REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISC CIVIL APP NO. E 629 OF 2020 (OS)

CTK (on behalf of AAO).....PLAINTIFF/APPLICANT

Versus

JO.....DEFENDANT/RESPONDENT

JUDGMENT

Introduction

1. The factual matrix which triggered these proceedings is essentially uncontroverted or common ground. It is common ground that the applicant AAO and the Respondent JO solemnized their marriage at the [Particulars withheld] Catholic Church, Nairobi on the **10th** October 1987. The marriage was blessed with **5** issues. The Respondent petitioned for Divorce in Nairobi CMCC Divorce Cause No. **327** of 2008. On **4th** September 2009 the court dissolved the marriage and issued a *decree nisi* which was made absolute on **4th** December 2009 and a *decree absolute* issued.

2. AAO filed HCCC No**. 21** of 2009 (OS) seeking distribution of the matrimonial property. The parties signed a Deed of Settlement dated **5th** August 2009 agreeing on: - (a) maintenance and custody of the children; (b) the applicant's and the Children's monthly maintenance; and (c) distribution of the matrimonial assets. A consent was recorded in the said case on **17th** September 2009 resolving the said case. There is no contest that the parties were also before the Children's Court in Children's Case No. **445** of 2010.

3. The point of departure is that the applicant states that at all material times relevant to all the cases, she was mentally unsound and lacked the capacity to conduct the said proceedings or instruct an advocate or record the aforesaid consent. As a consequence, through her next of friend Mr. CTK she filed the instant proceedings.

The Originating Summons

4. Vide an Originating Summons dated **26th** February 2020, **CTK,** (the applicant) seeks the following orders: -

> *a. A declaration that the applicant was suffering from a disease of the mind which limited her faculties and could not have been in a position to litigate in her personal capacity.*
>
> *b. **That** all the consent orders entered into between herself and the Respondent in all the suits be set aside, and or vacated or in the alternative be declared null and void.*
>
> *c. **That** the defendants bear the costs of this suit.*

5. The nub of the applicant's case is that the Respondent unlawfully and unfairly dispossessed AAO all her property rights in numerous assets through numerous suits. He argues that suits were funded by the Respondent and that AAO was misled and taken advantage of during her most vulnerable times as a result she executed consents whose effects have left her with nothing. He argues that the law protects mentally unsound persons, and, it is in the interests of justice that the orders sought be granted. The grounds are explicated in his supporting affidavit and the annexed medical reports.

6. The applicant invites this court to determine the following questions: -

> *a. Whether the applicant has ever suffered from infirmity of the mind and or is still suffering from the same disease?*
>
> *b. How long has the disease manifested itself and whether she was fully treated, resulting in her being in full control of her faculties at all material times relevant during the litigation or is the disease a manageable condition that the applicant has to live with.*
>
> *c. Pursuant to the numerous specialists' reports and medical reports, was she a person described by Order **32** of the Civil Procedure Rules and therefore a non-litigant in her personal capacity as outlined by the rules.*
>
> *d. Can consent orders arising from the applicant litigating in her personal capacity during her infirmity of the mind be set aside, varied, suspended and or be vacated upon confirmation of her mental status.*

e. Is it lawful for a party who is aware of a litigant's mental condition to hire a lawyer for the litigant, meet costs of the suit, enter into a consent and rely on the same consent to disadvantage the litigant?

*f. Whether the applicant has met the conditions set out in order **32** to be declared a person who can sue through a next of friend.*

g. A declaration be made that the applicant as she was and is not in a position to litigate on her own name.

h. Whether the litigation and the consequent orders entered into by the litigants are in conformity with the law.

i. Who should meet the costs of this suit?

The Respondent's Replying affidavit

7. The Respondent swore the Replying Affidavit dated **23rd** November 2020. He deposed that their marriage was dissolved on **4th** September 2009 and upon the dissolution of the marriage, the parties settled the matrimonial property dispute and a consent order was recorded on **1st** October 2009. He averred that he fully performed his obligations under the said consent. Further, her admission to hospital on **28th** April 2010 was long after the conclusion of the divorce case, and, that, there is nothing in Mr. CTK's affidavit to show that her mental health was conclusively determined.

8. He deposed the instant application is fatally defective because she has never been declared mentally unsound by a competent authority. Further, that the application is defective for want of proper procedure. Lastly, that the application is based on generalities.

