



Openda v IOI (Suing as Father and Next Friend of RO) (Civil Appeal E065 of 2024) [2025] KEHC 10427 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E065 OF 2024**

**AC BETT, J
JULY 17, 2025**

BETWEEN

JEAN OPENDA APPELLANT

AND

IOI (SUING AS FATHER AND NEXT FRIEND OF RO) RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. Gladys Kiamah (Adjudicator) in the Small Claims Court at Kakamega SCC. No. E371 of 2023 delivered on 14th March, 2024)

JUDGMENT

Introduction

1. Pursuant to a Judgment of the Small Claims Court delivered on the 14th day of March, the judgement was entered against Appellant in the following terms:

- Liability.....100%
- Special damages..... Kshs. 21,420/=
- General damages..... Kshs. 900,000/=
- Total Kshs. 921,420/=

2. Aggrieved by the said decision, the Appellant lodged the present appeal which is predicated on the grounds inter-alia, that the Learned Trial Adjudicator erred in law and in fact in failing to correctly interpret and apply the provisions of Section 2 of the [Mental Health Act](#) and by failing to appreciate and hold that the Respondent ought to have sought leave of court prior to instituting the suit in his capacity as the father of a mentally incapacitated daughter.



3. The appeal is also predicated on an assertion that the Learned Trial Adjudicator erred in law and in fact in awarding damages without any basis and which damages were inordinately high as to amount to a gross overstatement of the loss suffered considering the injuries sustained and the authorities cited.
4. The Learned Trial Adjudicator is also faulted for awarding special damages which were not specifically pleaded and proved, and holding the Appellant 100% liable against the weight of evidence to the contrary.

Issues for Determination

5. In view of the parties' pleadings, evidence and the grounds of appeal highlighted above, this court deduces the following issues for determination:-
 - (i) Whether the Respondent had locus to bring and sustain the claim herein; and
 - (ii) If the answer to the foregoing is in the affirmative, whether the Appeal herein is merited.

Analysis and Determination

Whether the Respondent had locus to bring and sustain the claim herein

6. An Appellate Court faced with a first appeal is obliged to re-evaluate and subject the evidence submitted before the trial court to a fresh analysis so as to reach an independent decision as to whether or not, the trial court erred in it reaching its conclusions. Nonetheless, appeals from the Small Claims Court are limited to matters of law pursuant to Section 38 of the [*Small Claims Court Act*](#).
7. That said, this court is minded to first address whether the Claimant had locus to institute and prosecute the instant matter in a representative capacity.
8. Looking at the statement of claim and accompanying witness statement, the Claim was instituted by the Respondent on behalf of his daughter, hereinafter, "the Subject", who is said to be mentally incapacitated.
9. The Respondent filed an "Authority to Act for Person of Unsound Mind" indicated to have been premised on the provisions of Order 32 Rules 1 and 15 of the Civil Procedure Rules.
10. The Appellant contested the Respondent's standing, arguing that he had no authority to act for the Subject.
11. In determining this issue, the Learned Adjudicator found that Section 20 of the [*Small Claims Court Act*](#) foresees a situation where a claimant is represented by an authorized person who has sufficient knowledge of the case and sufficient authority to bind the part being represented.
12. The Learned Adjudicator further found that though the Respondent did not seek leave to get authority to represent the Claimant, the spirit of the Act (read [*Small Claims Court Act*](#)) frowns upon denying a party justice due to undue regard to technicalities.
13. It is on this premise that the Learned Trial Adjudicator dismissed the Appellant's challenge to the suit on account of want of capacity on the part of the Respondent.



14. Before delving into this issue, this court finds it necessary to seek guidance in the applicable provisions of the law. Starting with the *Small Claims Court Act*, which the court appreciates allows representative suits, Section 20 provides thus:

“A party to the proceedings shall appear in person or where he or she is unable to appear in person, be represented by a duly authorised representative.

2) Deleted by *Act No. 5 of 2020*, s. 4.

