



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 378 OF 2017

MARGARET MWIKALI NGUNGU.....PLAINTIFF/RESPONDENT

-VERSUS-

CHINA ROAD & BRIDGE CORPORATION(K).....1ST DEFENDANT

ELIJAH NGUNGU MWENGI.....2ND DEFENDANT/APPLICANT

RULING

1. What is before court for ruling is the 2nd Defendant's/Applicant's Notice of Motion Application expressed to be brought under Order 51 Rules 1, Order 32 Rule 15, Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law for Orders: -

i. That the suit against the 2nd Defendant/Applicant herein be dismissed and/or struck out as he lacks capacity to be sued for reasons of mental health.

ii. That the costs of this application be provided for.

2. The application is dated 29th November, 2019 and was filed in court on 2nd December, 2019. It is predicated on the grounds on its face and is further supported by the supporting and further affidavits of Naomi M. Mutinda, an associate Advocate in the firm of Messrs Mulyungi & Mulyungi Associates Advocates who have the conduct of the matter on behalf of the 2nd Defendant/Applicant.

3. The Plaintiff/Respondent has opposed the application vide her replying affidavit sworn at Nairobi on 16th January, 2020 and filed in court on 17th January, 2020.

4. The application was canvassed by way of written submissions and by the time of writing this ruling, only the Plaintiff/Respondent had filed her submissions.

5. Naomi M. Mutinda, has deposed in paragraphs 2, 3, 4, 5 and 7 of her affidavit that she was instructed by the 2nd Defendant on or about 08/05/2018 to come on record and defend him in the instant suit and that she duly filed the proper pleadings and attend court in prosecution of the suit, that at the time of being instructed, the 2nd Defendant informed her that he had been ailing for years and was under intensive physical and mental treatment and could not cohesively appreciate the nature of the suit but that he wanted an advocate on record to protect his interests, that the 2nd Defendant mental health rapidly deteriorated as with time he lost his memory, lost his cognitive functioning and could not attend their chambers to give proper instructions in defending the suit and can barely remember and/or understand the suit even his sane moments, that through various efforts, it was brought to her knowledge that the 2nd Defendant herein had since been diagnosed with mental illness (Dementia) and that his cognitive functioning is completely compromised to a point where he is not fit to stand trial on account of illness and several medical reports were made to that effect and that the suit is not one that can survive the 2nd Defendant/Applicant and thus the suit against him ought to be dismissed and/or struck out as it has also become impossible for the 2nd Defendant/Applicant's advocates to act in the matter without instructions from their client.

6. In her replying affidavit, the Plaintiff/Respondent has deposed in paragraphs 3, 4, 5, 6, 7, 8 and 9 that she wishes to register her strong opposition to the Application filed as well as the affidavit as it is misplaced and an abuse of the court process, and ought to be dismissed with costs, that the Plaintiff/Respondent filed a plaint contemporaneously with a Notice of Motion application dated 2nd October 2015, upon which she sought *inter alia* a permanent injunction Order against the Defendants restraining them from trespassing and/or in any other manner whatsoever interfering with her previous quiet use, possession, occupation and enjoyment of all those parcels of land known as **PLOT NUMBERS 232 and 1260 at KIBOKO "B" SETTLEMENT SCHEME**, that for the last five years since the date of institution of

this matter, the 2nd Defendant/Applicant has actively participated in the proceedings and even during the hearing of a series of interlocutory applications filed in this matter. However now that the matter has been fixed for hearing, the 2nd Defendant alleges that he is mentally unfit to stand trial, an act that the court cannot believe without the production of sufficient evidence supporting the said allegations and the determination of the same, if any, from any court of law, that she has been advised by her advocates, and which advice she verily believes to be true that firstly, this application is *void ab initio* as the advocate on record for the 2nd Defendant/Applicant has no capacity whatsoever to swear an affidavit and depose facts on behalf of her client under the Civil Procedure Rules, that the said advocate is not a party to this suit, a total stranger to me and yet she swears an affidavit stating alleged facts in respect to the 2nd Defendant's health and annexing various medical reports that she is in no capacity of knowing their authenticity, an act that she views as means of delaying the hearing and just determination in this matter, that she has been advised by her advocates, and which advice she verily believes to be true that the 2nd Defendant/Applicant has filed this application in the wrong forum. The 2nd Defendant/Applicant ought to have filed an application under the Mental Health Act (Cap 248) in the High Court seeking for orders that he be declared as mentally unfit to stand trial, an exercise that excludes the Plaintiff's/Respondent's participation, before proceeding to appraise this Court on the verdict and/or orders issued thereto, that further, the 2nd Defendant/Applicant has failed to propose or secure the attendance of the various medical doctors who assessed his mental condition namely, Dr. L. Mativo, Dr. J. K. Mutiso and Dr. S. Saswa from Machakos Level 5 Hospital, Gilead Mental Health Consultants and Mathari National Teaching and Referral Hospital respectively for cross-examination on the contents of the letters so authored and that it is her humble prayer that the court do dismiss the application since she cannot rely on the assumption that the documents and/or averments made are *bona fide* or genuine until they are tested by a court competent for such and exercise upon which a guardian will be appointed.