Applicant's Replying Affidavit

9. Mr. CTK swore the affidavit dated **15th** January 2021 essentially reiterating his earlier affidavit. He deposed that the Respondent took advantage of the applicant's condition; that she never instructed counsel to represent her nor did she pay any advocate to represent her; and, that all the costs were paid by the applicant. He deposed that the applicant's mental incapacity is uncontested.

Applicant's Advocates submissions

10. The applicant's counsel relied on *MMM v AMK*[1] in which the court cited *Duvvuri Rami Reddi v Duvvudu Papi Reddi And Ors*[2] which laid down the applicable principles in cases of this nature. I had the benefit of determining the said case. I will say more about it later in this determination. The applicant's counsel argued that the law governing management of affairs of a mentally infirm person is enshrined in section **26** of the Mental Health Act.[3]

11. Additionally, counsel cited *Re estate of CMW (A person on unsound mind)**[4]*** in which the court held that a manager appointed under the Mental Health Act is deemed to be a trustee of the subject as provided under section **27 (4)** of the Act. He argued that AAO should be adjudged to be mentally infirm now and at the proceedings in divorce cause number **327** of 2008, HCCC No. **21** of 2009 (OS) and Children's Case No. **445** of 2010 and any agreement, settlement of judgment entered into at the said time is null and void. He urged the court to appoint CTK as her guardian.

The Respondent's Advocates submissions

12. Mr. Mungla, the Respondent's counsel submitted that the application is fatally defective, incompetent and beyond redemption even under Article **159 (d)** of the Constitution. He submitted that the application is a monstrous mix in that it is both a miscellaneous application and an Originating Summons. He argued that an Originating Summons is a substantive mode of initiating proceedings under Order **37** Rules **1** to **12** of the Civil Procedure Rules, 2010 and that the registration of such suits is regulated under rule **15.**

13. He submitted that the instant application does not meet the requirements of the said provisions nor does it fall under the purview of Order **37** Rules **1** to **12.** He submitted that the instant application falls under the purview of the Mental Health Act which defines a person suffering from mental disorder to mean a person who has been found to be suffering under the act and includes a person diagnosed as a psychopathic person with mental illness and a person suffering from mental impairment due to alcohol or substance abuse. Additionally, he cited section **28(1)** of the Mental Health Act which provides that the court may, upon application made to it by a Petition concerning any mater connected with a person suffering from mental disorder or with his estate may make such order in the circumstances of the case as the court may think fit.

14. Mr. Mungla submitted that under the above provisions, a person can only be found to be suffering from a mental disorder under the Act after treatment in a mental hospital established under the Act by the Director of Mental Health and the court can only be moved or approached by way of a Petition. He argued that an Originating Summons or a miscellaneous application such as the instant application is not the substantive procedure for invoking this courts jurisdiction under the Act. He submitted that failure to approach the court through the correct procedure renders the application defective. He relied on *Speaket of the National Assembly v Karume*[5] for the proposition that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

15. Mr. Mungla submitted that no current medical reports were availed and those relied upon were prepared **11** years ago when she suffered from Bipolar disorder, which from the medical reports is manageable. He argued that she is not disputing that she was paid **Kshs.40,000,000/=** as per the consent and that she continued receiving **Kshs. 40,000,000/=** monthly up keep. He relied on *Moitra Law of Estoppel and Res judicata*[6] for the proposition that where a person knowingly accepts the benefits of any order, he is estopped from

denying the validity of the binding effect of the order. He submitted that AAO under guidance of her advocates knowingly and freely negotiated the terms of a deed of settlement pursuant to which a consent was recorded in court.

Determination

16. The applicant in the Originating Summons prays for two substantive prayers, namely, *a declaration that the applicant was suffering from a disease of the mind which limited her faculties and could not have been in a position to litigate in her personal capacity; and, an order that all the consent orders entered into between herself and the Respondent in all the suits be set aside, and or vacated or in the alternative be declared null and void.*

17. At the earliest opportunity, I must mention that the applicant's counsel in his submissions at paragraph **34** urges this court to adjudge he applicant to be of unsound mind and declare that any agreement, settlement or judgment entered into at the material time is null and void; and, that CTK be appointed as her guardian. This last prayer was introduced in the advocate's submissions. It does not appear anywhere in the Originating Summons.

18. The core issue here is to understand the function of and purpose of good pleadings. Issues for determination in civil cases should be raised in the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage, to treat un pleaded issues as having been fully investigated. Order **15** Rule **2** of the Civil Procedure Rules, 2010 provides that the court may frame the issues from all or any of the following materials—

a. allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;

b. allegations made in the pleading or in answers to interrogatories delivered in the suit;

c. the contents of documents produced by either party.

19. Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case.[7] There is no direct prayer in the pleadings seeking the appointment of the said CTK to be appointed as the applicant's guardian. The said prayer cannot be introduced by way of submissions.

20. Even if such a prayer had been properly sought in the instant Originating Summons, the said prayer, and indeed all the prayers sought would still collapse, not on one but several fronts as demonstrated in the succeeding paragraphs.

21. Despite the applicant's counsel citing *MMM v AMK*[8] which I had the benefit of deciding, he appears not to have understood the reasoning in the said case and the *ratio decidi* for the decision. In the said case after carefully evaluating the law and authorities, I discussed the proper procedure in applications of this nature. I referred to Section **2** of the Mental Health Act which defines "person suffering from mental disorder" as *follows " means a person who has been found to be so suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse."*

22. I also referred to Part **XII** of the Act which provides for judicial power over persons and estates of persons suffering from mental disorder. I quoted in extenso the provisions of section **26** of the Act and addressed the question whether the proceedings in the said case which is similar to the instant application ought to have been instituted under the Mental Health Act or the Civil Procedure Rules. I recalled the definition in Section **26** of the Mental Health Act which defines a person suffering from mental disorder as *a person who has been found to be so suffering under this Act* and observed that the subject in the said case, just like in the instant application has **not** been found to be suffering from a mental disorder under the said act. On this ground alone I dismissed the said case.

23. The said AAO has not been adjudged to be of unsound mind to fall under the provisions of the Mental Health Act. Her condition falls under the provisions of Order **32** Rule **15** discussed below which covers *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.*

24. In the decision cited by the applicant's counsel, I culled five principles from the above provision which are designed to protect people who lack capacity to make particular decisions, but also to maximise their ability to make decisions, or to participate in decision-making, as far as they are able to do so. I listed the said principles as follows: -

a. A person must be assumed to have capacity unless it is established that he/she lacks capacity.

b. A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success.

c. A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.

d. An act done, or decision made, under the above rule for or on behalf of a person who lacks capacity must be done, or made, in his/ her best interests.

e. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

25. The procedure provided under Order **32** Rule **15** of the Civil Procedure Rules, 2010 has not been followed. In the cited case, I referred to the Indian case of *Balakrishnan v. Balachandran*[9] in which the court interpreting similar provisions held that the said rule[10] is intended to ensure that no man is adjudged a lunatic without proper enquiry, and that the court should hold a judicial inquiry and it may seek the assistance of medical experts. The court was emphatic that the only safe course to adopt is to follow strictly the procedure prescribed in Order **32** Rule **15**. It held that *if the precaution of a judicial inquiry is not observed, a man cannot be declared to be a lunatic (or unfit to protect his interests), and a guardian appointed for him on that basis.* In the instant case, no inquiry has been applied for or held as contemplated under the above provision. The applicant only made generalized averments and exhibited **11**-year-old medical reports.

26. In arriving at the decision in the cited case, referring to earlier decisions in other jurisdictions, I observed that the procedure contemplated under the above provision involves a judicial inquiry which consists 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 only by a layman, to send the alleged lunatic to a doctor for a 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.

27. Order **32** Rule **15** contemplates a judicial inquiry. The words used in the rule are "*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"* This is an inquiry prescribed by the law under the said rule as correctly interpreted in the above decision.

28. I also cited *Ramanathan Chettiar v Somasundararn*[11] where an application for the appointment of a *guardian ad litem* was filed on the ground that the defendant became mentally infirm subsequent to the institution of the suit. The court, instead of holding a regular judicial enquiry contemplated under Rule **15**, thought that it was sufficient to rely on the previous history of the litigation, and on the opinion it formed after looking at the defendant, and eliciting answers to some questions. Pandrang Rao, J., held that there was no enquiry of the kind contemplated by law, and that the order must be deemed to be one in the irregular exercise of his jurisdiction. The learned Judge held that in the absence of a record of the questions and answers, it was impossible for the court of revision to decide whether the conclusion arrived at on that particular aspect was justifiable and that the enquiry was un-judicial and unsatisfactory. I respectfully agree with the said decision and decline to follow the route suggested by the applicant.

29. Decided cases are in agreement regarding the necessary details of conducting the inquiry which must be followed in the judicial inquiry. The questions and answers in the inquiry must be recorded and must form part of the record to satisfy the requirement that a proper inquiry was conducted as contemplated under the above rule.

