



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.135 OF 2016

HELLEN MBINYA KING'OLA.....PLAINTIFF

VERSUS

HNO.....1ST DEFENDANT

NAIROBI CITY COUNTY.....2ND DEFENDANT

RULING

(1) Before this Court is the Notice of Motion dated 25th July 2018 by which TOO (the intended Interested Party), seeks the following orders:-

“1. SPENT

2. THAT this Honourable Court be pleased to allow the next friend to act on behalf of the 1st Defendant herein who is mentally incapacitated and defend this suit to its conclusion.

3. THAT the 1st Defendant's next of friend be allowed to defend this suit unconditionally.

4. THAT this Honourable Court be pleased and do grant the 1st Defendants next of friend to file his defence out of the prescribed time.

5. THAT the statement of defence annexed thereto be certified as fully filed subject to directions or orders as to payment of requisite court fees.

6. THAT the costs of this application be provided for.

The application which was premised upon **Order 32 Rules 3(2) and (15) and Order 51** of the **Civil Procedure Act** and all other enabling provisions of the law, was supported by the Affidavit dated 25th July 2018, sworn by **TOO** (the Applicant herein).

(2) In opposition to the application the Plaintiff **HELEN MBINYA KING'OLE** filed the Grounds of Opposition dated 25th October 2018. The Plaintiff also filed a Preliminary Objection dated 21st November 2018, but on 1st April 2019 Counsel for the Plaintiff unconditionally withdrew that Preliminary Objection.

(3) The application was canvassed by way of written submissions. The Applicant filed his written submissions on 17th June 2016, whilst the Plaintiff filed her written submissions on 15th February 2019. On 21st June 2016, counsel for both parties appeared in court in order to highlight their written submissions.

BACKGROUND

(4) On 20th April 2016 the Plaintiff in this matter filed a suit against a Defendant **HNO** vide the Amended Plaint dated 29th April 2016. The suit arose from a transaction between the parties relating to the purchase by the Plaintiff of a property known as **Plot No.A5-209 Kayole** which property belonged to the Defendant. In her suit papers the Plaintiff alleged that despite making payments as agreed the Defendant failed to hand over vacant possession of the suit property. The Plaintiff therefore sought to be refunded the sum of **Kshs.2, 180,000** being

the amount she had paid towards its purchase.

(5) The Applicant in the Notice of Motion dated 27th July 2018, one “TOO” is a brother to the Defendant in the original suit. He seeks to be allowed to come in as a “next friend” in order to defend the suit on behalf of the Defendant, on grounds that the Defendant suffers from mental incapacity and is not in a position to defend the suit himself.

(6) In opposing this application the Plaintiff submits that the same is incompetent, lacks merit in law and has been filed merely to defeat any intended judgment, and that if allowed will cause undue hardship and prejudice to the Plaintiff.

ANALYSIS AND DETERMINATION

(7) The present application has been brought under **Order 32 Rule 3(2)** of the **Civil Procedure Rules, 2010**, which provides that:-

“(2) 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.

(8) The Applicant has annexed to the application various medical reports indicating that the Defendant suffers from and has been on treatment for “psychotic illness.” A letter from the Chief of Kayole Ward dated 13th August 2014 (annexture TOO4(b)) indicates that the Applicant is the “guardian” of the Defendant and is the one managing his affairs.

(9) **Order 32 Rule 15** of the **Civil Procedure Rules 2010** provides as follows:-

“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.”

(10) Therefore in order for the orders being sought in this application to be granted, one of two things must have happened.

(i) The Defendant has been adjudged to be of unsound mind or

(ii) The Court upon enquiry has found the Defendant to be incapable of protecting his own interests due to unsoundness of mind or mental infirmity.

(11) The procedure for one to be adjudged of unsound mind is contained in the **Mental Health Act No.10 of 1989 laws of Kenya**. **Section 28(1)** of that Act requires that a person seeking to manage the affairs of one who is suffering from mental disability must file a petition seeking the requisite orders. In this case no such petition has been filed under the **Mental Health Act** and there is no evidence that the Defendant has been adjudged as mentally unsound by any court in the land.

