MMM v AMK (Miscellaneous Civil Application 51 of 2015) [2016] KEHC 4741 (KLR) (13 June 2016) (Ruling)

M M M v A M K [2016] eKLR

Neutral citation: [2016] KEHC 4741 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

MISCELLANEOUS CIVIL APPLICATION 51 OF 2015

JM MATIVO, J

JUNE 13, 2016

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21, LAWS OF KENYA, AND THE CIVIL PROCEDURE RULES

BETWEEN

MMM .... PLAINTIFF

AND

AMK .... DEFENDANT

Applicable procedure and principles when determining the mental capability of a person in protecting their rights

The applicant filed originating summons seeking to be appointed as the defendant's guardian ad litem on grounds that due to old age, ill health and senile dementia, the respondent was incapable of protecting his interests. The court highlighted the applicable procedure and principles when determining the mental capability of a person in protecting their rights.

Reported by Emma Kinya Mwobobia & Ian Kiptoo

Civil Practice and Procedure *- pleadings - instituting a suit - instituting suit under the Mental Health Act – claim that a suit under the Mental Health Act could only be instituted by way of petition and not originating summons - whether the proceedings before the court was incompetent and fatally defective by being filed by way of originating summons - whether proceedings in regards to a person of unsound mind or a mentally infirm person ought to be instituted under the Mental Health Act or the Civil Procedure Rules, 2010 - Civil Procedure Rules, 2010, Order 32 rule 15; Mental Health Act Chapter 248; section 26.*

Statutes *- interpretation of statutes - interpretation of the Civil Procedure Rules in regards to persons of unsound mind - what was the proper procedure for determining that a person was unfit to protect his/her interests under the Civil Procedure Rules - what were the principles governing determination that a person was unfit to protect his/her interests under the Civil Procedure Rules – Civil Practice and Procedure Rules, 2010, Order 32 rule 15.*

Words and Phrases *- dementia - definition of dementia - a condition that affected the mind of aging people and caused them to be confused, to forget things, etc; dementia was an umbrella term for a group of cognitive disorders typically characterized by memory impairment, as well as marked difficulty in the domains of language, motor activity, object recognition, and disturbance of executive function; the ability to plan, organize, and abstract. Generally speaking, dementia was an illness of older adults - Meriam-Webster.*

Brief facts

The applicant filed originating summons seeking to be appointed as the defendant's *guardian ad litem* on grounds that due to old age, ill health and senile *dementia* the respondent was incapable of protecting his interests hence it was necessary to appoint a *guardian ad litem* to manage his affairs. He averred that the respondent, aged 84 years, had been treated in hospital for numerous conditions and was confirmed to be suffering from senile *dementia*.

The applicant's two siblings had given their consent to the applicant being appointed as their father's *guardian ad litem* but their step mother opposed the prayers sought demanding for the applicant to produce the respondent in court for the court to carry out its own independent assessment. She stated that the application was lacking in merit and that the same had been brought in bad faith and that if there was a situation warranting the appointment of a *guardian ad litem,* then as the wife she ranked first in priority.

Issues

i. Whether senile *dementia* was a mental illness under the definition of a mental disorder in the Mental Health Act.

ii. Whether the application was defective for being filed by way of an originating summons as opposed to a petition as provided under the Mental health Act.

iii. Whether proceedings in regards to a person of unsound mind or a mentally infirm person ought to be instituted under the Mental Health Act or the Civil Procedure Rules, 2010.

iv. What was the proper procedure for determining that a person was unfit to protect his/her interests under Order 32 rule 15 under the Civil Procedure Rules, 2010.

v. What were the principles applicable in determining whether a person was unfit to protect his/her interests under Order 32 rule 15 under the Civil Procedure Rules, 2010?

Relevant provisions of the Law

Mental Health Act, Chapter 248

Section 2 - Person suffering from mental disorder

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.

Section 26 - ***Order for custody, management and guardianship***

(1) The court may make orders—

(a) For the management of the estate of any person suffering from mental disorder; and

(b) For the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.

(2) Where there is no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate and guardian of any such person.

(3) Whereupon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.

