1st defendant, the said Order had a life time of 12 months hence could not

go beyond the year 2018. He argued that the said orders had not been extended and relied on **Order 40 Rule 6 of the Civil Procedure Rules 2010** which prescribes that:

> ***Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve years from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise…'***

8. The 1st defendant further submitted that the suit *vide* **MERU ELC NO. 325 OF 2017** was dismissed on the 4th December 2024 whereby the court therein held that the plaintiff herein was not possessed of locus standi to lodge the said suit. Finally, the 1st defendant submitted that the suit herein was a replica of the suit vide **MERU ELC NO. 325 OF 2017** and thus the instant suit was untenable

9. I have appreciated the issues raised in the written submissions dated 12th February 2026; *vis a vis* the notice of preliminary objection before the court and it is my considered view that the issues that the court is being called upon to decide on are two issues namely; Whether the plaintiff has the locus standi to bring the instant suit; and Whether the suit herein is a replica of the suit vide **MERU ELC NO. 325 OF 2017**.

10. I will proceed to discuss same as hereunder;

ISSUE Number One [1].

Whether the Plaintiff has the locus standi to bring the instant suit.

11. Before I proceed to the merits of the Notice of Preliminary Objection, it is important to state that preliminary objection must only raise issues of law. Where the court is required to comb through evidence in order to ascertain alleged facts in a matter, the issue before court metamorphizes to something else. The 1st defendant raised an issue of locus standi which to me, is a point of law. Looking at the plaint lodged by the plaintiff, same at paragraph 2 thereof was aware that the issue of legal capacity to lodge the suit was critical in this matter.

12. No wonder at the said paragraph, the plaintiff proceeded to explain how the next friend was being incorporated in the instant proceedings. The plaintiff refers to proceedings vide **NAIROBI MILIMANI HCFA MISC. NO. 106 OF 2017** whereby the next friend was appointed as a Manager and Guardian of the Plaintiff.

13. However, counsel of the 1st defendant has taken the court through various proceedings including but not limited to **MERU ELC NO. 325 OF 2017** which according to the submissions of the 1st defendant, appeared to have been dismissed sometimes on the 4th December 2024. He has also submitted that the suit herein is similar to the said suit and the more reason why the suit herein ought to be struck out. Now, I seem to be having a problem with that especially the issues of res judicata which counsel for the 1st defendant seemed to have been raising in his submissions.

14. For clarity, in **J E N -V- D O K [2018] EKLR**, the Court of Appeal held that:

*…**The essence of a preliminary objection was succinctly set out by the predecessor of this Court in the locus classicus case of Mukisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors (1969) EA 696*** at 700 wherein Law, JA stated that: ***"…a 'preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*** Sir Charles Newbold P. added at page 701: ***"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact*** **has to be ascertained or if what is sought is the exercise of judicial discretion…'**

15. The appellate court proceeded to hold in the said case that;

…The objection raised by the appellant was not based on pure points of law and required interrogation of the facts thereto. Whether the petition was a nullity on account of the respondent's mental capacity and/or whether the petition was instigated by third parties could only be determined after the hearing of the intended guardian ad litem's application. Our position is further fortified by the following sentiments of this Court in Ethics and Anti-Corruption

Commission (The legal successor of Kenya Anti - Corruption Commission) vs. Stanley Mombo Amuti [2015] eKLR:

"A preliminary point cannot be sustained if any fact is contested and has to be ascertained…" The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with costs.'

16. Still on what is contained in a preliminary objection, I beg to rely on **LUCY KURGAT V FRANLINE YAOLA MANYONGE [2020] EKLR**, where the Court of Appeal held that…

"We think, with respect, that the appellant ought to have heeded the caution expressed by Sir Charles Newbold, P in ***MUKISA BISCUITS*** *(supra) at p701;* ***"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.*** *It cannot be raised if any facts have to be ascertained* ***or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."*** *We find it quite surprising that the clear sentiments expressed so long ago seem to have fallen on deaf ears and parties still insist on the unhealthy and often time-wasting penchant for raising preliminary objections when they clearly do not lie, as in the case before us…'*

17. In **KANDARA RESIDENCE ASSOCIATION & ANOTHER V ANANAS HOLDINGS LIMITED & 4 OTHERS; DIRECTOR OF SURVEY & 3 OTHERS (INTERESTED PARTIES) [2020] EKLR**, the court when dealing with similar issues where the issue of sub judice and res judicata were raised in the preliminary objection held that:

