



**In re SMK (Miscellaneous Application 21 of 2022)  
[2023] KEHC 3734 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3734 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
MISCELLANEOUS APPLICATION 21 OF 2022  
FN MUCHEMI, J  
APRIL 27, 2023  
IN THE MATTER OF THE CIVIL PROCEDURE  
ACT, CAP 21 AND THE CIVIL PROCEDURE RULES  
AND  
IN THE MATTER OF AN APPLICATION FOR AN  
APPOINTMENT OF GUARDIAN AD LITEM FOR SMK**

**IN THE MATTER OF**

**SKW ..... APPLICANT**

**JUDGMENT**

1. This petition for determination dated October 7, 2022 and is brought under Order 32 Rules 3(2) and 15, Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#) and Section 26(1) of the [Mental Health Act](#) seeking for orders to appoint the plaintiff as the legal Guardian ad Litem of SMK to enable him file a suit on his behalf against one Robert Chombe Jelino for general and specific damages pursuant to Order 32 Rule 1 of the Civil Procedure Rules.
2. The plaintiff is an adult of sound mind and the father of the subject SMK. He states that the subject was involved in a road traffic accident on October 9, 2019 involving motor vehicle registration number xxxx. As a result of the accident, the subject sustained injuries on his left leg and head. The plaintiff contends that from the history in the medical report, the subject still suffers from mental incapacity as he is disoriented in time, place and person. He therefore contends that the subject is unlikely to properly represent himself in a suit or properly protect his interests in a suit.
3. It is argued that as a result of the subject's mental incapacitation, the subject is not capable of instituting a suit on his own against the driver and owners of motor vehicle registration number xxxx. Further, the applicant states that his son is unable to perform normal activities due to the injuries he sustained from the said accident and as a result of his illness, he is fully dependent on him and the rest of his immediate family for upkeep.



4. The plaintiff further states that his interest in the intended suit is not adverse to that of his son and he is therefore fit to be appointed as his guardian particularly for the purpose of the intended suit.

### **The Law**

5. Order 32 Rule 3(2) of the Civil Procedure Rules, provides:-

'An order for the appointment of guardian ad litem may be obtained upon application in the name and on behalf of the minor or by the Plaintiff.'

6. Order 32 Rule 15 of the Civil Procedure Rules provides:-

'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 reasons of unsoundness of mind or mental infirmity to be incapable of protecting their interests when suing or being sued.'

7. Therefore one or both of the requirements must be satisfied by the applicant before the court:-

- a. The plaintiff has been adjudged to be of unsound mind; or
- b. The court upon enquiry has found the plaintiff to be incapable of protecting his own interests due to unsoundness of mind or mental infirmity.

8. The procedure for one to be adjudged of unsound mind is contained in the *Mental Health Act*, Cap 248 Laws of Kenya. Section 28(1) of the Act requires that a person seeking to manage the affairs of the person suffering from mental disability must file a petition seeking the requisite orders. In the instant case, no such petition has been filed under the *Mental Health Act* and there is no evidence that the subject has been adjudged as mentally unsound by any court in the Republic.

9. Having not been adjudged as mentally unsound by any court of law, pursuant to Order 32 Rule 15, the court would have had to conduct an enquiry and found that the subject is incapable of protecting his own interests due to unsoundness of mind and mental infirmity.

10. Mativo J (as he then was) laid out an extensive procedure of what is required in such an inquiry in the decision of *MMM vs AMK [2016] eKLR* as follows:-

That procedure involves a judicial inquiry which normally consist normally of two parts: (1) questioning the lunatic (or the person in question) by the Judge himself in open court, or in chambers, in order to see whether he is really a lunatic and of unsound mind (or unfit to protect his interests) and (2) as the Court is generally presided over by a layman, to send the alleged lunatic to a doctor for report about his mental condition after keeping him under observation for some days. When this elementary precaution of a judicial inquiry prescribed by law is not observed, I am afraid that the laws of this country will not allow a man to be declared a lunatic and a guardian appointed for him, on such basis.

