



Ethics & Anti Corruption Commission v Koech & another (Anti-Corruption and Economic Crimes Civil Suit 18 of 2016) [2024] KEHC 1146 (KLR) (Anti-Corruption and Economic Crimes) (8 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1146 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 18 OF 2016
EN MAINA, J
FEBRUARY 8, 2024**

BETWEEN

ETHICS & ANTI CORRUPTION COMMISSION PLAINTIFF

AND

DAVY KIPROTICH KOECH 1ST RESPONDENT

DUNSTAN MAGU NGUMO 2ND RESPONDENT

RULING

1. This ruling pertains to the Plaintiff's application dated 1st November 2023.
2. The application was made pursuant to Order 32 Rule 15 of the *Civil Procedure Rules* upon Counsel for the 1st Defendant Ms Midenga and Company Advocates writing a letter dated 1st November 2023 to the effect that they were unable to get further instructions from their client as would enable them to draft and file his witness statement due to the client's infirmity. According to the letter, the 1st Defendant suffered a stroke on 17th August 2023 and when an MRI was done it established there was a big scar on his brain which affected his cognitive abilities leading to his inability to walk. It was intimated that he was constantly on diapers and was receiving home care from the Karen Hospital.
3. The specific prayers sought in the Notice of Motion were: - Firstly for this court to conduct an inquiry to determine whether the 1st Defendant was incapable of protecting his interests in these proceedings, whether by reason of unsoundness of mind or mental infirmity and secondly to make an order that he submit himself to a medical assessment by a doctor in a government hospital and a report be filed in court. This court was to do the above so as to inform itself of the necessity of the appointment of a guardian ad litem or next friend as provided in Order 32 of the Civil Procedure Rules.



4. This court duly allowed the application and granted both prayers. Its decision to hold the inquiry being informed of course by Order 32 Rule 15 of the Civil Procedure Rules as interpreted by the High Court in the case of MMM v AMK [2016] eKLR and the case of Hellen Mbinyo King'ola v HNO & Another [2019] eKLR.

5. In the case of MMM v AMK (*supra*), Mativo J, as he then was, held:-

“...Thus guided by the above authorities and the express provisions of Order 32 Rule 15, I find that it is necessary for this court to conduct a judicial inquiry and form an opinion that the person in question is incapable of protecting his/her own interests. This position was reiterated in the case of Duvvuri Rami Reddi Vs Duvvudu Papi Reddi And Ors [24] where the court authoritatively stated that after evaluating the authorities, the following principles emerge which I entirely agree with:-

- a. Order 32, Rule 15 places persons of unsound mind or persons so adjudged in the same position as minors for purposes of Rules 1 to 14. <http://www.kenyalaw.org> - Page 3/5 Hellen Mbinyo King'ola v HNO & another [2019] eKLR
- b. Order 32, Rule 15 applies not only to a person adjudged to be of unsound mind, but also to a person of weak mind.
- c. Where it is alleged that a party to a suit is of unsound mind and the other party denies it the court must hold a judicial inquiry and come to a definite conclusion as to whether by reason of the unsoundness of mind or mental infirmity, he is incapable of protecting his interests in the suit.
- d. Mental infirmity may even be due to physical defects, if it renders him incapable of receiving any communication or communicating his wishes or thoughts to others.
- e. Whether a person is of unsound mind or mentally infirm for the purpose of the rule and the event of the infirmity has to be found by the Court on inquiry.
- f. Where the question of unsoundness of mind arises not only under Order XXXII, Rule 15 of the Civil Procedure Code but is also one of the issues in the suit, the Court has ample jurisdiction to enquire into that question, and for that purpose seek medical opinion.
- g. The enquiry should consist not only of the examination of the witnesses produced by either party, but also of the examination of the alleged lunatic by the judge, either in open court or chambers, and as Courts are generally presided over by lay-men, as a matter of precaution, the evidence of medical expert should be taken.
- h. Of course, the opinion of a doctor as is the opinion of any other expert under the Evidence Act, is only a relevant piece of evidence.
- i. The Court may also compel the attendance of the alleged person before it, and to submit himself for medical examination. If the alleged person is in custody, the Court may direct the next friend or any other person having custody to produce him before the medical expert for examination.