> ***…The above being the description of a Preliminary Objection, it is not in doubt that a Preliminary Objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. In the case of Quick Enterprises Ltd.Vs. Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, the Court held that:-***
>
> ***"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings."***

18. The court further held:

> ***'…In determining a Preliminary Objection, the Court will also take into account that the Preliminary Objection must stem from the pleadings and raises pure point of law. See the case of Avtar Singh Bhamra & Another…Vs…. Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, where the Court held that: - "A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be***

ascertained." Before the Court embarks on determining the merit of the Notices of Preliminary Objections, it will first determine whether what have been raised by the parties herein satisfy the ingredients of a Preliminary Objection. In this determination, the Court will be persuaded by the findings in the case of Oraro…Vs…Mbaja (2005) 1KLR 141, where it was held that: - "Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence".

19. Finally, the court held that:

> …*For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this Court's considered view that it* ***will have to ascertain facts and probing of evidence****. Further the issue on whether or not the same is* ***Sub judice****,* ***facts have to be ascertained and a Preliminary Objection cannot be raised on disputed facts.*** *Therefore, this Court holds and finds that what has been raised by the 2nd to 5th Defendants does not amount to a* ***Preliminary Objection,*** *hence the same is dismissed…*'

20. What I gather from the authorities hereinabove is that a party raising an issue that requires the court to interrogate through evidence, what is being deemed as a preliminary objection ceases to be so. The 1st defendant has raised not just an issue of locus standi but res judicata. He submits that the suit herein is a replica of a suit *vide* MERU ELC NO. 325 OF 2017 but on one hand, submits that the 1st defendant herein was not a party to the said suit.

21. For coherence, I have not had a chance to go through the said proceedings and/or order dismissing the said suit. And even if I had, what has been placed before me is a preliminary objection where parties are legally required to confine themselves on pure points of law which issues must stem from the pleadings. I have perused the statement of defense lodged by the 1st defendant and dated 7th February 2024.

22. The said pleading doesn't raise any issue of law but refers to the suit *vide* MERU ELC NO. 325 OF 2017 where the 1st defendant pleads that same is not a party. On the other hand, the plaintiff demonstrates the locus standi of the Next Friend to bring the suit on his behalf. It is thus my considered view that the issues that have been raised in the submissions are not pure points in law, but requires the court to interrogate further vide evidence. Besides, the Order *vide* NAIROBI MILIMANI HCFA MISC. NO. 106 OF 2017 has been attached to the plaint6iff's bundle of documents and though extensively referred to by the 1st defendant as a basis for the lodging of the preliminary Objection, the issues as to whether the Orders were extended and/or the application therein heard and determined before the said judge are issues that can only be raised during the hearing of the case herein upon parties adducing evidence.

23. On the other hand, suffice to say, the court needs to make a determination on the preliminary objection only on the issue of locus standi. It is not in dispute that the Plaintiff herein suffers from a mental illness as same has

been admitted by the plaintiff through his pleadings, to be precise, Paragraph 2 of the plaint dated 3rd October 2023.

24. According to the 1st defendant, the orders appointing the Next Friend as manager and guardian to the plaintiff was issued on the 7th August 2017 on the interim basis. Besides, the 1st defendant posits that the said orders issued by *Far**ah S.M. Amin,*** **J vide NAIROBI MILIMANI HCFA MISC. NO. 106 OF 2017**, had since lapsed in the year 2018 because they were not extended. Counsel has pegged this argument on **Order 40 Rule 6 of the Civil Procedure Rules, 2010.**

25. However, I think that argument is not only misleading but is untenable. For clarity, I have had a chance to peruse the pleadings on record and I discern that what was before the said judge was not an application for temporary injunction under **Order 40 of the Civil Procedure Rules, 2010;** as being propagated by the 1st defendant.

26. For clarity, the application for appointment as manager and guardian for the plaintiff had been brought under the **Mental Health Act Cap 248 Laws of Kenya**. To that end, the argument by the Learned Counsel for the 1st defendant hold no waters and I decline to be persuaded by counsel for the 1st Defendant.

27. **Order 32 of the Civil Procedure** prescribes for suits by or against minors and persons of unsound mind.

28. Rule 15 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 reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued…'

29. Rule 3 thereof provides for appointment of guardian ad litem in case of minors which process applies in the case here a person has been adjudged as a person of sound mind and/or though not adjudged, a court finds a person to be of unsound mind upon inquiry. In the instant case, the plaintiff's next friend had been appointed as manager and guardian of the plaintiff. This fact is not disputed by parties. Even the 1st defendant admits as much.