11. The court further relied on the case of *Duvvuri Rami Reddi vs Duvvudu Papi Reddi & Others* where the court after evaluating authorities came up with the following principles:-

- a. Order 32 Rule 15 places persons of unsound mind or persons so adjudged in the same position as minors for purposes of Rules 1 to 14.
- b. Order 32 Rule 15 applies not only to a person adjudged to be of unsound mind, but also to a person of weak mind.



- c. Where it is alleged that a party to a suit is of unsound mind and the other party denies it the court must hold a judicial inquiry and come to a definite conclusion as to whether by reason of the unsoundness of mind or mental infirmity, he is incapable of protecting his interests in the suit.
  - d. Mental infirmity may even be due to physical defects, if it renders him incapable of receiving any communication or communicating his wishes or thoughts to others.
  - e. Whether a person is of unsound mind or mentally infirm for the purpose of the rule and the event of the infirmity has to be found by the Court on inquiry.
  - f. Where the question of unsoundness of mind arises not only under Order XXXII Rule 15 of the Civil Procedure Code but is also one of the issues in the suit, the Court has ample jurisdiction to enquire into that question, and for that purpose seek medical opinion.
  - g. The enquiry should consist not only of the examination of the witnesses produced by either party, but also of the examination of the alleged lunatic by the judge, either in open court or chambers, and as Courts are generally presided over by lay men, as a matter of precaution, the evidence of a medical expert should be taken.
  - h. Of course, the opinion of a doctor as is the opinion of any other expert under the *Evidence Act*, is only a relevant piece of evidence.
  - i. The Court may also compel the attendance of the alleged person before it, and to submit himself for medical examination. If the alleged person is in custody, the Court may direct the next friend or any other person having custody to produce him before the medical expert for examination.
  - j. Where the precaution of judiciary enquiry is not observed, the person cannot be declared lunatic, and a guardian cannot be appointed for him.
  - k. When a person is adjudged as being of a lunatic or unsound mind irregularly and improperly; and notice was not served on him or a guardian alone was allowed to appear and defend the suit and decree was passed owing to the guardian not putting up a proper defence, the alleged lunatic can treat the decree against him as an ex parte decree and have it set aside under the provisions of the Civil Procedure Rules.
12. Upon conducting an inquiry during the hearing of this petition, the court found the subject as a young person who could not manage himself hygienically, physically or mentally. He lacks the mental and physical capacity to conduct his own affairs and depended on relatives who accompanied him to court. They had to wake him up from his seat and push him to the front for the court to talk to him. He was unaware of his surroundings and looked almost helpless without his relatives. The court concluded that the subject lacks the physical and mental capacity to manage himself or his own affairs.
13. A medical report by Dr FW Muleshe a consultant General Surgeon was produced dated 3<sup>rd</sup> February 2022 which stated that upon examination, he found that the subject suffered from confusion of mind, he was disorientated in time, place and person due to head injuries he suffered from a road traffic accident on 9<sup>th</sup> October 2019.
14. From the inquiry by the court and the examination and interview by Dr Muleshe, I am satisfied that the subject cannot manage his own affairs. He is in need of a legal guardian to institute and prosecute a case for damages so that he can acquire some financial resource to be administered by the petitioner to enable him live a decent life. From the supporting affidavit of the petitioner, it is clear that the subject



suffered very serious injuries which affected physical and mental health. His doctor supports these contentions in his report. The applicant being the father of the subject is best placed to take care of the subject and to manage his affairs including filing of a civil suit.

15. After considering the foregoing, I am of the considered view that the petitioner has satisfied the requirements of the law of being appointed guardian to his son SMK.
16. I find this petition successful and I hereby do appoint the petitioner the legal guardian ad litem of SMK to conduct Nyeri CMCC No 21 of 2022 as the plaintiff.
17. There will be no order as to costs.
18. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 27<sup>TH</sup> DAY OF APRIL, 2023.**

**F. MUCHEMI**

**JUDGE**

**JUDGEMENT DELIVERED THROUGH VIDEOLINK THIS 27<sup>TH</sup> DAY OF APRIL, 2023**

