Lukorito v Siror (Environment & Land Case 26 of 2019)
[2024] KEELC 13605 (KLR) (28 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13605 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 26 OF 2019

FO NYAGAKA, J

NOVEMBER 28, 2024

BETWEEN

VERONICA TERIGI LUKORITO ..... PLAINTIFF

AND

MICHAEL BETT SIROR ..... DEFENDANT

RULING

1. Before me is an Application by way of a Notice of Motion dated 09/08/2024. It was brought under Order 32 Rules 3, 4 and 15 of the *Civil Procedure Rules*. The Applicant, being the Defendant sought the following orders:-

    1. (That) David Kipchumba Siror be appointed Guardian ad Litem for behalf of the Defendant.

    2. Costs of the Application be in the cause.

2. The Application was based on a number of grounds which were that the Defendant had become mentally infirm due to his old age; he had started suffering dementia; he was over 92 years old and there was need to have his interests safeguarded by appointment of a Guardian ad Litem; his son David Kipchumba Siror was able and willing to be appointed as such and the ends of justice and fairness required the appointment.

3. The Application was supported by the Affidavit of one David Kipchumbna Siror, sworn on the 09/08/2024. He repeated the contents of the Application in deposition form but added that he had a medical report a copy of which he attached as annexture DKS 1 and a copy of his father's identification card which he marked as Annexture DKS 2. Further, that his father was by the infirmity unable to protect his interests effectively hence it was proper that he be substituted.

4. The Application was opposed through a Replying Affidavit sworn by the Plaintiff, Veronica Terigi Lukorito sworn on 25/09/2024. She deposed that she understood that under Order 32 Rule 15 the court could appoint a Guardian Ad Litem if it could, upon inquiry, find that the person to be replaced has by reason of mental infirmity or unsoundness of mind incapable of protecting his interests when suing or being sued. That she believed the medical report annexed to the Affidavit had not provided sufficient proof that the defendant was mentally infirm or and suffering from dementia hence the maker of the medical report, Dr. Geoffrey Kibii, ought to be cross-examined on its contents. Further, it was necessary for the Court to conduct an inquiry to satisfy itself that the defendant was mentally infirm to have a Guardian Ad Litem appointed.

5. The Plaintiff moved for the Court to issue summons to Dr. Geoffrey Kibii and Dr. Chelagat Saina who also filed a second medical examination report to attend court and be cross-examined on their reports. On 05/11/2024 both doctors attended court. Dr. Geoffrey Kibii testified that he examined the Defendant on 06/06/2024 and prepared the report dated the same date. His examination found that the Defendant had psychotic symptoms and dementia, delusions and paranoia. He produced the medical report in evidence.

6. On cross-examination he stated that he had a masters degree in medical education and was then studying for a Doctor of Philosophy (PhD) in the same subject. He conducted tests on the patient and found that he had manic symptoms which were long-term, could not remember everything all the time, had a mental ability degradation, and was not able to coherently manage his acts. He could not remember continuously current and past events. He had memory lapses. He added that dementia affects short-term memory and when such a patient has depressive conditions he would lose memory completely at that moment. He concluded that such a patient could not be able to defend his interests in his property whether in the current suit or at all. He stated in re-examination that the Defendant could not therefore give evidence coherently since the condition he suffered from compromised his ability to do so or testify.

7. On her part, Dr. Chelagat Saina testified that she was a consultant psychologist. She examined the Defendant on 12/06/2024 and found that he suffered from dementia. Further, he had loss or memory and depression which often leads to low moods, hopeless and inability to express his emotions and anxiety symptoms. By the time she examined him he was 93 years old. She explained further that dementia affects memory. In the condition, one becomes forgetful, very poor in decision-making, reasoning or judgment-making, including decisions about his family or himself. The doctor testified that for that reason the Defendant would have a challenge in protecting his interests. She concluded that the patient would need the assistance of his family in decision-making. She too produced the Report in evidence.

8. On cross-examination the doctor stated that she was not a medical doctor but she is qualified to examine such patients. It was not the first case of the nature that she dealt with. She stated that she conducted an examination on the patient and put the results in the report, although she did not attach the actual results, which to her was unnecessary. She testified that such tests could be done in a government hospital facility such as the Moi Teaching and Referral Hospital, Eldoret where she worked.