Civil Procedure Rules, 2010(cap 21 Sub leg)

Order 32 Rule 15

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

Held

1. The definition in section 26 of the Mental Health Act defined a person suffering from mental disorder as a person who had been found to be so suffering under the Act. The Defendant had not been found to be suffering from a mental disorder under the Act but from an illness described as senile dementia. On that ground alone the Court was persuaded that the application before it did not fall under the Mental Health Act.
2. Dementia, also known as senility, was a broad category of brain diseases that caused a long term and often gradual decrease in the ability to think and remember that was great enough to affect a person's daily functioning. Meriam-Webster had defined it as a condition that affected the mind of aging people and caused them to be confused and to forget things.
3. Dementia was an umbrella term for a group of cognitive disorders typically characterized by memory impairment as well as marked difficulty in the domains of language, motor activity, object recognition, and disturbance of executive function – the ability to plan, organize, and abstract. Generally speaking, dementia was an illness of older adults.
4. Concepts in legislation were based on a dichotomy between mental infirmity and mental illness that had changed over time. The change was the result of shifting perceptions about the basis of illness and disease and the causation of mental symptoms. Mental health legislation was aimed as much at social control of feared behaviour as protecting the ill or incompetent. Guardianship legislation offered a more holistic response that better met the patient's needs and could be extended to supplant mental health legislation.
5. The Respondent had not been adjudged to be of unsound mind to fall under the provisions of the Mental Health Act but his condition fell under the provisions of order 32 rule 15 which covered persons who though not so adjudged were 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. Thus, the originating summons before the Court was proper.
6. Order 2 rule 14 provided that no technical objection could be raised to any pleading on grounds of any want of form. Therefore, even if the Court were to be persuaded that the proceedings ought to have been initiated by way of Petition as opposed to Originating Summons, It would be reluctant to dismiss it on a technicality.
7. No suit ought to be summarily dismissed unless it appeared so hopeless that it plainly and obviously disclosed no reasonable cause of action and was so week as to be beyond redemption and incurable by amendment. If a suit showed a mere semblance of a cause of action, provided it could be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.
8. The instant case fell under the provisions of Order 32 rule 15 of the Civil Procedure Rules, 2010. Five principles could be discerned from the rule and they were designed to protect people who lacked capacity to make particular decisions and also to maximize their ability to make decisions or to participate in decision-making as far as possible. They were:-

1. A person would be assumed to have capacity unless it was established that he/she lacked capacity.
2. A person was not to be treated as unable to make a decision unless all practicable steps to help him/her to do so had been taken without success.
3. A person was not to be treated as unable to make a decision merely because he/she made an unwise decision.

4. An act done or decision made, under the above rule for or on behalf of a person who lacked capacity would be done, or made, in his/ her best interests.
5. Before the act was done, or the decision was made, regard was to be had to whether the purpose for which it was needed could be as effectively achieved in a way that was less restrictive of the person's rights and freedom of action.

9. The medical evidence adduced showed that the Respondent was suffering from senile dementia and was incapable of protecting his interests. At the time of giving directions, both parties had agreed that the matter be determined on the basis of the documents filed and by oral submissions by both advocates. The Respondent's wife or her advocate never submitted medical evidence to counter the available medical records. She argued that she has been denied access to her husband, implying that she could not have had him examined. Unfortunately no one had made a formal application before the court asking for court orders either to grant her access or seek the production of the defendant before the court. The proper cause of action would have been for her to move the court by way of a formal application supported by an affidavit so as to give the other party the opportunity to respond and let the application be heard and determined by the court on merits. However, even if both parties had submitted medical evidence confirming their opposing positions or identical positions, it would not have satisfied the requirements of order 32 rule 15 of the Civil Procedure Rules, 2010.

10. The correct interpretation of order 32 rule 15 of the Civil Procedure Rules, 2010 contemplated a judicial inquiry. The words used in the rule were "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". That was an inquiry prescribed by the law under the rule where two stages ought to be complied with to satisfy the rule

1. Questioning the person by the court
2. Medical evidence

The first part had not been complied with hence no inquiry had been held as provided under the rule.

10. Another important and necessary detail which needed to be followed in the judicial inquiry was that the questions and answers in the inquiry were to be recorded and would form part of the record to satisfy the requirement that a proper inquiry was conducted as contemplated under the order 32 rule 15.

