Kiptoo (Suing as the Guardian ad litem Kiptoo Talam) v Talam & 3 others (Environment & Land Case 52 of 2022) [2023] KEELC 874 (KLR) (14 February 2023) (Ruling)

Neutral citation: [2023] KEELC 874 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ENVIRONMENT & LAND CASE 52 OF 2022

L WAITHAKA, J

FEBRUARY 14, 2023

BETWEEN

AMBROSE KIPKOSGEI KIPTOO (SUING AS THE GUARDIAN AD LITEM KIPTOO TALAM) ..... PLAINTIFF

AND

BENJAMIN KIPLAGAT TALAM ..... 1ST DEFENDANT

JOSEPH KIPRONO KIPTOO ..... 2ND DEFENDANT

LAND REGISTRAR, ELGEYO MARAKWET ..... 3RD DEFENDANT

COUNTY SURVEYOR ELGEYO MARAKWET ..... 4TH DEFENDANT

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 10th May, 2022 and the Notice of Motion dated 10th February, 2022.

2. Through the aforementioned notice of preliminary objection, the 1st and 2nd defendant seek to strike out this suit in limine on the grounds that the plaintiff lacks locus standi to file and prosecute it; that the suit is frivolous, vexatious, incurably defective and an abuse of the court process.

3. Vide the Notice of Motion under reference, Ambrose Kipkosgei Kiptoo, hereinafter applicant, seeks to be appointed as the guardian ad litem for the plaintiff. The application is brought under Section 13 and 14 of the *Environment and Land Court Act*; Order 32 Rules 4, 12 and 15 of the *Civil Procedure Rules* and Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*.

4. The notice of preliminary objection and the application were heard orally on 17th October, 2022.

5. Counsel for the applicant relied on the grounds on the face of the application, the affidavit sworn in support of the application and the further affidavit sworn by the applicant on 26th September, 2022.

He submitted that no one should be denied the opportunity to bring a suit and that courts should not dwell on procedural technicalities.

6. Counsel for the 1st and the 2nd defendants relied on the notice of preliminary objection and the averments contained in paragraph 4 of the replying affidavit sworn in response to the application. He stated that the applicant is not a son of Kiptoo Tallam and argued that the applicant wants to be appointed as a guardian ad litem to secure his own interest. He further argued that the applicant is misleading the court.

7. In a rejoinder, counsel for the applicant made reference to the replying affidavit of the respondents where the respondents have deponed that the plaintiff has three sons claiming that the applicant is the third son of the plaintiff. He urged the court to ignore the respondents' contention that the applicant is not a son of the plaintiff as parties are bound by their pleadings.

Analysis and determination

8. It is not in dispute that as at 10th February, 2022 when the applicant instituted this suit he had not been appointed as the guardian of his father, Kiptoo Talam.

9. Noting that the suit is expressed to be brought by the applicant suing as the guardian ad litem of Kiptoo Talam, a question of both fact and law arises from that averment to wit whether without having been appointed as a guardian ad litem of his father, the applicant had locus standi to institute the instant suit.

10. My view on that issue is that the applicant needed to move the court for appointment as the guardian ad litem of his father before filing the suit. Without such appointment, the applicant is incapable of being described as the guardian ad litem of his father. At the time of filing the suit, the applicant was merely a prospective guardian ad litem of his father.

11. Having instituted the suit and sworn the affidavit in verification of the averments in the suit in the capacity of his father's guardian ad litem when in fact he was not, I am of the considered view that the defect in the pleadings is incapable of being cured by the proceedings seeking to appoint him as the guardian ad litem of his father. His appointment can only be effective from the time of his appointment and not before.

12. The action of the applicant of filing the suit first and then seeking to be given power to sue on behalf of his father is tantamount to putting the cart before the horse. Clearly, the applicant had no locus standi to institute the suit as at the time he instituted it.

13. Even assuming that the defect in the pleadings is curable through the application by the applicant seeking to be appointed as his father's guardian ad litem, the suit would also fail on the ground that the applicant has not met the threshold for being appointed a guardian ad litem. The allegation that the applicant's father is incapable of representing himself is incapable of being confirmed or authenticated as the applicant has not attached any medical report capable of proving that his father is incapable of representing himself. The letter attached to the applicant's supporting affidavit is not a medical report. Moreover, the affidavit evidence annexed to the affidavits show that the applicant's father participated in arbitration proceedings concerning the subject matter of the suit not too long before the institution of the suit.

14. In arriving at the above decision, I have been persuaded by the decision in the case of *Peninah Sanganyi v. Ram Hospital & 2 others* (2010) eKLR where it was observed:-

    a. "If the plaintiff is now of unsound mind as was orally alleged by Mr. Nyasimi, before any person can act as a next friend for her, he has to file the appropriate application in terms of order

XXXI as aforesaid. A person of sound mind cannot be represented by a next friend without any leave of the court. The verifying affidavit that was sworn by Peter Sanganyi is therefore bad in law. The entire suit is void ab initio and is therefore unsustainable. The consent document that was filed together with the plaint cannot assist the plaintiff at all. If the plaintiff was a minor the said consent would have been appropriate, see order XXXI rule 1 (2) of the Civil Procedure Rules.

b. I am aware that in *D.T. Dobie & Company (kenya) Ltd. –vs- Muchina* [1982] KLR 1, it was held that a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as it can be injected with life by amendment, it should not be struck out. These were the views of Madan JA.

c. I have anxiously considered whether an amendment to the plaint can cure the defect in this suit but I have come to the conclusion that it cannot. A plaint has to be verified by an affidavit but the latter cannot be amended.

d. It is regrettable that I have to strike out the suit with costs to the defendants which I hereby do."

15. I am also persuaded by the decision in the case of *Grace Mwakiria Mugambi vs. Philip Kimani* (2018) eKLR where it was stated:-

i. "I think given its ramifications, this Court ought first to ask itself whether the Plaintiff has the requisite standing to bring this suit. I say so because if a party is found to have no locus standi, it would mean that he/she cannot be heard even on whether or not he has a case worth listening to. In other words, if this Court were to find that the Plaintiff has no locus standi, then the Plaintiff cannot be heard and that point alone may dispose of the suit....."

16. The upshot of the foregoing is that the notice of preliminary objection dated 10th October, 2022 has merit and is upheld. Consequently, I strike out the suit herein with costs to the defendants.

17. Orders accordingly.

RULING READ, DELIVERED, DATED AND SIGNED AT ITEN THIS 14TH DAY OF FEBRUARY, 2023

L. N. WAITHAKA

JUDGE

In the presence of:-

Mr. Keter holding brief for Dr. Chebii for plaintiff/applicant

Mr. Okara for defendants/respondents

N/A for the 3rd and 4th defendants

Christine – Court Assistant

COURT

Ruling delivered virtually.

L. N. WAITHAKA

JUDGE

14.2.2023