REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 2456 OF 1994 (OS)

NJUGUNA & ANOTHER ……….. APPLICANTS

VERSUS

SHAH………………………….. RESPONDENT

RULING

The notice of motion dated11.9.2001 and brought under order 31 rule 15 Civil Procedure Rules and s 3A Civil Procedure Act prays that this Court appoints a guardian *ad litem* for the defendant Ramesh Shah and that the intended guardian one Joseph Kibe Mungai be also the manager to the estate of the said Shah. That was the main and substantive prayer.

The grounds on which the application is based said *inter-alia* that after judgment was entered in this suit on 20.9.99, on 11.9.2000 the defendant who is a diabetic suffered a heart attack followed by a brain stroke – both of which left the defendant completely incapacitated in his mental faculties. That Shah's recovering was slow with his speech still impaired, movement limited and his memory not dependable. That he is incapable of making reasonable decisions or giving instructions. Thus, so Mr Mutuli addressed the Court, it was proper and suitable that Joseph Kibe Mungai be appointed manager and guardian *ad litem*.

The intended manager and guardian Joseph Mungai swore an affidavit to the effect that having known Shah for long and being well-acquainted with his affairs, Shah's family (wife and son) had suggested and he had accepted to be appointed as proposed in this application, so that he could proceed to put into effect the judgment and other matters related to this suit. And that he had no interest adverse to that of the defendant in this suit at all.

Mr Mutuli went over the times the defendant was admitted in hospitals with his ailments and how the doctors whose reports/remarks were produced, managed Shah's condition. Such reports were filed by Dr Yogi Thakkar (dated 5.9.2001) and Dr Paresh Patel (dated 6.9.2001) which shall be referred to in due course. On the whole all this material was placed before the Court along with order 80 Supreme Court Practice Rules of England (SCPR) on this subject which substantially, though not all similarly, corresponds to our order 31 Civil Procedure Rules.

The case of *Credit Finance Corporation Ltd vs Karmali* [1965] EA 545 was cited. Ms Karua who appeared for the plaintiff begun by positing that in this case order 31 Civil Procedure Rules did not apply. That the defendant's application ought to have come under the Mental Health Act (Cap 248) and that it could not succeed at all. The Court will further comment on this statute below. That even under order 31 rule 15 Civil Procedure Rules, the defendant could not be certified mentally incapacitated or infirm at all because he had in the recent past appeared before this Court and/or filed affidavits and executed important documents all which showed that he was mentally competent. And that his own doctors had not

certified Shah mentally infirm or incapacitated even when he had unfortunately suffered heart attacks and brain strokes. That he was improving in his, mostly, physical aspects of health – movement and speech, albeit slowly. The rest of both sides' submissions now follows incorporated in the Court's determination below:

Beginning with the Civil Procedure Rules under which this application is brought order 31, rule 15 reads:

"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."

It may be pertinent to state at this point that order 35 Civil Procedure Rules refers to suits by or against minors and persons of unsound mind. It sets out the process by which such people can sue or be sued – either by a next friend or through a guardian *ad litem*, who should be a proper person appointed by the Court. Such a person must also be an adult and must not have an interest adverse to that of the minor in the matter/suit. To be appointed a guardian *ad litem* one has to consent to it. Orders against a minor who is neither represented by a next friend nor a guardian may be discharged if the applicant knew that the other party was/is a minor. Other aspects follow in order 31 ending with rule 15 (above). Mr Mutuli placed before this Court order 80 SCPR headed Disability and rule 1 opens by stating:

"1. In this order –

"the Act" means the Mental Health Act 1983 'patient' means a person who, by reason of mental disorder within the meaning of the Act, is incapable of managing and administering his property and affairs 'person under disability' means a person who is an infant or a patient." Reading order 80 SCPR even with difference in words used therein, leaves this Court satisfied that in substance, that provision of law is in accord with our order 31 Civil Procedure Rules. The general purposes and intent is that infants (minors), persons of unsound mind or mentally infirm (patients) have their affairs including litigation conducted by a next friend or duly appointed guardian *ad litem*.

If that approach be considered valid, and this Court thinks so, then it becomes imperative that course be taken to see how that order 31 Civil Procedure Rules can be seen to apply along or in the context of the Mental Health Act (cap 248). That Act has in the preamble:

"An Act of Parliament to amend and consolidate the case of persons who are suffering from mental disorder or mental subnormality with mental disorder; for the management and control of mental hospitals and for the connected purposes."

That Act defines:

"a person suffering mental disorder (as meaning) a person who has been found to be so suffering under this Act and includes a person with mental illness and a person suffering from mental impairment due to alcohol or substance abuse."

It is not readily available from the Act who is considered a person found suffering from a mental disorder under that Act but then we move to ss 26 to 28 which Ms Karua referred the Court to. In the pertinent parts under

Part XII Judicial Power Over Persons And Estates of Persons Suffering From Mental Disorder, it is said:

"26. 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."

The general reading of the Mental Health Act (Cap 248) leaves one with the impression that those concerned or suffering from mental disorders are persons who are, to paraphrase, mentally sick. That by the sickness of the mind from one cause or another including taking drugs, a person cannot properly and fully address his mind to his affairs or his estate. That accordingly a manager or a guardian should be put in place on that account.

