



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 176 OF 2017

DR. JOSEPH ALEF KIMANI WANJAMA

(SUING THROUGH NEXT FRIEND AND SON)

DANIEL WANJAMA KIMANI..... PLAINTIFF

VERSUS

TECH PRO SYSTEMS LIMITEDDEFENDANT

JOSEPHINE KAGEHA KIGUMBA.....INTERESTED PARTY

RULING

The Plaintiff filed this suit on 18th March 2017 seeking a declaration that he is still the lawful owner of land reference no. Nairobi Block 122/96 situated in Kasarani, Nairobi (“the Suit Property”). He also seeks a permanent injunction to restrain the Defendant from dealing with the Suit Property. Paragraph 1 of the plaint states that the Plaintiff is suing through his next friend and adult son Daniel Wanjama Kimani. The Interested Party is the Plaintiff’s wife and step mother to Daniel Wanjama Kimani.

The Plaintiff filed the application dated 16th March 2017 seeking a temporary injunction to restrain the Defendant from encroaching onto, trespassing, constructing, excavating or in any other way dealing with the Suit Property pending hearing and determination of the suit.

The suit and application were brought when the Defendant commenced construction of a perimeter wall around the Suit Property. Daniel Kimani swears in the supporting affidavit that an inhibition restricting dealings on the Suit Property was registered in March 2011. He further states that he learnt from the workers constructing on the Suit Property that they were doing so on instructions from the Defendant. He states that the Plaintiff is mentally incapable of transacting any business and his assets should be safeguarded for the benefit of his dependants. The extract of title annexed to the Affidavit shows that a lease was issued to Joseph Maina Kibe on 16.12.2010.

The Defendant’s director, Bhupinder Singh Sound swore the Replying Affidavit opposing the application for injunction. He denies that Daniel Kimani has capacity to bring this suit since no inquiry was undertaken under the Mental Health Act to ascertain that the Plaintiff is suffering from a mental disorder as Daniel Kimani alleges; and that Daniel Kimani has not been appointed by the Court to manage the Plaintiff’s affairs due to the Plaintiff’s mental disorder. The Defendant indicated that this would be taken up as a preliminary point of law and also confirmed that it is the registered owner of the Suit Property. Copies of the sale agreement between the Plaintiff and the Defendant dated 19th December 2016 and a certificate of title were annexed to the Replying Affidavit. Daniel Kimani filed a supplementary affidavit in which he depones that he does not seek to be appointed guardian but merely seeks that the status quo of

the Plaintiff's assets be maintained until the issue of how the Suit Property was transferred to the Defendant without the Plaintiff presenting himself before the Chief Land Registrar is determined.

Submissions were made on both the preliminary objection and the injunction application. Mr. Munene submitted that the Plaintiff has been unable to conduct any business without supervision since 2009 owing to his mental incapacity. He urged that the transfer of the Suit Property to the Defendant was fraudulent and illegal.

The Defendant objected to the manner in which this suit was filed arguing that the procedure under the Mental Act that requires an inquiry had not been undertaken. The Defendant submitted that two tests have to be established, a judicial inquiry and a medical examination. Counsel for the Defendant urged that there is a rebuttable presumption that the Plaintiff is capable of bringing this suit since there has been no judicial inquiry and no medical evidence on the Plaintiff has been provided. The Defendant also contended that the Plaintiff has not met the threshold for the grant of injunctive relief. The Defendant relied on the case of **Peninah Sanganyi v Ram Hospital & 2 Others** [2010] eKLR in which Musinga J. (as he then was) found that a person of unsound mind cannot be represented by a next friend without the leave of the court and declared that that suit was void ab initio.

Counsel for the Interested Party aligned herself with the Defendant's submissions urging that the suit is fatally defective as the Plaintiff has no locus to institute the suit as next friend. Both the Interested Party and the Defendant maintained that the court ought to have been moved to inquire into Dr. Kimani's mental illness before this suit was filed.

The Plaintiff urged that striking out of suits ought to be done sparingly and that there is a cause of action which is not beyond redemption. The Plaintiff argued that the Mental Health Act only applies to persons adjudged to be of unsound mind. The Plaintiff relied on Article 159 of the Constitution which frowns upon procedural technicalities. Counsel urged that this court can still do the enquiry and have the medical board appoint a medical doctor to examine the Plaintiff and if he is found to be of sound mind then the Plaintiff can amend the pleadings. The Plaintiff relied on the case of **M M M v A M K** [2016] eKLR in which Mativo J. dealt with the issue extensively. The Judge found that the Mental Health Act defines a person suffering from mental disorder as a person who has been found to be so suffering under that Act. Since Dr. Joseph Alef Kimani Wanjama has not been adjudged to be of unsound mind under the Mental Health Act, his condition does not fall under that Act. Order 32 Rule 15 of the Civil Procedure Rules applies to his case. It provides that where applicable, rules 1 to 14 of that Order 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.

The Court agrees with the finding of Mativo J. that for the court to find that the Plaintiff is incapable of protecting his interests, the court is required to hold an enquiry as provided under Order 32 Rule 15 of the Civil Procedure Rules by examining the Plaintiff and considering medical evidence on his mental capacity. Since no inquiry has been conducted, the suit cannot stand as it is. It is dismissed with costs to the Defendant and the Interested Party.

Dated and delivered at Nairobi on 28th June 2017.

K. BOR

JUDGE

In the presence of: -

No appearance for the Plaintiff

Wageche for the Defendant

Mrs. Ligunya for the Interested Party

Mr. V. Owuor- Court Assistant