11. It was necessary for the Court to conduct a judicial inquiry and form an opinion that the person in question was incapable of protecting his/her own interests. The following principles applied:-

1. Order 32, Rule 15 placed persons of unsound mind or persons so adjudged in the same position as minors for purposes of Rules 1 to 14.
2. Order 32 Rule 15 applied not only to a person adjudged to be of unsound mind, but also to a person of weak mind.
3. Where it was alleged that a party to a suit was of unsound mind, and the other party denied it, the Court would hold a judicial inquiry, and come to a definite conclusion, as to whether by reason of the unsoundness of mind or mental infirmity, he was incapable of protecting his interests in the suit. Mental infirmity would even be due to physical defects, if it rendered him incapable of receiving any communication, or of communicating his wishes or thoughts to others.
4. Whether a person was of unsound mind or mentally infirm for the purpose of the rule and the extent of the infirmity had to be found by the Court on inquiry.
5. Where the question of unsoundness of mind arose not only under order 32, rule 15 of the Civil Procedure Code but was also one of the issues in the suit, the Court had ample jurisdiction to enquire into that question, and for that purpose seek medical opinion.
6. The enquiry would 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 were generally presided over by lay-men, as a matter of precaution, the evidence of medical expert would be taken.

7. Of course, the opinion, of a doctor, as was the opinion of any other expert, under the Evidence Act, was only a relevant piece of evidence.
8. The Court would also compel the attendance of the alleged person before it, and to submit himself for medical examination. If the alleged person was in custody, the Court would direct the next friend or any other person having custody to produce him before the medical expert for examination.
9. Where the precaution of judicial enquiry was not observed, the person could not be declared lunatic, and a guardian could not be appointed for him.
10. When a person was adjudged as being 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 could treat the decree against him as an ex parte decree, and have it set aside under the provisions of the Civil Procedure Rules.

12. Applying the principles to the facts of the instant case, for the court to find that the Respondent was incapable of protecting his interests, the Court was 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 stated authorities; that was to examine the said person in Court and consider the medial evidence. The two fold procedure had not been done, yet it was prescribed under the law. It was necessary to have a full-fledged enquiry, and after the inquiry the Court would then decide whether the Respondent suffered from infirmity of mind, and whether it was of such a character that prevented him from safeguarding his interests.

13. Since no inquiry had been conducted, the orders sought at the instant stage were premature and if granted, the same would offend the clear provisions of order 32 rule 15 of the Civil Procedure Rules, 2010 and could be challenged on that ground alone. However, the interests of justice would not be met the application was dismissed and therefore, in the interests of justice and to enable the court to wholly and effectively determine the issue and fully satisfy the requirements of order 32 rule 15 of the Civil Procedure Rules, the Respondent ought to be produced in court for the purposes of an inquiry by the court to establish whether he was incapable of protecting his interests by reason of unsoundness of mind.

Application partly allowed.

Orders

No order as to costs.

Citations

Cases

1. D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another (Civil Appeal 37 of 1978; [1980] KECA 3 (KLR); [1982] KLR 1) — Explained
2. In the matter of Eliud Maina Wanjohia (Deceased) (Civil Case 18 of 2013; [2013] KEHC 3372 (KLR)) — Explained
3. Karaba v Kariuki & 2 others (Civil Appeal 125 of 2008; [2010] eKLR; [2010] 1 KLR 235) — Explained
4. Waweru, Loghan Njenga v Teresia Nyokabi Karanu & another (Civil Suit 242 of 2005; [2014] KEHC 1766 (KLR)) — Explained
5. Balakrishnan v Balachandran ((1956) 1 mad lj 459) — Explained
6. Duvvuri Rami Reddi v Duvvudu Papi Reddi and others (AIR 1963 AP 160) — Explained
7. Ramanathan Chettiar v Somasundararn (AIR 1941 Mad 505) — Explained
8. Dyson v Attorney-General ([1911] 1 KB 410) — Explained

Statutes

1. Civil Procedure Act (cap 21) — section — Interpreted
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) — order 2, rule 14; order 32, rule 15 — Interpreted
3. Constitution of Kenya, 2010 — article 159 (2) (d) — Interpreted
4. Mental Health Act (cap 248) — section 2, 26, 28 (1); part XII — Interpreted

