



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 113 OF 1999

JOHN PATRICK MACHIRAPLAINTIFF

VERSUS

PATRICK KAHIRU MUTURI.....DEFENDANT

R U L I N G

The prayers in the amended chamber summons dated the 17th day of July 2000 and amended on the 24th day of July, 2000 are for Orders:-

- (1) that the **ex parte** judgment entered in default of appearance on the 14th day of April, 1999 and all consequential orders be set aside;
- (2) that the defendant's wife be assigned guardian of the defendant by whom he may appear and defend the suit;
- (3) that the respondent be restrained from demolishing or renovating the applicant's house at Karen, and from constructing on the land;
- (4) that the respondent hands back vacant possession of that land to the proposed guardian;
- (5) that the respondent retransfers the said land to the applicant.

All these are to be temporary orders to last until the suit, if re-instated, is heard and determined or until further orders of this court.. It is an application based on enumerated grounds and supported by more than one affidavit. Stated in summary form they are:-

- (1) that the defendant being a person of unsound mind or mentally sick, was incapable of being made a party to the suit at its commencement in January 1999;
- (2) that the summons to enter an appearance in the suit was not served, even though a process server swears an affidavit of service saying that he served it upon the defendant;
- (3) that the proceedings in the suit were marred by certain enumerated serious irregularities; misrepresentation and concealment of material facts, so that had the court been put in full picture the suit would not have been entertained.

It is further said for the applicant, that the agreement of sale of land in respect of the suit land was "never completed and was frustrated and was to be renegotiated", and that the plaintiff and the defendant's advocates were in the process of negotiating the said agreement. It is said that the respondent

has commenced works on the “applicant’s house”, he has started digging the foundation and delivering construction materials onto the building site. He should be stopped. The proposed guardian is said to have a good case with overwhelming chances of success; and if the judgment is not set aside, the proposed guardian, the defendant and the family of the defendant will suffer irreparable loss and damage.

The respondent replied by affidavit, saying that the applicant is misleading the court, that the defendant has always been of sound mind; that there is a strained relation between the applicant and her defendant husband, with the applicant wife and children beating him; that the land sale agreement between the respondent and the defendant was done through a lawyer and no mental disorder was seen in the defendant; that the applicant has all along known about the sale transaction of the suit land, and she never raised a finger in objection thereto; that the suit was determined and the decree executed; that the defendant was duly served with a summons to enter appearance together with the rest of the process, this being together with the rest of the process, this being evident on record; that there was no contract frustration or renegotiation; that the respondent paid the entire purchase price, took possession and transfer of title and expended money on improving the land; that although she knew of the sale in 1989, the applicant did not come to the court to challenge it; that at the formal proof the court considered all relevant matter and passed judgment accordingly.

At the hearing of the application Mr. Mutua for the applicant took the court through his client’s grounds for the application; and Mr. K’owade took www.kenyalawreports.or.ke 5 the court through the grounds of opposition on the side of the respondent. I have studied the oral presentations to the court, together with the written matter filed or appended to the filed documents for the court’s attention and consideration.

The first point taken by the applicant was that the defendant was a person of unsound mind or mentally sick, and so, things done with him were null and void. To show that the defendant was of that mental state of mind, the applicant exhibited an uncertified copy of a letter written “To whom it may concern”, allegedly by a Dr. Irungu, J.M., after whose name is a designation of psychiatrist. It is dated 6th July, 2000. It is about Patrick Kaniaru Muturi, probably the defendant in the suit. It reads as follows:-

“The above named individual has been having a long standing mental disorder.

He was first treated in Mathare Hospital on January 1999 as an in-patient. He has been admitted twice to this hospital.

He suffers from schizophreni form illness, a disease characterized by bizarre thinking consisting mainly of delusional ideas. He has pronounced suspiciousness all the times pre-occupied ideas that people are scheming against them.

Currently he is admitted to hospital. He is very sick and seem to be deteriorating.

Assist him where possible.”

That is all there is by way of medical evidence on the mental state of the defendant. On the basis of this document, it is said that the defendant is free from any contract he might have entered into with anyone, and that he needs to be represented by a next friend.

It is a very serious thing to say of, and concerning a person, that such person is a person of unsound mind or suffers mental disorder. The law presumes that every person is mentally sound, unless and until he is proved mentally disordered. And, even where one person is shown to be unsound mind one must always bear in mind that the degrees of mental disorder are widely variable, and in competency to do any legal act or inability to protect one’s own interests, must not be inferred from a mere name assigned to the malady from which a person may be suffering. The validity of ordinary contracts entered into by persons of unsound mind depends mainly on the circumstances which accompany the act. If there is nothing unreasonable in the conduct of the person of unsound mind and the party with whom he contracts has no knowledge or suspicion of his mental disorder, the contract will be binding on the person of unsound

mind and his representatives.