(12) The next question is whether any enquiry into the mental capacity of the Defendant has been conducted. **Order 32 Rule 15** provides that this must be done before such orders are granted. The reasoning is that no man should be adjudged a lunatic without a proper inquiry. It would be wrong for a court to rely only on reports and letters to declare a person to be of unsound mind, given the far reaching consequences of such a declaration, not to mention the stigma attached.

(13) Having not been adjudged as mentally unsound by any court of law, this application would rest upon **Order 32 Rule 15**. This would cover persons who though not yet adjudged to be mentally unsound are found by the court after an inquiry to be incapable of protecting their own interests when suing or being sued on account of unsoundness of mind.

(14) I would rely on the decision of **Hon Justice John Mativo** as **MMM –Vs- AMK [2016]eKLR**, where in discussing the import of **Order 32 Rule 15** held as follows:-

“Interpreting a similar provision under the Indian Civil Procedure Rules, the court in *Balakrishnan V Balachandran* [2] held that the said rule [22] 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. It was pointed out that the only safe course to adopt is to follow strictly the procedure prescribed in *Order XXXII, Rule 15*. Civil Procedure Code, and that if the precaution of 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. A decree passed or orders issued against a defendant in such a case must be considered to be an ex parte decree, and must be set aside. At Page 461, when discussing the procedure to be followed by the court in an application such as the one before me the learned judge observed as follows:-

“That procedure 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 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.” [emphasis supplied]

To me, the authoritative position stated by the Indian High Court in the above cited case represents the correct

interpretation of Order 32 Rule 15 of the Civil Procedure Rules. The above rule 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 and as correctly interpreted in the above decision. Two stages must be complied with to satisfy the said rule (a) questioning the person by the court and (b) medical evidence. The first part has not been complied with hence no inquiry has been held as provided under the said rule. My answer to issue number three is clear. **Order 32 Rule 15 contemplates an inquiry by the court.**

In yet another Indian case i.e *Ramanathan Chettiar Vs Somasundararn* [23] an application under *Order XXXII, Rule 15* Civil Procedure Rules 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 respect-fully agree with this decision of the learned Judge.

The above authority adds another important necessary detail 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. [emphasis supplied]

Thus guided by the above authorities and the express provisions of Order 32 Rule 15, I find that it is necessary for this court to conduct a judicial inquiry and form an opinion that the person in question is incapable of protecting his/her own interests. This position was reiterated in the case of *Duvvuri Rami Reddi Vs Duvvudu Papi Reddi And Ors* [24] where the court authoritatively stated that after evaluating the authorities, the following principles emerge which I entirely agree with:-

- 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 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 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 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.”

(15) The Hon Judge went on to conclude as follows:-

“.....I find that for the court to find that prima facie the said AMK is incapable of protecting his interests, this

court is required to hold an inquiry as provided under Order 32 Rule 15 of the Civil Procedure Rules 2010 and strictly follow the procedure stipulated in the above authorities, that is examine the said person in court and consider the medical evidence..”

(16) I would have nothing useful to add to this very exhaustive examination of **Order 32 Rule 15** by my learned brother. Finally my finding is that the present application is premature as a grant of the orders being sought would offend the provision of **Order 32 Rule 15**. Accordingly I do dismiss the application dated **27th July 2018**.

(17) In order to meet the ends of justice and in order to enable this court wholly and effectively determine the issues at hand, and in order to comply with **Order 32 Rule 15**, I hereby direct that:-

(a) The said **HNO** be produced in court for purposes of an enquiry into whether due to mental infirmity he is incapable of protecting his interest in this suit.

(b) Each party to meet its own costs for this application.

Dated in Nairobi this 23rd day of September 2019.

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Justice Maureen A. Odero