5. Code of Civil Procedure, 1908 — order XXXII, rule 15 — Interpreted

Texts

1. U.S. National Library of Medicne (2015), Dementia (MedlinePlus. U.S. National Library of Medicine. 14 May 2015.)

Advocates

Mr. Kimondo for For Applicant

RULING

1. The originating summons before me raises three fundamental issues which must be resolved at the outset before considering whether or not to grant the reliefs sought. These are

    (a) Whether these proceedings ought to have been initiated under the provisions of the *Mental Health Act*[1] as argued by Mr Kabue, counsel for the defendants wife;

    (b) Whether these proceedings are properly brought under the provisions of order 32 rule 15 of the *Civil Procedure Rules, 2010*; and if so;

    (c) What is the proper procedure for declaring a person unfit to protect his/her interests under order 32 rule 15 of the *Civil Procedure Rules, 2010*.

2. The applicant MMM, a son to the defendant seeks orders that :-

    a. That the court finds that the defendant AMK is incapable of protecting his interests with regard to his affairs due to senile dementia.

    b. That the applicant MMM be appointed as the defendant's guradian ad liem.

    c. That the defendants wife ENK and all his children namely RWM, HKM and MMM do jointly manage all the affairs of the defendant AMK.

3. The applicants grounds are *inter alia* that due to old age and ill health and senile dementia the defendant is incapable of protecting his interests hence its necessary to appoint a guardian ad litem for him, and that all his children and his wife be appointed to jointly manage his affairs. It is stated that that Doctors have advised that due to the said condition he is incapable of protecting his interests. The applicant in his supporting affidavit avers that the said AMK aged 84 years has of late been treated in hospital for numerous conditions and was confirmed to be suffering from senile dementia. In support of this averment the applicant has annexed a document signed by Prof Mary Wangari Kuria who states that in his current mental state, the said AMK is vulnerable to exploitation and also a medical report dated September 19, 2015 by Dr VCA Okech-Helu which concludes *inter alia* that the said AMK does not have the mental capacity to take care of his property, medical and legal affairs. Annexed also is a CT Scan which revealed a moderate age related brain atrophy. The applicant also states that the said AMK has been sued by some family members prohibiting him from selling family property. The applicants two siblings have given their consent to the applicant being appointed as their fathers guardian ad litem but their step mother ENK vehemently opposes the prayers sought.

4. The said ENK in her replying affidavit filed on March 30, 2016, avers that the applicant and others picked their father from their matrimonial home on July 31, 2015 on the pretext that they were taking him for treatment, a move that prompted her to file a petition in court being Petition No 537 of 2015

[1] Cap 248, Laws of Kenya

seeking a declaration that the said act violates his fundamental rights, and an injunction to restrain the applicant and orders compelling him to return him back. The said petition is said to be still pending in court awaiting determination. She also avers that she has been denied access to her husband, and denied that her husband suffers from senile dementia and avers that her advocates have been denied access to her husband for the purposes of preparing a replying affidavit. She also states in her affidavit that the court ought to order the applicant to produce the respondent in court for the court to carry out its own independent assessment and insists that the application lacks merit and the same has been brought in bad faith and that if there was a situation warranting the appointment of a guardian ad litem, then as the wife she ranks first in priority.

5. On May 26, 2016 this court made directions that this matter be determined by way of affidavits and oral submissions and both advocates proceeded to argue the case before me. Mr Kimondo for the applicant relied on the grounds on the face of the originating summons and the supporting affidavit and added that two of the defendants children have filed their consent to the application but their step mother has failed to give her consent. He reiterated that the children desire to be appointed jointly with their step mother to manage the affairs of their father. Counsel also submitted that the medical evidence was clear that their father was not capable of managing his affairs. Counsel also submitted that no evidence was tendered to rebut the available medical evidence. Counsel reiterated that his clients were not opposed to the appointment of their step mother and the applicants

6. Mr Kabue, advocate for ENK opposed the application and submitted that the application as drawn is incompetent and fatally defective. In counsels view, the substantive law is the *Mental Health Act*[2] specifically section 28(1) of the said *Act*. Counsel submitted that an application of this nature ought to be filed by way of a petition, not an originating summons as in this case. Counsel submitted that the said section received judicial interpretation in *Loghan Njenga Waweru v Teresia Nyokabi Karanu & another*[3] and *In the matter of Eliud Maina Wanjohi*.[4] In both cases, the courts reiterated that an application under the *Mental Health Act*[5] ought to be initiated by way of a petition.

