



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 828 OF 2017

(Formerly Milimani ELC Case No. 234 of 2016)

FLORENCE SOILA NGOSSOR.....PLAINTIFF

VERSUS

RIKOYAN OLE KUKU.....1ST DEFENDANT

GEOFFREY NDUNGU GATHII.....2ND DEFENDANT

ROOTS INVESTMENTS COMPANY LIMITED3RD DEFENDANT

DCF ENGINEERING COMPANY LIMITED4TH DEFENDANT

JEFFERY ROBIN MEIN.....5TH DEFENDANT

DESTERIO OYATSI.....6TH DEFENDANT

KIRIINYA MUKIRA.....7TH DEFENDANT

THE LAND REGISTRAR, KAJIADO COUNTY.....8TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....9TH DEFENDANT

RULING

What is before Court for determination is the 6th Defendant’s application dated the 10th September, 2019 brought pursuant to Order 31 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules. The 6th Defendant seeks for the following orders:

1. That an inquiry be conducted by this Honourable Court to determine whether the Plaintiff in the present suit who is also the first Defendant in the counterclaim is of sound mind or has mental capacity to sue or institute the case and defend the counterclaim.
2. That in the event the court is satisfied of the fact of the Plaintiff’s unsoundness of mind or mental infirmity, guardian ad litem or next of friend of the Plaintiff be appointed to protect the interests of the Plaintiff in the case.
3. That the costs of this application be provided for.

The Application is premised on the grounds on the face of it and the supporting affidavit of the 6th Defendant DESTERIO ANDADI OYATSI where he deposes that on 30th and 31st July, 2019, the Plaintiff came to their offices and caused commotion thereon. He explains that on the two occasions they wrote to the Plaintiff’s advocates but did not receive any response. Further, the Plaintiff has resorted to sending messages over her mobile phone and they have reported the matter to the Police. He contends that the Police have questioned whether the Plaintiff is of sound mind. Further, the Plaintiff has resorted to sending messages to some of the staff members in his firm.

To oppose the instant application the Plaintiff FLORENCE SOILA NGOSSOR filed a replying affidavit where she insists she is of proper mind leading an intelligent and mentally healthy life. She denies being treated for any mental ailment and contends that she has always managed all her social including financial affairs. She further denies causing a commotion in the firm of messrs Shapley Barret & Co. Advocates. She contends that the said firm has represented her in several conveyance transactions in the past and she had appeared therein to

make inquiries on one of her past files but was met with hostility from the firm staff including security and was forced out. Further, the inquiry she was making did not involve, in any way, the issues before the Court. She explains that she went to the firm of messrs Shapley Barret & Co. Advocates to inquire about some forty one (41) title deeds belonging to her which are held by the Applicant's firm from the time they were her advocates to date, which title deeds are subject to investigation by the CID. She admits that any communication she made to the Applicant or his staff with regard to this matter was borne out of frustration and not in any way out of mental instability. Further, her advocates on record have cautioned her against directly communicating with the Applicant or staff of his law firm. She reiterates that the application lacks merit and allowing it would greatly prejudice her pursuit for justice in recovery of her land.

The 6th Defendant/ Applicant DESTERIO OYATSI filed a supplementary affidavit where he reiterates his claim and contends that the Applicant does not have full control of her mental capacity. He refers to the contents of a letter dated the dated 28th January, 2014 which the Plaintiff has filed in her list of documents and insists the Plaintiff's property was never subdivided into 41 portions. Further, that the Plaintiff has failed to give the numbers of the forty one (41) title deeds. He insists the Plaintiff's claim against the law firm of Shapley Barret & Co in respect to the forty one (41) title deeds is delusional and arises from the Plaintiff's apparent mental sickness.

The 6th Defendant and Plaintiff filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 10th September, 2019 including the rivalling affidavits and the submissions, the only issue for determination is whether the court should order an inquiry to be conducted to establish if the Plaintiff is of sound mind and has the mental capacity to sue or defend the counterclaim.

The 6th Defendant in his submissions reiterated his claim and contends that the Plaintiff's actions as stated in the affidavit confirms she has a mental disorder or instability. Further, the Court should make an inquiry to that effect. To support these arguments, he relied on the case of **Nyeri High Court Misc Application No. 51 of 2015 (OS) MMM Vs AMK.**

The Plaintiff in her submissions insist the 6th Defendant has not sufficiently demonstrated that she has shown symptoms of mental incapacity. She relied on the following decisions **John Patrick Machira V Patrick Muturi Civil Case No. 113 of 1999; Wiltshire V Cain (1958 – 60) 2 Barb. L R 149; and Miscellaneous Cause No. 160 of 2017 In the matter of K N Gandin the matter of Mental Health Act.**

In the current scenario, the 6th Defendant claims the Plaintiff suffers from mental incapacity and an inquiry should be conducted to determine the same. He has proceeded to highlight instances where the Plaintiff has created commotion in his offices and provided excerpts of messages she sent to him. He has further proceeded to flag out the contents of one of the documents filed by the Plaintiff and contended that since it was contrary to the Plaintiff's averments, it confirmed her unstable mental status. Order 32 of the Civil Procedure Rules makes provisions on when a guardian ad litem can be appointed for a person with unstable mental status. In the case of **JOHN PATRICK MACHIRA v PATRICK KAHIRU MUTURI [2002] eKLR** the court held that: '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.' From the averments in the 6th Defendant's affidavits, except for the highlighted instances, he has not provided a preliminary report from a professional who had treated the Plaintiff for her mental health nor given the mental history. I opine that the burden of proof was upon him to demonstrate that the Plaintiff had been subjected to treatment for her actions. Further, I note that he has referred to one of the documents that has been filed in court, and I believe he will have the opportunity to cross examine the Plaintiff on the same to test its veracity. To my mind, since the Plaintiff sued the 6th Defendant, I find that the 6th Defendant does not have the capacity to claim the Plaintiff is unstable mentally especially when the averments relate to issues which are in dispute herein. Further, from the averments in the respective affidavits, it is emerging that the Plaintiff and the 6th Defendant had a history wherein the 6th Defendant provided legal support in respect to conveyancing over various parcels of land and at this juncture I believe the allegations of the 6th Defendant require material evidence to be placed before the court to enable it make a proper determination of the same. I note the 6th Defendant has further not placed before court, when the Plaintiff who had been his client, commenced to be mentally unstable.

Based on the facts at hand while associating myself with the decision I have cited, I find that the 6th Defendant has not provided sufficient evidence to enable this court proceed to make an order of inquiry into the Plaintiff's mental status. I opine that the court cannot proceed to make orders on mere allegations of mental health especially where the allegations are raised by an opposing party who has not furnished any professional documentary evidence to that effect.

It is against the foregoing that I find the instant application dated the 10th September, 2019 unmerited and will disallow it.

I will award the Plaintiff the costs of this application.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 7TH DAY OF APRIL, 2021

CHRISTINE OCHIENG

JUDGE