A contract with a person of unsound mind is valid and enforceable against him if at the time when the agreement was made he was not of unsound mind; and soundness of mind may be presumed if it appears that the negotiation of the agreement was conducted by him with apparent prudence, sanity, and judgment, although in fact he was insane both before and after the transaction. The general rule is that when a person of apparently sound intellect enters into an ordinary contract, and the parties cannot be restored to their former condition, the mere fact that one of them was at the time *non compos mentis* is no ground for setting aside the contract. But contracts of a person who is *non compos mentis* may be avoided when there is proof that his condition was known to the other party. There is no right to avoid a contract made with a person of unsound mind unless it is proved that the other party either knew that he was of unsound mind or knew such facts about him that the other party must be taken to have been aware that he was of unsound mind. Moreover, supervening mental disorder does not release a person from his obligations under a contract unless the nature of the mental disorder renders the performance of the contract impossible.

All these propositions are really elementary and do not require a citation of authority. They are sound propositions which have stood the test of time. They are found in a long range of cases, including, amongst others, cases like *Molton Vs Camroux (1849)4 Exch. 17; Imperial Loan Co v Stone [1892]1 QBD 599*; and *York Glass Co. v Jubb, (1925), 42 TLR 1*. They all show, in addition, that degrees of mental order are widely variable, with some persons of unsound mind being as fully competent as some persons to observe and grasp facts and to understand their obligations. Fixing the degree and form of mental disorder which shall free a person from a contract which shall free a person entered, is not, therefore a light matter, and cannot be automatically inferred from a mere name assigned to a malady from which a person is said to be suffering. It must be decided by the special condition and the kind and degree of intellectual power of the patient at the material point of time. His intelligence quotient must be put in evidence, as at the material time.

It is well known, that the competent of an individual to make a contract or to indulge in other civil rights, is in general lost if mental disorder or “insanity” can be shown to have been present and to have produced defective judgment. The mere presence of mental disorder, however, may not necessarily destroy competence in a particular instance, and it does not do so if the defect does not touch the issue at stake. It is within the power of the court to decide. Evidence must be given on the mental state at the material time.

It does not need saying that in the general theory of contract, it is postulated that in order to make a contract each contractant must have a free and full consent reached by an act of reason after due deliberation. If this is not so, the contract may be declared void. But it is equally elementary and requiring no restating, that if the mentally disordered person makes a contract during a lucid period, then the contract is valid despite further relapses of the illness; and, further, if mental disorder develops in an individual after he has made a contract, the illness does not release either party from the terms of the contract unless circumstances are such that it is quite impossible for the insane individual to fulfill the terms of the contract.

Clearly, therefore, a diagnosis of some mental disorder is not an end in itself. One must before the court the history of the case, showing the behaviour immediately before, during, and after the act.

Bearing all those propositions of principles in mind, when what is said in this case is measured by those propositions, the case founded on alleged mental disorder or unsound mind, cannot be sustained at all. It is said that the alleged mental disorder set in the year 1987. Yet, nobody is questioning the validity of many other acts of the defendant after that year. He entered into a contract with the plaintiff, under which contract the defendant hired the legal services of the plaintiff. It is not alleged that the contract should be avoided because of the defendant’s mental condition.

It is also said (para 11) that the same defendant appointed the applicant’s present advocate on record, to act in this matter. There can be no difference in principle, between the defendant entering into contracts

of hiring legal services, and his entering into a contract for sale of his land and disposition of his interest therein. If he is truly mentally ill, then his present advocate should not have entered into any contract with the defendant and accepted his instructions under that contract.

Similarly, (as per para 9), the defendant has entered into mortgage contracts for loans with the Kenya Re-insurance Corporations, during the same period of time in which he is alleged to have been of unsound mind. Those contracts are not being challenged on account of his state of mind.

The psychiatrist's letter from Mathare hospital, after the court case filed, is not backed by any history, hospital attendance and treatment records. It states no genesis and history of the alleged "long standing mental disorder", or the intensity (if any) of that alleged disorder. It says that the defendant has been twice admitted as an in-patient. It is silent as to whether there have ever been lucid intervals of clear sanity during which the defendant could do things right. And yet, it is in the same year, on November 30, 1999, that the defendant was writing to Messrs Mutua Mboya & Nzissi, a letter of appointment as advocates, in which he referred to "several discussions" with Mr. Mutua and himself. He vividly remembered the discussions. There is no sign of mental disorder.