30. The Next Friend had approached the court *vide* **NAIROBI MILIMANI HCFA MISC. NO. 106 OF 2017** and orders issued appointing her as such with the court making an order that the Next Friend and Physicians appear before her at a later date.

31. Needless to say, that a party who seeks to be appointed as guardian ad litem where one has been adjudged a person of sound mind must first approach the High Court pursuant to **Sections 26 and 27** of the **Mental Health Act** for appointment of *Guardian Ad Litem*. It is through being adjudged as being of unsound mind that the Next Friend would now apply for guardian ad litem to lodge the instant suit and prosecute the suit herein on behalf of the Plaintiff.

32. In the case of **STEPHEN MBUGUA IKIGU –VS- PETER M. MBUGUA & 2 OTHERS [2014] eKLR** the court at page 5 when faced with a similar Application held that,

> '…***Where the Plaintiff is the person of unsound mind…The omission here is that the Plaintiff's mental status had not been determined as required; and the provisions of Section 26 and 27 of the Mental Health Act had not been adhered to...***'

33. In **GRACE WANJIRU MUNYINYI & ANOR –VS- GEDION WAWERU GITHINGURI & 5 OTHERS [2005] eKLR**, the court held that"

> '…***What the Plaintiffs should have done was to Petition the court under section 26 and 27 of the Mental Health Act Cap 248 of the laws of Kenya to be appointed to be the Administrators of the Estate such a person of unsound mind. In the circumstances of this case, the Plaintiff lacked capacity to file this suit on behalf of Moses Munyinyi Mbogo…'***

34. **In M M –VS- NANCY KANUGU MBAYA (LEGAL ADMINISTRATIX THE ESTATE OF AYUB MBAYA MWONGERA) [2018] EKLR,** the court in dealing with an application that was lodged during *the pendency of the suit stated that:*

> ***…The Application dated 8.9.2016 seeks orders that the Applicant M M be allowed by the Honourable court to be substituted by his son Dr. Kimathi Mwongera in this matter***

and that costs be provided for this Application. 2. The grounds in support of the Application are that Applicant is 85 years old. He has developed partial memory loss, cannot seem to remember some issues and cannot understand questions put to him.

The question to determine first and foremost is with regard to the applicable law. What is the legal basis of substituting a litigant with another on the allegation that a party suffers from senility". In the present case Plaintiff is suffering from a condition known as severe mental deterioration- see Dr. Kiome's report.

The preamble of the mental health Act provides that; "It is an act of Parliament to amend and consolidate the law relating to the case of persons who are suffering from mental disorder or mental sub-normality with mental disorder, for the custody of their persons and the management of their estate……."Section 26 of the said Act provides that "The court may make orders— for the management of the estate of any person suffering from mental disorder; and for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person".

In ELC CASE NO 520 OF 2012 ELDORET, ISAAC KIPKEMBOI CHESIRE & 4 OTHERS VERSUS JOSEPH KIMITEI KWAMBOI & 3 OTHERS AND ROSE CHERUIYOT RONO & 3 OTHERS INTERESTED

***PARTIES*, a litigant (2nd defendant) had suffered a stroke thus impairing his mental faculties. The Court invoked the provisions of the mental health act and stated that "*the Law on management of an estate of a mentally ill person is enshrined in the mental health Act. Orders for the appointment of a person to manage the estate of any person suffering from mental disorder are provided for under section 26 of the mental health act". The court further rule that an application for guardian ad litem is to be made by the *court* which is defined as the *High Court* under section 2 of the Act.**

The court stated thus "This court finds that it has not been established that Matilda Sawe is the guardian ad litem of the estate of John Malan Sawe hence the application for substitution is not well founded….". I find no reason to deviate from the aforementioned holding. *The person wishing to be substituted in place of the plaintiff should first obtain the guardian ad litem order from the High Court, there after he can apply for substitution before this court.

35. The above decisions discussed the procedure where one could bring a suit on behalf of a person of unsound mind. In the instant case, in the year 2017, the Next friend to the plaintiff had petitioned the court for grant of guardian ad litem for purposes of managing the estate and/or affairs of the plaintiff herein. The court therein granted an order appointing the Next friend as interim manager and guardian to the plaintiff herein. For clarity, I am not aware of what became of the said petition by the Next Friend but it is not in

dispute that in the year 2017, there as a lawful court order appointing the Next Friend as the manager and guardian of the Plaintiff herein. The 1st defendant has not demonstrated that the Orders therein were varied, discharged and/or vacated.