7. Further counsel was of the view that article 159(2)(d) of the *Constitution* does not permit a party to flout express provisions of a statute. Counsel pointed out that the application is expressed under the provisions of the *Civil Procedure Act* and no notice was served upon his client. Counsel reiterated that the application has been brought in bad faith, has no merits, and reiterated his clients denial that her husband suffers from the alleged ailment.

8. In his rejoinder, Mr Kimondo reiterated that the application is not made under the *Mental Health Act*[6] as submitted by Mr Kabue and maintained that the defendant is not a mental patient within the meaning of the *Mental Health Act*[7] but is suffering from an ailment diagnosed as senile dementia.

[2] Cap 248, Laws of Kenya

[3] HCCC No 242 of 2005

[4] HCCC No 18 of 2013

[5] *supra*

[6] Ibid

[7] Ibid

9. Section 2 of the *Mental Health Act*[8] 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."

10. Part XII of the *Mental Health Act*[9] provides for judicial power over persons and estates of persons suffering from mental disorder. This is the section Mr Kabue relied on his submissions. The said section provides as follows:-

    26. Order for custody, management and guardianship

        (1) The court may make orders—

            (a) for the management of the estate of any person suffering from mental disorder; and

            (b) for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.

        (2) Where there is no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate and guardian of any such person.

        (3) Whereupon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.

11. The first issue that falls for determination from the opposing positions adopted by both counsels is whether these proceedings ought to have been instituted under the *Mental Health Act*[10] or the *Civil Procedure Rules*.

12. The definition in section 26 of the *Mental Health Act*[11] reproduced above defines a person suffering from mental disorder as a person who has been found to be so suffering under this Act. The defendant has not been found to be suffering from a mental disorder under the said act but from an illness described as senile dementia. On this ground alone I am persuaded that the application before me does not fall under the *Mental Health Act*.[12]

13. Dementia, also known as senility,[13] is a broad category of brain diseases that cause a long term and often gradual decrease in the ability to think and remember that is great enough to affect a person's

[8] Ibid

[9] Ibid

[10] Ibid

[11] Ibid

[12] Ibid

[13] "*Dementia*" Medilineplus US National Library of Medicne 14 May 2015. Retrieved 27 May 2015

daily functioning. Meriam-Webster[14] defines it as a condition that affects the mind of aging people and causes them to be confused, to forget things, etc.

14. Dementia is an umbrella term for a group of cognitive disorders typically characterized by memory impairment, as well as marked difficulty in the domains of language, motor activity, object recognition, and disturbance of executive function – the ability to plan, organize, and abstract. Generally speaking, dementia is an illness of older adults.[15]

15. Is dementia a mental illness? Concepts in legislation are based on a dichotomy between mental infirmity and mental illness that has changed over time. This change is the result of shifting perceptions about the basis of illness and disease and the causation of mental symptoms. Mental health legislation is aimed as much at social control of feared behaviour as protecting the ill/incompetent. Guardianship legislation offers a more holistic response that better meets the patient's needs and could be extended to supplant mental health legislation.[16]

16. In this regard, I find that the said AMK has not been adjudged to be of unsound mind to fall under the provisions of the *Mental Health Act*[17] but his 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. Accordingly, I find that the originating summons before me is properly before the court, hence my answer to issue number one above is in the negative.