- j. Where the precaution of judicial enquiry is not observed, the person cannot be declared lunatic, and a guardian cannot be appointed for him.
- k. When a person is adjudged as being of a lunatic or unsound mind irregularly and improperly; and notice was not served on him or a guardian alone was allowed to appear and defend the suit and decree was passed owing to the guardian not putting up a proper defence, the alleged lunatic can treat the decree against him as an ex parte decree and have it set aside under the provisions of the Civil Procedure Rules.”
6. The inquiry by this court was held on 21st November 2023 whereupon the court made an order for an examination of the 1st Defendant by a doctor. However, on 24th January 2024 the court was regrettably informed by Counsel for the Plaintiff that the 1st Defendant had refused and/or neglected to submit himself to a medical examination as ordered despite an appointment having been secured for him.
7. The inquiry held by this court on 21st November 2023 was conducted virtually by way of question and answer. The language elected by the 1st Defendant was English and the inquiry went as follows: -

“ 21/11/2023 (Open Court)

Before Lady Justice E N Mains (J)

Court Assistant – Raymond

Mr. Wambugu for the Plaintiff

Mr. Midenga for 1st Defendant

1st Defendant (who is online) also present

Mr Wambugu - The purpose of today’s appearance is for the court to conduct an inquiry as to the mental infirmity of the 1st Defendant. Second limb is for the 1st Defendant to be presented to a doctor for assessment.

Sgd.

E N Maina, J

Mr Midenga - My client has attended and the court can proceed and examine him.

Sgd.

E N Maina, J

Court - Language elected: English.

What is your name?

Davy Kiprotich Koech

What are you doing currently?

I am a recovering patient. Before that I was the Chief Executive Officer of KEMRI which stands for Kenya Medical Research Institute.

When did you become the CEO of KEMRI?

13th June 1989.

When did you leave KEMRI?

23rd August 2007



Do you remember the specific roles you played in KEMRI as its CEO?

My roles and responsibilities were in my letter of appointment. I was in charge of KEMRI.

What was KEMRI about?

It was a research in health matters. I worked with several people from different fields.

Why did you leave KEMRI?

It was determined by the then Permanent Secretary – Hezron Nyangito.

Were you given a letter of termination?

I was given a letter of suspension.

I suppose you know why you are before us today?

Yes. I was told to come before you in court today.

So you know you have a case before this court? Yes. A case concerning what? Staff pensions funds. What about those funds? I do not remember the specifics. I am aware that this case concerned property that is alleged to have been fraudulently acquired from the staff pensions funds. Sgd. E N Maina, J Mr Wambugu - No further questions. MR Midenga - No questions Court - As this court has asked questions of the 1st Defendant which would sufficiently assist it to make a determination regarding this cognitive abilities and there being no questions from Counsel I shall stop there. Sgd. E N Maina, J Court – Further Questions As we speak to you, where are you. I am at home in Nairobi Lavington. You are with? My son Architect Kiprop. I am here with my family meaning my wife and children. So you are fully aware of your surroundings? It is my son who told me it is my house. It is my house. Sgd. E N Maina, J Court

1. Mr. Kimani Maina for 2nd Defendant walks in and he says he has no questions.

Sgd.

E N Maina, J

2. Mr. Midenga shall have his client examined by a doctor and file the same by 1st December 2023.

3. The examination shall be done in close consultation with Mr. Wambugu, learned Counsel for the Plaintiff as the examination shall be by a Government doctor.

4. Mention on 11th December 2023.

Sgd.

E N Maina, J

21/11/2023.”

8. The background of this case is that the Plaintiff sued the Defendants to recover public funds which they are alleged to have misappropriated and or embezzled while in the leadership of the Kenya



Medical Research Institute (KEMRI). The 1st Defendant was the Director of the institute and the 2nd Defendant a board member. The Plaintiff's prayers in the Plaint dated 2nd June 2010 are: -

- “(a) The sum of Kshs.509,002,643.80
- (b) Costs of and incidental to this suit.
- (c) Interest of (a) above from the time of the loss at the appropriate bank rates and (b) above at court rates.”