This Court is left with the impression that while the Mental Health Act of

UK is imported directly to be applied when order 80 SCPAR is under review, it would be prudent to consider our Mental Health Act as not falling in the same category *vis a vis* order 31 Civil Procedure Rules.

There seems to be no link and as the Act limits itself to suffering from mental disorder order 31 refers to those adjudged to be of unsound mind and those whom the Court on inquiry finds that by reason of unsoundness of mind or mental infirmity they are incapable of protecting their interest when suing or being sued. Order 31 Civil Procedure Rules however does not set out by whom and how the Court shall go about this inquiry. It can however be assumed that the inquiry will be commenced if the relatives, friends etc of the party thought to be of unsound mind or has mental infirmity, move the Court on that account, it shall be at liberty, if not obliged to call for, receive and consider expert evidence on whether the party to the suit is of unsound mind or has some mental infirmity. This the

Court will do before a suit is filed or as it progresses.

In this matter the defendant's lawyer on instruction and intimation from his relatives desire that the defendant be considered a person suffering from mental infirmity so serious that he cannot manage his affairs or conduct further proceedings in this suit. They (wife and son) did not swear affidavits to support that prayer but one Joseph Mungai a close associate and friend of the defendant did. The wife and son seem to have endorsed that move. In absence of specific procedure of how to go about this inquiry under order 31 rule 15 Civil Procedure Rules, this Court is prepared to accept the course taken as valid. But then the evidence and material placed before the Court must satisfy it on a balance of probabilities that it should certify Shah a man of infirmity of mind and therefore deserving appointment of a guardian *ad litem*. It ought to be observed and strongly so that a person himself cannot naturally want to be certified as being infirm in his mind. Indeed his relatives and friends will be equally reluctant to take that course unless it is genuine and necessary. This can be attributed to a natural inclination that every human being would like at all the times to be considered of sound mind and competent to handle his/her affairs.

By the way this is an observation. However would it be proper if a Court which observes one to be mentally infirm, to say so and cause an inquiry to be conducted under order 31 rule 15 Civil Procedure Rules? Probably so.

Back to our case is this Court satisfied that on material placed before it and which Ms Karua impeached at every point, such as to convince this Court that Joseph Mungai be appointed guardian *ad litem* for the defendant Shah? This Court does not think so.

First the medical reports: the Court had two – by Drs Thakkar and Patel. On 5.9.2001 Dr Thakkar whose qualifications were not shown but who is a general practitioner said that the defendant was under his care and what he was about to say related to his earlier report of September 2000:

"He had MP intercranial bleed – After the discharge he has still not fully recovered. He is getting fits. He has not regained his speech. He is impossible to understand and he has lots of difficulty in expression. He is quite forgetful and keeps forgetting things and incidents. To my opinion Mr Ramesh Shah has not yet recovered and may take long time to recover as progress is very slow."

From this report it can be said that the defendant is sick but is slowly recovering from health problems,

other than that constitute infirmity of the mind. And, God bless, he did not and should not suffer mental infirmity of any kind or such as to make him incapable of managing his affairs or incapable of giving instructions to his agents to do so.

Then comes another report by Dr Pamesh Patel – a consultant cardiologist/ physician. In Joseph Mungai's affidavit sworn on 11.8.2001 this report is in exhibit JKM 1. It is dated 6.9.2001 but the same report, word for word in every respect, but dated 6.6.2001 was placed before this Court in the replying affidavit of James Kirika as part of exhibit B! Now the first question that was not satisfactorily explained to this Court is, why, two similar reports but having different dates on the same subject? Because that question was not answered this Court took the liberty to term the two reports by Dr Patel wholly worthless and not meant to help this Court at all. The Court is constrained to stop at that remark only, and wastes no time in considering the two reports.

The other material placed before the Court was the defendant's replying affidavit to the plaintiff's notice of motion dated 30.5.2001. The defendant opened by deponing:

"1. THAT I am the defendant/respondent herein and therefore competent to make this affidavit."

It is thus right away clear that on 18.6.2001 or thereabout when the defendant swore that affidavit, he was a man without mental infirmity at all. The affidavit flowed for nineteen paragraphs. At paragraphs 15 he deponed:

"15. THAT according to my doctor's report aforesaid I am at the moment recovering from the effect of the stroke. Whereas I was totally incapacitated previously

I have gradually been improving and have started walking and occasionally going to my place of work."

The deposition should be taken to be genuine, positive and true from the defendant himself. One's state of health could be robust one moment but then deteriorate another. That is the nature relating to frailty of human nature. But it has not been shown here after this affidavit – Shah's state of health and in particular the mental bit begun to suffer and it even went down. It never was at any time any way.

In sum the applicant's notice of motion under review is dismissed with costs. The applicant, Shah, is in no mental state of infirmity that Joseph Mungai should be appointed to manage his estate and affairs now. Costs to the plaintiff/respondent.

Dated and delivered at Nairobi this 15th day of October, 2001

J.W. MWERA

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J UDGE