



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 60 OF 2011

M M.....PLAINTIFF

VERSUS

NANCY KANUGU MBAYA

(Legal administratrix the Estate of

AYUB MBAYA MWONGERA).....DEFENDANT

RULING

1. 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 Mwangera 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. In short, the applicant is senile. That is why the applicant has requested to be substituted by his son Dr. Kimathi Mwangera in order that he can proceed with this matter to its most logical conclusion. Dr. Kimathi Mwangera, the proposed plaintiff has also filed a supporting affidavit where he reiterates the averments of his father.

3. The application is opposed vide the replying affidavit of one Nancy Kanugu Mbaya (filed on 25.9.2017) where she contends that plaintiff is a fit person who comes to court without any assistance. She further claims that subsequent to the filing of this application, the plaintiff made a detailed witness statement on his case. This statement depicts a man in full control of himself and alive to this case. Respondent contends that the application is not merited and should not be allowed.

Submissions of the applicant.

4. The applicant has availed a medical report dated 10.8.2017 indicating that plaintiff is 83 years old and suffers from senile dementia. The doctor who is a consultant psychiatrist has described the condition as **severe mental deterioration in old age and it presents itself as severe forgetfulness, progressive loss of memory and mental abilities.**

5. The applicant who is a son of plaintiff has also availed a consent from the children of the plaintiff where by the six siblings have appended their signature. Applicant urges the court to administer justice pursuant to provisions of article 159 (2) (d) of the constitution as well as to take into account the overriding objective of delivering justice expeditiously under section 1 A, 1B, 3 and 3 A of Civil Procedure Act.

Submissions of the respondent

6. The respondent submits that after the application was filed on 9.9.2016, plaintiff proceeded to record a comprehensive statement which was filed in court on 21.7.2017. It is averred that in the said statement plaintiff even recalls events of 1970 and hence the impression given is that plaintiff is a litigant with a clear mind and well versed with facts of this case.

Determination

7. 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.

8. 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”.

9. In *ELC case no 520 of 2012 Eldoret, Isaac Kipkemboi Chesire & 4 others versus Joseph Kimiti 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 ruled 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....**”.

10. 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. The application of 8/9/2016 is hence dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 11TH DAY OF JULY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Muchomba holding brief for kiome for plaintiff

Kiogora holding brief for Gatari Ringera for defendant

HON. LUCY. N. MBUGUA

ELC JUDGE