9. From the record when Counsel for the parties appeared before Ombija J, on 18th January 2016 they recorded a partial consent for judgment, in favour of the plaintiff, for a sum of Kshs. 200 million with the balance of KShs.309,002,643 ordered to be subject of further negotiation or trial. It was also agreed that the 1st Defendant was to within 30 days of the consent pay the Plaintiff an initial sum of Kshs. 15 million in settlement of the said partial judgment in the sum of Kshs. 200 million and the balance within 120 days from the date of execution of the consent. Prohibition orders were confirmed against certain of the 1st Defendant's properties pending hearing and determination of this suit while some were lifted.
10. The above position prevailed when I took over the conduct of the case and as the pretrial proceedings had been conducted I scheduled the case for hearing and we were done hearing the Plaintiff's and 2nd Defendant's case and it was the turn of the 2nd Defendant when his Counsel wrote the letter to the Plaintiff. It is instructive that on 20th June 2022 this court granted parties 30 days to comply with the Civil Procedure Rules but by 8th February 2022 the 1st Defendant had not fully complied this despite that he was required to file his defence, witness statements and documents within 14 days upon being served with the Plaint and summons to enter appearance (See Order 7 Rule 1 and 5 of the [Civil Procedure Rules](#)). For avoidance of doubt, the 1st Defendant filed a statement of defence dated 28th June 2010 on even date. He did not however file any witness statement or documents.
11. Having given a background of the case let me now turn to the inquiry. As I stated the inquiry was conducted virtually by way of question and answer. The purpose of the inquiry was to assess whether there is need to appoint a next friend or guardian ad litem for the 1st Defendant as the court would for minors and persons of unsound mind under Order 32 of the [Civil Procedure Rules](#) – See Order 32 Rule 15 which states: -
 - “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 mine)
12. The questions put to the 1st Defendant were to assess whether he was aware of his surroundings, his past and his present and where he was and why there were proceedings against him in court. The 1st Defendant answered all the questions truthfully and in the positive. Only in one question did he seem not to be sure and that was whether he was fully aware of his surroundings. Only then did he falter but even then he quickly corrected himself and stated that he was at his own home.
13. The 1st Defendant was coherent and clear in his answers. He exhibited a very good memory of the events surrounding his life. He could remember where he worked, when he was appointed and when he was terminated. His body may have failed but his mind seems to me to be very intact. I was satisfied from the answers that the 1st Defendant is fully in charge of his cognitive abilities and is fully capable of giving evidence in this case should it please him to do so.



14. Unlike in criminal cases, there is no provision in the rules governing civil proceedings for termination of a civil suit. A civil suit can only “go away” if it is withdrawn or if it abates. In this case the Plaintiff has not expressed any intention to withdraw the suit. As for abatement of suits, Order 24 Rule 1 of the Civil Procedure Rules provides that a suit would not abate merely by the death of a party if the cause of action survives. Section 2 (1) of the Law Reform Act expressly prescribes the causes of action that do not survive as breach of promise to marry and defamation. In other words, this is a cause of action that survives and it would not abate or disappear even had the court found that the 1st Defendant has lost his cognitive ability. It would therefore be in his best interest for him to continue protecting his interest in the suit. Order 24 Rule 1 of the Civil Procedure Rules states: -

“24

- (1) The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.”

Section 2(1) of the Law Reform Act states: -

“2

- (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.”

15. It is clear therefore that even had the court found the 1st Defendant to be incapable of protecting his interest this case would not terminate. What the court would be required to do would be to appoint a guardian ad litem to step into his position. It cannot terminate the case.
16. The upshot is that this court finds that the 1st Defendant is sufficiently capable to instruct his Advocate and to proceed with his case. However, in the interest of fairness and justice should he consider himself incapable of protecting his interest in the proceedings it would do well for his advocate to make an application for the appointment of a guardian ad litem and to identify a person for that purpose.
17. In view of the age of the case, the application, if any, shall be made within 14 days failing which the 1st Defendant shall be deemed to have elected to continue in person. The case is accordingly fixed for hearing on 13th March 2024. There shall be no order as to costs.

Those are the orders of the court.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 8TH DAY OF FEBRUARY 2024.

E N MAINA

JUDGE