17. I also find comfort in the express provisions order 2 rule 14 which provides that:-

> No technical objection may be raised to any pleading on ground of any want of form"

18. Thus, even if I were to be persuaded that the proceedings ought to have been initiated by way of petition as opposed to originating summons, I would be reluctant to dismiss this on a technicality. Perhaps at this juncture it is important to recall with approval the words of Madan, JA, (as he then was) in *DT Dobie Co Ltd v Muchina*[18]where he stated that:-

> No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so week as to be beyond redemption and incurable by amendment.If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."(Emphasis added)

14 www.meriam-webster.com

15 https:www.cdc.gov/mentalhealth/basics/mental-illness/dementia.htm

16 Hunter Mental Health Services, James Fletcher Hospital, Newcastle, New South Wales, Australia. mdsbt@mail.newcastle.edu.au

17 Supra

18 [1982] KLR 1 at page 9:

19. Further, I also find it necessary to recall the words of the court in *Dickson Karaba v John Ngata Kariuki & another*[19] whereby the court stated as follows:-

> …striking out is a very serious matter, it is draconian and it should be resorted to as an avenue when the cause filed is hopeless or it is meant or intended to abuse the process of the court…"

More illuminating on this point is the dicta of Fletcher Moulton LJ in *Dyson v Attorney General*[20]

> ………and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used and rarely, if ever, excepting in causes were the action is an abuse of legal procedure… To my mind, it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad". (Emphasis added)

20. On the second issue, I am clear in my mind that this case properly falls under the provisions of order 32 rule 15 of the *Civil Procedure Rules,* 2010 and therefore my answer to the second issue is in the affirmative and is supported by my reasoning expressed hereunder. The said rule provides that:-

> 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"

21. 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.

22. The medical evidence adduced shows clear that the defendant is suffering from senile dementia and is incapable of protecting his interests. At the time of giving directions, both parties agreed that this matter be determined on the basis of the documents filed and secondly by oral submissions by both advocates. The defendants wife or her advocate never submitted medical evidence to counter the available medical records. Her argument is that she has been denied access to her husband, implying that she could not have had him examined under owing to the said denial. Unfortunately neither herself

19 [2010] eKLR

20 [1911] KB 418

nor her advocate made a formal application before the court asking for court orders either to grant her access or seek the production of the defendant before the court. The proper cause of action would have been for her to move the court by way of a formal application supported by an affidavit so as to give the other party the opportunity to respond and let the application be heard and determined by the court on merits.

23. However, even if both parties had submitted medical evidence confirming their opposing positions or identical positions, would such a position have satisfied the requirements of order 32 rule 15 cited above. I do not think so. The answer to the said question can be found in the procedure provided under order 32 rule 15 of the *Civil Procedure Rules,* 2010 reproduced above which 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 reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued"

24. Interpreting a similar provision under the Indian *Civil Procedure Rules*, the court in *Balakrishnan v Balachandran*,[21] 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 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. 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, the 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."

25. 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 uses 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"

21 (1956) 1 mad lj 459

22 Order XXXII, Rule 15 CPC of the Indian *Civil Procedure Code*

26. 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 in inquiry by the court.

27. In yet another Indian case ie, *Ramanathan Chettiar v 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 respectfully agree with this decision of the learned Judge.

28. 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.

29. 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 v 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.

[23] AIR 1941 Mad 505

[24] AIR 1963 AP 160

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*.

30. Applying these principles to the facts of the present case, 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 medial evidence. The said two fold procedure has not been done, yet it is prescribed under the law. It is necessary to have a full-fledged enquiry, and after the inquiry the court will then decide whether the said AMK suffers from infirmity of mind, and whether it is of such a character that prevents him from safeguarding his interests.

31. Accordingly, I find that since no inquiry has been conducted, the orders sought at this stage are premature and if granted at this stage, the same will offend the clear provisions of order 32 rule 15 of the *Civil Procedure Rules* 2010 and can in my view be challenged on that ground alone. I however find that the interests of justice will not be met if I dismiss the application. Accordingly in the interests of justice and to enable the court to wholly and effectively determine the issue, and fully satisfy the requirements of order 32 rule 15 of the *Civil Procedure Rules* 2010, I hereby make the following orders:-

a. That the said AMM be produced in court for the purposes of an inquiry by the court for the court to establish whether by reason of unsoundness of mind or mental infirmity, he is incapable of protecting his interests.

b. That pursuant to the above order, the parties herein are directed to take a date for the said judicial examination/inquiry.

c. No orders as to costs.

Orders accordingly

Right of appeal 30 days

SIGNED, DELIVERED AND DATED AT NYERI THIS 13TH DAY OF JUNE, 2016

JOHN M. MATIVO

JUDGE