Questioning one's mental health is a serious thing. He who questions another's mental well-being must demonstrate the basis of the question. Everybody is presumed to be of sound mind unless and until the contrary is shown on credible evidence. That is why there are stringent provisions in the Mental Health Act (Cap 248) setting out a laborious process by which a conclusion is to be reached concerning a person's state of mind. That process has not been embarked upon in the instant case, and no medical evidence has been furnished to the court to support any allegation putting the mental health of the defendant in doubt and to rebut the initial presumption of sanity. The **prima facie** material has not established anything on which the court at this stage at least hold that there is a viable defence that the defendant, through disease affecting his mind, was incapable of knowing at the time of entering into any deal with the plaintiff what he was doing, or he was incapable of understanding what he was doing or of knowing that he ought not to do what he did. The doctor's letter to the world at large, is not sufficient evidence in this case.

It is in evidence and there is no sensible dispute, that the property in question was sold by the defendant through an agent, namely, Messrs Town Properties Ltd, who made an offer to sell to the plaintiff. At that time, the defendant had an independent advocate acting for him in the sale transaction. The plaintiff was not the defendant's advocate.

Unfortunately, the applicant has not annexed a draft of what would be the proposed defence if the matter were to be re-opened. I am satisfied that there was proper service of the plaint and that summons to enter appearance. I am also satisfied that the applicant has seen the plaint, either by reading it on this court-file, or obtained from the defendant. It was then incumbent upon the applicant to show to the court what defence there is to the plaintiff's claim. Normally a draft of the proposed defence would do; but it can also be demonstrated by affidavit. Here the affidavit in support of the application does not disclose a reasonable defence; and no draft defence was offered for the court's consideration as to whether it is worthy the while. It is not for the applicant to confront the court with a bare statement "I have a good defence", without disclosing it.

Apart from these substantive aspects, there are also fundamental procedural failures which go to the root of the whole matter. They include the applicant attempting to litigate in this case before she seeks and obtains an order to defend the suit as a guardian **ad litem**. If she seeks to replace the defendant on account of his alleged unsound mind, then it was incumbent upon her to enter this suit in accordance with the procedure prescribed for suits against persons of unsound mind. Order 31 of the Civil Procedure Rules is elaborate on that procedure. It is a safeguard against any person merely fouling another as of unsound mind and unilaterally usurp the other's right to protect his own interests. The applicant has not attempted to follow the prescribed process, and she lacks the locus standi in this whole matter. She has not, in the instant application, satisfied the court on the propriety and justice of appointing her a guardian **ad litem**.

I have carefully considered each of the applicant's prayers and grounds for the application, as well

as the oral presentations by counsel at the hearing of this application. Nothing is made out to justify setting aside the judgment of the court which was duly entered. I find that a summons to enter appearance was properly and duly served upon the defendant. The criticisms leveled against the return of service are purely of a technical nature not going to the root of the issue of the defendant having been actually served. Technicality for its own sake will not do to upset a judgment.

The applicant's complaint that the proceedings in this suit have been marred by serious irregularities, misrepresentations and concealment of material facts, does not find factual support. In the absence of the actual contract document it does not suffice to state boldly that the suit was premature, or that it was not one in which a decree for specific performance would be sought. In view of the facts that at the time of the sale transactions the defendant was represented by lawyers other than the plaintiff, it cannot legitimately be said that the plaintiff purported to act for the defendant when he was in fact acting for himself.

On the whole, there is no good explanation for the defendant allowing judgment to be entered by his default; no defence intended to be relied upon has been disclosed from the affidavit material, grounds for the application, arguments at the hearing, and no draft proposed one has been annexed to be looked at as to form and content so as to see whether it would be worthwhile to re-open the case by setting aside the default judgment. Nor has the applicant shown that she has any **locus standi** in the case. Her husband has not been proved to be a person of unsound mind whether at any time or at the material time.

For these reasons, the application is dismissed.

Without going into them, I find that in the special circumstances of this case, each party bears its own costs of the application, and I so order. Signed and dated by me at Nairobi, this 7th day of November, 2002.

R. KULOBA

JUDGE

7.11.2002

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COURT:

This Ruling was read out and delivered by me this 7th day of November, 2002 at Nairobi in the presence of Mr. Ahmednasir, holding brief for Mr. Mutua for the defendant/applicant, and in the presence of Mr. Kiiru, holding brief for Mr. Ritho for the plaintiff/respondent.

R. KULOBA

JUDGE

7.11.2002