Issue, Analysis And Determination

9. I have considered the Application, the law and the evidence of the doctors in relation to it. The Applicant prayed that he be appointed as Guardian Ad Litem in this matter for his father whom he

contended was old and unable to manage his affairs for reason of mental infirmity due to that old age. He stated that his father was 92 years old. He annexed the Defendant's identity Card as DKS 2. This Court has perused a copy of the identity card, whose No. is 5724519 bearing the name Michael Bett Siror. It indicates that the bearer was born on 01/01/1934 in Baringo Central. A simple calculation of the age of the bearer is 92 years. This corresponds with the age given by the Applicant as that of his father, the Defendant. The question that remains is whether the defendant is of such a state of mind that a Guardian ad Litem ought to be appointed on his behalf.

10. Order 32 Rules 3 and 4 of the *Civil Procedure Rules* which the applicant cited would be irrelevant if read in isolation since the Defendant herein is an adult, not a minor. They relate to the procedure to be followed in suits instituted by next friends or Guardians ad Litem on behalf of minors as either plaintiffs or defendants. However, Order 32 Rule 15 qualifies them to apply to situations which where persons are adjudged to be of unsound mind. It 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 interest when suing or being sued."

11. Thus, they apply to persons whom the Court adjudges to be of unsound mind or even when they are not found to be of sound mind, they are of such disposition that they will be incapable of protecting their interests.

12. The provision does not state clearly how the Court should go about making the finding. But a proper interpretation renders it that there have to be two stages of this process, one being a judicial inquiry and the next one, a medical examination to confirm that indeed the person is incapable of protecting his interests or is of unsound mind.

13. I am alive to the fact that before the instant application was made, the Defendant was not presented before me to make the inquiry as to the soundness or otherwise of his mind. But one fact is clear to me, that the age of the Defendant is so advanced that this Court is prepared, under Section 60 (1) (m) of the *Evidence Act* to take the ordinary course of nature regarding the deterioration of the mental abilities of old people of the age such as that of the Defendant to find that there is no need for a judicial inquiry as to his mental state. In any event, the Plaintiff only raised the issue that the doctors who examined the Defendant had not placed sufficient material before the court regarding the mental capacity of the individual and only wanted to cross-examine them to test the veracity of the reports. She was given the opportunity and the cross-examination brought about the evidence summarized above. With such finding, this Court proceeds to determine whether indeed the evidence by the doctors support a finding that the defendant is incapable of protecting his interests.

14. Both doctors who testified in support of the Application gave evidence that the Defendant is of old age and has reached a stage where he has dementia. They both agreed that such a condition diminishes one's ability to use his memory and therefore often does not remember things consistently or at all at times. Further, Dr. Kibii said the patient suffered depression. Dr. Saina added that the Defendant suffered low moods, hopelessness and poor judgment. They stated that in the circumstances the Defendant cannot protect his interests in the suit and requires assistance of a member of the family as Guardian ad litem.

15. This Court had occasion to listen to the arguments by learned counsel for the Plaintiff who insisted that the Defendant was capable of giving evidence and had no need of a guardian ad litem. It is a sad position taken by the Plaintiff. I wonder whether she would love to be treated the same way when, if God permits, she reaches the same age. It reminds me of this party who, last year but one in July or

thereabouts, upon the adverse party applied for an order to give evidence de bene esse in their matter because he was old and sickly and wished to testify before anything would happen, insisted that the Court does not grant the orders. He contended that the sickly old man was not sick but pretending so that he testifies. This Court analyzed the condition of the old sickly witness and the medical evidence and granted the orders. It set a hearing date two weeks away. Sadly, before the two weeks would lapse, the party who insisted that the other does not give evidence de bene esse died, leaving the 'pretender'. The Plaintiff wants to act like some police who are often trigger-happy but when their time to leave this world and be ready for judgment day comes they wail like children in travail but it is too little too late. She wants to keep an old man of 92 years in the dock and shoot questions to his in his 'helpless' mental state and be happy to have won the suit, if she proves it to the required standard. This Court being one of justice shall balance the interest of all, including ensuring that if the Defendant is unable to protect his interests, one who is able to do so is brought in: no party to take advantage of the other. In life, tables can turn. Parties and all and sundry are reminded not to be in haste to be happy about one's misfortune.

16. That said, the upshot is that the Application dated, 09/08/2024 is allowed, with costs to the Applicant. The Defendant is given 10 days to amend the Defence to reflect the orders granted herein and serve. The suit shall be mentioned on 09/12/2024 to confirm compliance.

17. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM THIS 28TH DAY OF NOVEMBER, 2024.

HON. DR.IUR F. NYAGAKA,

JUDGE, ELC KITALE

In the presence of:

Brian Kipruto Advocate for the Plaintiff

Momanyi Advocate for the Defendant