REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CIVIL APPL. NO. 8 OF 2019

ERIC NAGWAGAMEJA.....APPLICANT

VERSUS

SOLOMON MEJA IRANGI.....1ST RESPONDENT

ZIMBIA CHARLES IDAGIZA.....2ND RESPONDENT

RULING

The applicant filed an application dated 9th April 2019 seeking for orders that the 1st respondent be produced in court for the purposes of inquiry to establish whether by reason of old age and ill health he is incapable of protecting his interests. Further, that the court be pleased to appoint the applicant as the respondent's guardian ad litem.

APPLICANT'S CASE

The applicant filed his supporting affidavit with the application and his submissions on 30th October 2019.

As per the supporting affidavit he deponed that the 1st respondent was incapable of protecting his interests due to ill health and old age and annexed a medical report from Matunda Maternity home dated 6th March 2019. The same was annexed as ENM 1. The 1st respondent sold trees to the 2nd respondent in 2007 and the applicant annexed copies of letters dated 20th March 2018 and 5th September 2007 marked as ENM2 & 3 respectively. The 2nd respondent has taken advantage of the 1st respondent's predicaments and neglected to pay the balance of Kshs. 124,000/-.

He submitted on the raised preliminary objection and was of the position that it does not raise any points of law. That the objection is attempting to discredit the medical report relied upon and further, he cited the case of ***Mukisa Biscuit Manufacturing Company Limited v West End Distributors Ltd (1969) EA 696*** in support of his submission.

The applicant is only seeking for a judicial inquiry to be made, at the determination of which other issues can be addressed. The purpose of the inquiry is to establish whether by reason of absurdness of mind or mental infirmity the applicant is incapable of protecting his interest. The applicant cited the case of ***Miscellaneous Civil Application No. 51 of 2015 M M M v A M K [2016] eKLR*** in support of his submissions.

The 2nd respondent acknowledged being indebted to the 1st respondent who he bought trees from as demonstrated in the letter dated 5th September 2017. The 1st respondent vide a letter dated 20th march 2018 demanded payment of the amount in issue from the 2nd respondent. The claim for indebtedness is therefore not time barred. Every time there is a claim for the indebtedness the time starts running afresh.

The applicant shall be at liberty to move the court appropriately for leave or otherwise upon the court conducting judicial inquiry on the capability of the 1st respondent to protect his interests.

RESPONDENT'S CASE

The respondents did not file any submissions. They filed a Preliminary objection on 14th May 2019.

They opposed the application on the grounds that the alleged report marked ENM 1 was not a qualified report for purposes of assessing the mental capacity of a person and that the report did not contain a medical examination carried out for purposes of establishing the 1st respondent's mental capacity. The report does not reveal the age of the 1st respondent and the author could not be verified.

The cause of action arose in 2007 and therefore it is time barred by dint of *Section 4* of the *Limitation of Actions Act*. The orders sought are not tenable since they have not been filed in a representative capacity and therefore the applicant lacks locus standi to bring the application before the court. The application is self-contradicting as the 1st respondent to whom the applicant seeks to obtain guardian ad litem is a party herein.

ISSUES FOR DETERMINATION

1. Whether the application is defective for the reason that the medical report is not a qualified medical report for purposes of assessing the mental capacity of the first respondent

2. Whether the 1st respondent should be produced in court for purposes of inquiry by the honourable court to establish whether he is incapable of protecting his interests

WHETHER THE APPLICATION IS DEFECTIVE FOR THE REASON THAT THE MEDICAL REPORT IS NOT A QUALIFIED MEDICAL REPORT FOR PURPOSES OF ASSESSING THE MENTAL CAPACITY OF THE FIRST RESPONDENT

The application is brought under *Order 32 Rule 15* of the *Civil Procedure Rules. Order 32 Rule 15* 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 reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued".***

The court in the case of ***M M M v A M K [2016] eKLR*** the court set out the principles for the orders sought herein as follows;

> **I have given the above rule complete system of thought and in my considered opinion and interpretation, five principles outlined below can be discerned from this rule. These principles 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. These are: -**
>
> ***1. A person must be assumed to have capacity unless it is established that he/she lacks capacity.***
>
> ***2. 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.***
>
> ***3. A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.***
>
> ***4. 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.***
>
> ***5. 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.***

The main principle that the respondent objected to was that of establishing the lack of capacity. Annexure EMN1 is alleged to be a medical report but it bears no semblance whatsoever of a medical report. The court further went on to state;

> **"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.**

The upshot of this is that there must be sufficient medical evidence as basis for the court to ask for a judicial inquiry. In the premises, the application can be considered premature.

WHETHER THE 1ST RESPONDENT SHOULD BE PRODUCED IN COURT FOR PURPOSES OF INQUIRY BY THE HONOURABLE COURT TO ESTABLISH WHETHER HE IS INCAPABLE OF PROTECTING HIS INTERESTS

In ***M M M v A M K [supra]*** the court held;

> **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 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 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 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.***

In the premises the evidence of a medical expert is required as basis for having a judicial inquiry. I direct that the 1st respondent be subjected to a proper medical assessment by a medical doctor and the report be filed in court before subjecting him to a judicial inquiry. To ensure the same is complied with, the judicial inquiry should be conditional to a medical examination being conducted and the report filed in court.

Costs be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 29TH DAY OF OCTOBER, 2019.

In the presence of;

Mr. Mibei holding brief for Mr. Kibii for the Applicant

Mr. Omollo for the Respondents absent

Ms Abigael - Court assistant