(3) A Court shall, before permitting a person to act as a representative under subsection (1) where the representative is not a legal practitioner, satisfy itself that the person has sufficient knowledge of the case and sufficient authority to bind the party being represented.”

15. Applying the foregoing to the instant case, the first question this court has to answer is whether the Respondent was an authorized representative. Section 2 of the Act defines an authorized representative as follows:

“duly authorized representative” means the next of kin or a close relative of a party to the proceedings appointed in writing and approved by the Adjudicator to represent that party in court proceedings;...”

16. It was the Respondent’s contention that having filed a duly signed authority to act as a next friend of the Subject, he had complied with provisions of Order 32 Rules 1-15 of the Civil Procedure Rules.

17. The said provisions are reproduced as follows:

“Order 32 Rule 1:

Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

Order 32, rule 3:

Where the defendant is a minor, the court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian ad litem of such minor.

An order for the appointment of guardian ad litem may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in suit adverse to that of the minor and that he is a fit person to be so appointed. (emphasis added).

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.” (emphasis added)

18. A keen look at the provisions cited above which are clearly applicable in similar tenor and effect in cases involving minors and persons of unsound mind clearly require that an application be made before the court for an order for the appointment of guardian ad litem/next friend to issue.



19. In the instant case, no such application was filed, instead, the Respondent only filed what he termed as an, “Authority to Act for a Person of Unsound Mind” which in my view was misconceived.
20. The court also notes that Section 26 of the *Mental Health Act* Cap 248 provides for appointment of a guardian of a person of unsound mind. The Section provides thus:

“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...”

21. The court further observes that the provisions of Section 20 of the *Small Claims Court Act* should not be construed to have ousted the express provisions of the Section 26 of the *Mental Health Act*, Section 2 of the *Civil Procedure Act* and the rules thereunder (read Order 32 Rules 1-15 of the Civil Procedure Rules).
22. I am therefore inclined to find and hold that the Learned Trial Magistrate indeed erred in reaching the conclusion that the requirement to seek leave of court to represent a person of unsound mind was a mere technicality given the provisions of Section 20 of the *Small Claims Court Act*.
23. For the reasons expressed above, this court finds that the claim before the Small Claims Court was incompetent and thus ought to have been struck out as it was brought by a person lacking capacity to institute and prosecute it.
24. In reaching, this conclusion, the court is further guided by the various decisions cited by the parties on this matter. More specifically the court takes cognizance of the following findings of the Court of Appeal in *MGG v Gateway Insurance Co. Ltd & 2 others* [2020] KECA 880 (KLR) cited by the Appellant, which decision is binding on this court:

“Clearly from the pleadings it is rather obvious that the appellant filed the suit on behalf of Dr. G because he was incapacitated mentally. It was also not disputed that Dr. G was incapacitated and perhaps even mentally as stated above. However, the appellant was supposed to file proceedings under the *Mental Health Act* seeking to be appointed as manager or guardian ad litem before filing the suit in the High Court on behalf of her husband. Having not done so the Judge cannot be faulted for finding that the appellant lacked capacity to file the suit on behalf of her husband as the Judge simply gave effect to the provisions of the law. Even counsel for the appellant seems to have appreciated this fact as she only based her arguments in this appeal on the fact that the trial Judge failed to consider that the appellant was pursuing the shares of her husband on her own behalf as a wife...”(emphasis added).

25. For the above reason, the Judgment and Decree of the Small Claims Court is hereby set aside in its entirety and the suit struck off. The Appellant is however, at liberty to file a competent claim for consideration by the court.
26. Having found so, this court need not delve into the merits of the Learned Adjudicator’s findings on liability and quantum of damages payable in the circumstances of this case.



27. Given the nature of the claim herein, the court hereby directs that each party shall bear their own costs in the originating matter and the appeal herein.

28. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17TH DAY OF JULY 2025.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Appellant

Mr. Otieno for the Respondent

Court Assistant: Polycap