36. Counsel, however submitted that:

> ***…<u>the orders could not go beyond 2018. The same lapsed. The plaintiff has never extended temporary orders or prosecuted the application to confirm the orders to date. It is now about 9 years and the plaintiff has never bothered to make right the orders.</u> we are ell guided by the provisions of Order 40 Rule 6 which provides… where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve years from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise…'***

37. As earlier pointed ought in the preceding paragraphs, that counsel got it wrong as to the applicable laws. The temporary injunction doesn't arise in the said case hence there was no need for extension of the orders issued on 2017. For coherence, so long as the said orders are in place and same has not been set aside, same are binding and gives the Next Friend the authority and/or locus standi to bring the suit herein or any other suit and manage the estate of the plaintiff so long as she remains the guardian ad litem or manager of the plaintiff.

38. Whether, or not I agree with the issuance of [sic] interim order in the circumstances is not my place; neither can I deem the interim orders vacated for want of extension. Issues concerning the said Order can only be addressed by the court that issued them. For now, the only Court Order that the suit has been anchored on is the Order referred to by parties and my humble view is that same is a valid Court Order issued by a competent court with Jurisdiction and thus, the Notice of Preliminary Objection fails on this ground.

ISSUE Number Two [2].

Whether the suit herein is a replica of the suit vide MERU ELC NO. 325 OF 2017.

39. Having discussed and found that the issue raised by the 1st defendant cannot be raised in a Preliminary Objection, I will not belabor much on this issue. Really, res judicata is not a pure point of law. Same requires evidence to be placed before a court of law to in order for a determination be given. I have not had the occasion to see the said Order dismissing the suit *vide* **MERU ELC NO. 325 OF 2017**. On the other hand, the plaintiff deponed and/or disclosed that the suit therein exists as between the plaintiff and other parties not before the court. While it encompasses the suit properties herein, the said suit did not incorporate the 1st defendant herein and same has confirmed as much.

40. The Order for dismissal of the said suit [if at all] is in existence, same does not take away my jurisdiction to hear the suit herein as the suit herein is not dependent on the said Order. The 1st defendant thus cannot raise the issues therein in a preliminary objection. They are not pure points of law. I echo

the Court of Appeal decision in **LUCY KURGAT V FRANLINE YAOLA MANYONGE [2020] EKLR**, where the court of appeal held that:

> …*We think, with respect, that the appellant ought to have heeded the caution expressed by Sir Charles Newbold, P in* ***MUKISA BISCUITS*** *(supra) at p701;* ***"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.*** *It cannot be raised if any facts have to be ascertained* ***or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."*** *We find it quite surprising that the clear sentiments expressed so long ago seem to have fallen on deaf ears and parties still insist on the unhealthy and often time-wasting penchant for raising preliminary objections when they clearly do not lie, as in the case before us…'*

41. This is a part heard matter which has proceeded substantially. The notice of Preliminary Objection is not only unhealthy but indeed time-wasting. The 1st defendant was aware that there was no temporary injunction that was issued to arrant the invocation of **Order 40 Rule 6 of the Civil Procedure Rules**. As an officer of the court, he [Learned Counsel] was aware on what needed to be included in a preliminary objection. Indeed, this matter came

up for hearing of the main suit on the 21st January 2026 when the 1st defendant lodged the notice of preliminary objection.

42. It is critical that parties are guided by the provisions of **Article 159 (2) (b) of the Constitution, Section 1A of the Civil Procedure Act Cap 21 and Section 3 of the Environment and Land Court Act No. 19 of 2011** on expeditious disposal of disputes.

43. It is thus my considered view that the issue herein has not raised a pure point of law as espoused by the various decisions relied on; and hence the Notice of preliminary Objection also fails on this ground.

Final orders:

44. From the foregoing, the final orders of the court are*:*

i. ***The Notice of Preliminary Objection dated 19th January 2026 is hereby dismissed.***

ii. ***For avoidance of doubt, the Plaintiff's Next Friend is seized with the Locus Standi to maintain the suit herein pursuant to Orders issued vide NAIROBI MILIMANI HCFA MISC. NO. 106 OF 2017.***

iii. ***The Costs of the Notice of Preliminary Objection be and are hereby awarded to the Plaintiff.***

45. It so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF MARCH, 2026.

OGUTTU MBOYA FCIArb ;CPM [MTI- EA]

JUDGE

In presence of:

Naserian Court Assistant

Ms. Nduta Kamau holding brief for Dr. Gibson Kamau Kuria [SC] for the Plaintiff.

Ms. Kiyuki for the 1st Defendant

N/A for the 2nd Defendant