30. Under Order **32** Rule **15**, the court must conduct a judicial inquiry and form an opinion that the subject is incapable of protecting his/her own interests, a position reiterated in *Duvvuri Rami Reddi v Duvvudu Papi Reddi And Ors.*[12] where the court after evaluating the authorities distilled 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.*
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> *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.*
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> *d. Mental infirmity may even be due to physical defects, if it renders him incapable of receiving any communication, or of 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 extent 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** 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.*
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> *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 medical expert should be taken.*
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> *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 judicial 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 irregularity and improperly, and notice was not served on him, and 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.

31. It is admitted that the parties recorded a consent order in court. There is no dispute that the applicant paid the required amount under the consent. The consent order still stands. This court cannot be used to overturn a judgment issued by a court of competent jurisdiction. Above all, a consent order can only be challenged on limited grounds. This can only be done by the issuing court, not by way of an Originating Summons as the applicant purports to do. The instant case is a clever attempt to evade the wrath and constraint created by limited grounds upon which a consent order can be assaulted.

32. What is before me is essentially an attack on the consent order. The applicant is estopped from challenging the consent order through the back door by way of these proceedings. Talking about estoppel, I find it prudent to state that there are two species of estoppel *per rem judicatam* namely: - (i) cause of action estoppel; and (ii) issue estoppel. The particular type of estoppel in this case is issue estoppel. The classic modern statement of the nature of issue estoppel is to be found in a passage from the judgment of Diplock LJ (as he then was) in *Mills v Cooper*, approved subsequently by the House of Lords in *DPP vs. Humphreys.* Diplock LJ said: -

"This doctrine [namely of issue estoppel], so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him."

33. This doctrine applies even though the decision on the first occasion, said to give rise to the estoppel, had resulted from a mistaken appreciation of the underlying facts, or from an incorrect view of the underlying law, as is apparent from what Coleridge J said in *R v. Hartington Middle Quarter (Inhabitants)*.

34. Perhaps I should point out that it is not clear why the applicant filed these proceedings in the Commercial Division. The questions raised in the Originating Summons do not disclose a commercial dispute. And in any event, the questions the applicant framed are shallow and framed to attract a direct answer as opposed legal issues. For example, the applicant asks the court whether the applicant has ever suffered from infirmity of the mind and or is still suffering from the same disease. Sincerely, the court can only answer such a question after a hearing not after being presented with **11-year-old** medical reports.

35. The second question is even more interesting. The court is being asked how long has the disease manifested itself and whether she was fully treated, resulting in her being in full control of her faculties at all material times relevant during the litigation or is the disease a manageable condition that the applicant has to live with. These are issues of fact which require oral evidence. The applicant claims to be related to A. A court cannot be invited to answer such a question. If the applicant is a close relative as he claims, then he has the answers. It does not require a judicial inquiry to secure to investigate such an issue. This position applies to the question whether the applicant she falls under Order **32**.

36. The applicant's capacity to sign the consent or hire a lawyer or litigate cannot be determined in the instant proceedings and more so, in the manner in which the proceedings are drawn and presented. Similarly, the question whether the subject litigation and the consequent orders entered are in conformity with the law is a clever invitation to this court to exercise appellate jurisdiction and impugn decision rendered by courts of competent jurisdiction. I decline the invitation to travel that route.

37. Flowing from my analysis of the facts presented in this case, the law and authorities and the conclusions arrives at, it is my finding that the applicant's Originating Summons dated **26th** February 2020 fails both in law and in substance. It is totally unmerited. Accordingly, I dismiss the said Originating Summons with costs to the Respondent.

Orders accordingly

Right of appeal

SIGNED, DELIVERED AND DATED AT NAIROBI THIS 23RD DAY OF MARCH, 2020

John M. Mativo

Judge

Delivered electronically via e-mail

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[1] {2016} e KLR.

[2]AIR 1963 AP 160.

[3] Cap 248, Laws of Kenya.

[4] {2019} e KLR.

[5] {2008} KLR 425.

[6] Chief Justice M. Monir and A.C. Moitra, 4th Edition, Universal Law Publishing.

[7] See *Galaxy Paints Co. Ltd vs. Falcon Guards Ltd* [2000] 2 EA 385 and *Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others* Civil Appeal No. 37 of 2003 [2004] 2 KLR 183.

[8] {2016} e KLR.

[9] (1956) 1 mad lj 459

[10] Order XXXII, Rule 15 C. P. C. of the Indian Civil Procedure Code.

[11] AIR 1941 Mad 505.

[12]AIR 1963 AP 160 .