7. In rejoinder, Naomi M. Mutinda, has deposed in paragraphs 3, 4, 5, 6, and 8 of her further affidavit as the advocate in conduct of the instant matter, the Supporting Affidavit was deposed by herself based on facts that are known to her personally and after due diligence and examination of the medical reports availed to her as the advocate of the Applicant herein and thus the Supporting Affidavit is limited to facts known to her and thus valid under the relevant provisions of the law since the instructing client currently has no capacity to swear an Affidavit or issue instructions and/or stand trial, that the Respondent is at liberty to disprove the authenticity of the medical reports annexed to the application prepared by experts in the field and should the Respondent wish to cross-examine on the same, she is at liberty to seek for the attendance of the doctors, at her own cost, to confirm the contents therein as otherwise, that the Medical Reports are from known mental institutions and speak for themselves, that the application as filed is meritorious and filed under the relevant provisions of the law contrary to the Respondent's averments and the application is duly supported by uncontroverted evidence by way of annexure of various medical reports of which this Court is at liberty to call for the Doctors for inquiry, that the averments by the Respondent at paragraph 7 of the Replying Affidavit are grossly misinformed as it is not a court of law that declares an individual as mentally unfit but a qualified doctor and since there are valid medical reports to that effect, it is for the Plaintiff/Respondent herein to move the court appropriately as provided by law and not the Applicant herein who is a Defendant and that the contents of paragraph 8 of the Respondent's Replying Affidavit are also grossly misinformed as the authenticity of the said medical reports have not been challenged by evidence of any other contrary medical reports and thus as filed speak for themselves and the burden as it stands and does not fall upon the Defendant and it is for the Plaintiff/Respondent to move the court appropriately or for the Court to call for inquiry if need be, as provided by law.

8. The Plaintiff/Respondent's counsel framed one issue for determination namely;

- Whether the court should dismiss or strike out the suit against the 2nd Defendant/Applicant herein.

9. The submissions by the counsel for the Plaintiff/Respondent were that the instant application by the 2nd Defendant/Applicant is misplaced, unjust, unfair and frivolous as it seeks to wave away the Plaintiff's/Respondent's right to seek a just determination of the issues pitting her proprietary interests in the suit properties and which rights the Defendants have been interfering with. The counsel added that it is trite that striking out a merited suit is a serious issue and a court is bound to exercise this inherent power so carefully to ensure that it does not drive a deserving party out of a judgment seat. In support of his submissions, the counsel cited the case of **D.T. Dobie & Company (Kenya) Ltd – Vs- Joseph Mbaui Muchira & Another [1980] eKLR** where it was stated;

“If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. 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 weak 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..”

10. The Plaintiff's/Applicant's counsel further submitted that the 2nd Defendant/Applicant could be mentally unwell to the extent of not being able to stand trial or give instructions but he has not exhausted all the possible legal remedies that would adequately address his issue. The counsel pointed out that dismissing or vacating the suit is not one of the remedies contemplated by the grounds contained in the application by the 2nd Defendant/Applicant.

11. It was also submitted that under the Civil Procedure Code (sic) and the Mental Health Act, there are clear legal procedures that the 2nd Defendant/Applicant ought to follow in regard to the circumstances enlisted in their application. It was submitted that Order 32 Rule 15 of the Civil Procedure Rules categorically provides guidance on protecting the interest of persons adjudged to be of unsound mind when suing or being sued in court.

12. The counsel went on to submit that the 2nd Defendant/Applicant should be cognizant of the meaning and purpose of Section 28 of the Mental Health Act which provide that;

“The court may, upon application made to it by petition concerning any matter connected with a person suffering from mental disorder or with his estate, make such order, subject to this part, regarding such application as, in the circumstances of the case,

the court may think fit.”

13. Arising from the above, the counsel submitted that the 2nd Defendant/Applicant has the option of Petitioning the court to seek leave for appointment of a guardian for purposes of representation of his interest in this matter, an option he has conveniently chosen to boycott. The counsel termed the application dated 29th November, 2019 as unfounded, lacks merit and should be dismissed with costs.

14. Having read the application, the replying affidavit as well as the submissions by the counsel for the Plaintiff/Respondent, I would adopt the issue for determination as framed by the counsel.

15. I do note that annexed to paragraph 5 of the Supporting Affidavit to the application are medical records by medical Doctors L. Mativo, J. K. Mutiso and S. Wawa. The three reports are consistent in their findings that the 2nd Defendant/Applicant suffers from senile dementia among other illnesses.

16. The reports further show that the 2nd Defendant/Applicant may not be fit to plead. The letters by Dr. Mutiso and Dr. Wawa are addressed to the Executive Officer, Criminal Division, Milimani Law Courts and the Chief Magistrates Court Nairobi respectively. The two reports presuppose that the 2nd Defendant/Applicant had a criminal charge to plead to at the Chief Magistrate’s Court.

17. Be that as it may, since the 2nd Defendant/Applicant appears to rely on the three medical reports in support of his application, under Order 32 of the Civil Procedure Rules, he ought to have made an application before this court for the appointment of a guardian to represent his interest instead of applying for the Plaintiff’s/Respondent’s suit to be dismissed. I say so because Section 28 (1) of the Mental Act [revised edition 2012] provides a guideline on what is required of a person suffering from mental disorder. Equally Order 32 of the Civil Procedure Rules provides the procedure for making such an application.

18. To that extent, therefore, I am in agreement with the counsel for the Plaintiff/Respondent that the instant application is misplaced, unjust, unfair, frivolous and lacks merit. In the circumstances, I hereby proceed to dismiss it with costs to the Plaintiff/Respondent.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 11TH DAY OF MAY, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi