



**GMG & another v IMN; Ng’ang’a (Interested Party) (Petition
27 of 2019) [2023] KEHC 667 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
PETITION 27 OF 2019
MW MUIGAI, J
FEBRUARY 9, 2023**

**IN THE MATTER OF MENTAL HEALTH ACT CAP 248 LAWS OF KENYA
AND
IN THE MATTER OF EWM (AGED 34 YEARS OLD)
AND
IN THE MATTER OF AN APPLICATION BY**

BETWEEN

GMG 1ST PETITIONER

SMM 2ND PETITIONER

AND

IMN INTERESTED PARTY

AND

ISAAC MUKURIA NG’ANG’A INTERESTED PARTY

JUDGMENT

1. The 1st Petitioner is the father to the subject, a resident of [Particulars Withheld] Location in Murang’a County and the 2nd Petitioner is a brother to the subject, a resident of [particulars Withheld] in Machakos County. It is contended that the 1st and 2nd Petitioners are male adults of sound mind.
2. The interested party is a male adult of sound mind and the Plaintiff in Machakos CMCC Case No. 20 of 2019.
3. The subject is a bachelor aged 34years and is a business person who at the time of filing the petition resided with the 2nd Petitioner.



Petition

4. The Petition is dated 1st October 2019 and seeks the following orders;
 - a. The Hon. Court be pleased to conduct a “judicial inquiry” to the subject EWM in accordance with Order 32 Rule 15 of the Civil Procedure Rules, 2010
 - b. The Subject herein EWM, be adjudged to be suffering from unsoundness of mind or mental infirmity, to be incapable of protecting/ safeguarding his interests generally including when suing or being sued.
 - c. The Petitioners be appointed as the Manager of the estate and/or Legal Guardian of the subject EWM
 - d. The Petitioner be granted orders to collect, preserve and manage without disposing any properties owned and/or formerly owned by the subject EWM.
 - e. Any other relief this Hon. Court may deem fit and just to grant.
5. It was the Petitioners contention that sometimes around March 2018, the subject withdrew socially, could not manage his affairs and was unable to communicate or speak. He disappeared from home and three days later, he was traced at Tala Police Station by his immediate family members who were informed that he had been found loitering aimlessly in the streets of Tala Market whereby well-wishers came to his rescue and took him to the Police station.
6. The subject was taken to Machakos Level 5 Hospital and on many occasions treated as an in -patient and out-patient in several hospitals. It was contended that despite undergoing among others speech therapy, his condition has not improved. Further, he is not in a position to manage his affairs and/ or protecting his interests.
7. The Petitioners aver that on 27.02.2019, the interested party instituted a civil suit being Machakos CMCC no. 20 of 2019 herein a defense was filed raising issues inter alia that the subject was suffering from mental infirmity and is incapable of protecting his interests when suing or being sued.
8. On 4.6.2019, the Defense advanced their position and sought for Court to conduct a “judicial inquiry” in accordance with Order 32 Rule 15 of the Civil Procedure Rules, 2010 and supplied the court with the authority of Nyeri High Court Misc Civil Application No 51 of 2015 (OS).
9. On 16.7.2019, the Trial Court gave directions staying proceedings in Machakos CMCC No. 20 of 2019 and directed the defense to move to High Court hence the Petition before this Court.
10. It was averred that the subject was not in a position to give an account of what he knows concerning the case and the advocate believes the subject is incapable of protecting or safeguarding his interests generally, properly managing his own affairs and is of such character without rehabilitation of his mental health condition and having an intensive speech therapy to pursue rights in the stayed proceedings.
11. The Petitioners contend that the subject is likely to suffer manipulation and misguided influence that may occasion negative impact on himself and his general well-being.
12. The Petitioners opine that the subject requires close monitoring which the 1st Petitioner has been undertaking and is willing to continue undertaking at his own cost and expense and also to protect the subject’s estate from unnecessary spillage, waste and deterioration.
13. The Petition is supported by and affidavit sworn by GMG and SMM on 1.10.2019.



14. Consents were attached that all family members have consented to the Petitioners herein to be appointed as Manager/ Legal Guardian of the subject and his estate.
15. The medical reports of the subject's condition and court proceedings and pleadings in Machakos CMCC no. 20 of 2019 are hereby attached.

Replying Affidavit

16. The interested Party deposed an affidavit dated 29th November 2019 in response to the Petition in which he contended that he is the registered owner of Land Title No Machakos/Kitanga/125 and on 19.8.2015, he charged it to National Bank of Kenya as security for a loan of Kshs 2,750,000/- advanced to the subject. The Interested party attached the Certificate of Official Search that confirms his ownership of the suit property Land Title No Machakos/Kitanga/125.
17. The Interested Party also attached the Legal Charge dated 15/8/2015 between IM (interested Party) & EWM (subject) with National Bank of Kenya (the Lender) over Machakos/Kitanga/125 (suit property) for advanced um of Ksh 2,750,000/- at 18.5% per annum.
18. The subject defaulted in repayment of the loan as a consequence of which the bank demanded the balance of Kshs 2,858,471 form him which he paid to the bank on 21.9.2017.
19. It was deposed that upon being served with summons to enter appearance, the subject herein acknowledged receipt by signing the said summons. He made a complaint to Machakos Police Station and the subject was charged with the offence of conspiracy to defraud on 7.01.2019 and the said charge was withdrawn on 14.01.2019.
20. On 27.02.2019, he sued the subject to indemnify him for the loss of Kshs 2,858,471 and in his defense, he raised the defense of mental illness. He opined that this was never raised by the subject in the Criminal Proceedings and he believes this is being raised as an afterthought to evade paying his money. The Interested party opines that the petition has not been presented in good faith by the Petitioners, who have failed to disclose to the Court if the subject owns any property which can be managed on behalf of the subject.

Hearing

21. This matter was canvassed by viva voce evidence before Hon D. K. Kemei J as follows;
22. PW1 was SMM from Muranga but resides in [particulars Withheld] area of Machakos stated that the subject, EM his brother herein in running a shop in Tala. He stated that the 1st petitioner is his father. He relied on the contents of his petition and affidavit in support plus annexures as evidence. MFI1-Medical documents.
23. It was his testimony that in 2018 the subject was found loitering in the market. They realized that he had a mental problem. He was taken to Machakos Level Five Hospital and he was treated is still on medication. He said he is unable to talk as he has a mental problem. He is expected back in hospital on 9-3-2020. MFI 6- Patient appointment card. He did not know the doctors who attend to the subject. The subject suffers seizure fits occasionally and there must be a family member to be close to the subject. There has been marked improvement. He requested to be given authority to manage his affairs.
24. Upon cross examination, he stated that the subject had a cosmetic shop at Tala market styled Bana Cosmetics. He confirmed that they collect the daily sales in the evening and take the proceeds home. He did not know if there is a bank account for the business. He confirmed that the business was licensed in the name of Visina Store and not Bana cosmetics. He affirmed that he had not paid for the year's



license and had only paid for the license for 2019. He said he maintains the business but did not have a document on the same. He said he knew the interested party herein over the alleged loan obtained by the subject.

25. He said he had indicated age of subject in the petition as 34 years while doctor's letter indicates it as 30 years and admitted to being wrong on the issue of age of the subject. He did not accompany subject to Dr. Wachira during the admission on 23-3-2016. The subject had not been taken to a Psychiatrist. The subject was placed at Tala Police Station for three days, he did not have the Police OB over the subject's incarceration in police cells. He contended that the subject only has the Tala shop and no other assets. He heard that the subject was charged and placed in custody for two months. currently he stays with the subject. He was aware that the subject was charged and did not know if the subject was represented by an advocate in the criminal proceedings.
26. Upon re -examination, he stated that the interested party has sued the subject. That there is an error on the subject's true age and requested the court to go by the copy of his ID Card. He was in Nairobi when the subject was taken to hospital. The subject is unable to manage his affairs. He opined that it is the doctor to ascertain the subject's mental status. The police assisted the subject after being found loitering aimlessly. He learnt of the criminal case which was discontinued due to his mental status.
27. On 3.11.2020, directions were taken by consent of the parties that;
 - a. All documents filed by the respective parties be admitted as exhibits to be relied upon by the parties.
 - b. Doctors Mutunga and Wachira to file medical reports on the subject within 30 days from that date.
28. On 8/11/2021, this Court took over the matter and sought proceedings to be typed and parties to obtain a copy then proceed with the hearing. On 6/6/2022 the matter proceeded with the interested party's case/evidence.

Interested Party Case

29. IMN was DW1, He produced the medical report by Dr. Atur Wachira – Machakos level Hospital. He stated that he knew EWM and adopted the evidence in the replying affidavit of 29/11/2019 be adopted as his evidence in chief and produced the exhibits as attached.
30. Upon Cross – examination he stated that he knew EWM, he lives in [particulars Withheld] within Machakos County, He lives alone. He did not know his house/home. They met and he took a loan in 2015 and they charged his property L.R. Machakos/Kitanga/125. He was charged in a criminal court in 2019 and the charge were withdrawn. The charge sheet and proceedings Chief Magistrates Court Machakos Criminal Case 17 of 2019 were attached and confirm that the matter was withdrawn under Section 87A CPC. The interested party was not there and did not testify during those proceedings. EWM (subject) came to Court and when the Court interrogated him he kept quiet. He filed medical documents in Court and he saw them and it was said he had mental instability.
31. Upon Re-Examination he stated that for the time he knew EWM he was stable and normal. He has no mental incapability. If he knew he was mentally unstable he would not have given his title deed to be used.
32. The Parties filed submissions.



Petitioners Written Submissions

33. The Petitioner filed submissions on 23.08.2022. While relying on the case of *M.M.M vs AMK* [2016], it was submitted that the only evidence that the Hon. Court could rely on was the evidence adduced by the Petitioners, Interested parties and medical evidence. It was submitted that when the subject was put into the witness box, he could not talk and/or communicate anything. The Petitioners contended that among their documents filed are medical documents which confirm that from march 2018 which is almost a year after the Subject was sued by the Interested Party, the subject has been undergoing medication and was being treated as an in -patient and out -patient in various hospitals.
34. It was contended that the treatment was and is ongoing during the pendency of this petition as confirmed by the patient’s appointment card for the subject which was filed in court on 31.01.2020. It was submitted that the subject herein is not in a position to properly manage his affairs and or protecting his interests due to his mental condition and this was even before he was sued by the interested party.
35. The Petitioner referred to the medical report by Dr. Mutunga dated 16.11.2020. in which it is contended that they confirm the following;

“Documents related on discharge summary from Machakos level 5 hospital

Brain CT Scan report

ID Card for identification.

Diagnosis: Focal Neurological deficit due to Left Frontol -temporal Infarct (lack of blood supply to the frontal Neurological deficit due to Left Frontol -temporal Infarct, lack of blood supply to the Frontol lobe/ temporal region of the brain)

Current Status

I have examined EWM today 16/11/2020

Findings

Well Kempt middle aged man

Has incoherent speech and loss of memory

He is unable to engage in daily family chores and has to rely on his guardians to perform such activities

It is my opinion that he cannot standi in court of law and give credible evidence”

36. Dr. Wachira filed a report dated 27.01.2020 to the effect that

“I have gone through his medical records and wish to state that I and my my team managed Mr. EWM between 23rd March 2018 and 28th March 2018 as dated in the discharge summary.

He was managed for a vascular event; a left sided infarct (stroke) of which he had developed sudden loss of speech. There was no indication at any point during his admission that there was underlying mental illness. The condition he was managed for does not amount to psychiatric disease or mental illness

He was to follow up with the speech therapist who would assist with recovery of his speech.”



37. It was submitted that the reports confirm that the subject was in hospital in March 2018, before the matters in the Chief Magistrate's Court and in this court were filed. Further, that despite the medical reports differing on whether or not the subject is suffering from mental illness, it is clear that the subject was and is still under medication and has among other speech issues, loss of memory, suffered some sort of stroke and is not able to engage in daily activities without assistance. When the subject was presented in court he had to be guided to the witness box and when the Hon. Court communicated to him, he could not communicate back.
38. It was submitted that the petitioners being the brother and father of the subject have been able to take care of the subject since 2018. The court was urged to consider the overriding objectives which is the welfare and best interest of the subject and grant the prayers sought. Reliance was placed on [Re K Arap M](#) [2021]

Interested Party Submissions

39. The Interested Party filed submissions on 13.10. 2022 and submitted that the report by Dr. J. B. Mutunga dated 16.11.2020 was not addressed to the court and it neither indicated whether he personally examined or managed the subject nor referred to the subject's medical records. It was submitted that the report dated 27.01.2021 by Dr. Alvin Wachira addressed to the court confirmed that he personally managed the subject and referred to the subject's medical records and discharge summary dated 28.03.2018.
40. It was submitted that it was evidently clear that Dr. Wachira's report is more comprehensive than that of Dr. Mutunga. The Interested Party questioned why the Petitioners did not seek for a medical report from Dr. Wachira who personally managed the subject but instead went to Dr. Mutunga who never managed the subject and had no personal knowledge of the subject.
41. It was also submitted that the Petitioners did not give any report on the subject's speech therapy follow up. That the subject did not raise the alleged mental illness during the criminal proceedings where he was represented by counsel and was only raised at the commencement of the civil proceedings. Further, it was contended that after filing of the petition is when the Petitioners went to search for the alleged evidence of mental illness of the subject. The petition is hinged on medical records filed on 01.10.2019 which do not show any mental illness of the subject.
42. The interested party submitted that the subject has schemed to avoid payment of the interested party's debt by presenting this petition which he says is an abuse of the process of court. The court was asked to dismiss the petition with costs.

Determination

43. This Court considered the Petition, the Replying affidavit, the evidence on record and the written submissions of the parties through their respective advocates.
44. The main issue for determination is for the Court to conduct judicial inquiry on/of the subject herein EWM and confirm him of unsound mind or having a mental infirmity and therefore he is incapable of protecting and/or safeguarding his interests/estate /wellbeing.

Section 2 of the [Mental Health Act](#) Cap 248 provides that:

“A person suffering from mental disorder” means a person who has been found to be suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and suffering from mental impairment due to alcohol or substance abuse.”



This Petition has been brought under the [Mental Act](#), Cap 248, Laws of Kenya, Section 26 provides as follows;

- (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.
- (2) Where there is no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate and guardian of any such person.
- (3) Whereupon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.

45. The Petition has also been brought under Order 32 Rule 15 of the [Civil Procedure Rules](#), 2010 provides as follows;

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.

46. The Court has a duty to consider this petition by virtue of Section 28 (1) of the [Mental Health Act](#) that provides;

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.

47. In [re Estate VFM \(Patient\)](#) [2020] eKLR, the court held that:

- a) For the court to grant the application for appointment of a manager of the estate and guardian to the patient, the Petitioner/Applicant is duty bound to prove that:
- b) There exists medical proof by show of evidence confirming that the subject suffers from mental disorder.
- c) The Petitioner/Applicant seeking to be appointed as manager or guardian must be legally fit to be so appointed.
- d) That due to the subject's mental disorder, he or she is incapable of managing his/her own affairs independently and responsibly.



- e) That the proposed manager/guardian will manage the subject's property effectively and efficiently for the benefit of the estate and welfare of the subject.
48. The Petitioners heavily rely on the case of *MMM v AMK* [2016] eKLR by Hon. J. Mativo (as he then was) which I have carefully considered and I am persuaded by it. In this case, the subject had been diagnosed with dementia. The court held as follows;

“I have given the above rule complete system of thought and in my considered opinion and interpretation, five principles outlined below can be discerned from this rule. These principles are designed to protect people who lack capacity to make particular decisions, but also to maximise their ability to make decisions, or to participate in decision-making, as far as they are able to do so. These are:-

1. A person must be assumed to have capacity unless it is established that he/she lacks capacity.
2. A person is not to be treated as unable to decide unless all practicable steps to help him/her to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.
4. An act done, or decision made, under the above rule for or on behalf of a person who lacks capacity must be done, or made, in his/ her best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

.....

Two stages must be complied with to satisfy the said rule (a) questioning the person by the court and (b) medical evidence. The first part has not been complied with hence no inquiry has been held as provided under the said rule. My answer to issue number three is clear, Order 32 Rule 15 contemplates inquiry by the court.

In yet another Indian case i.e. *Ramanathan Chettiar v. Somasundararn*

- (23) an application under Order XXXII, Rule 15 Civil Procedure Rules for the appointment of a guardian ad litem was filed on the ground that the defendant became mentally infirm subsequent to the institution of the suit. The Court, instead of holding a regular judicial enquiry contemplated under Rule 15, thought that it was sufficient to rely on the previous history of the litigation, and on the opinion, it formed after looking at the defendant, and eliciting answers to some questions.

Pandrang Rao, J., held that there was no enquiry of the kind contemplated by law, and that the order must be deemed to be one in the irregular exercise of his jurisdiction. The learned Judge held that in the absence of a record of the questions and answers, it was impossible for the Court of revision to decide whether the conclusion arrived at on that particular aspect was justifiable and that the enquiry was un-judicial and unsatisfactory. I respectfully agree with this decision of the learned Judge.”

49. To merit such an application, the Petitioners must adduce sufficient evidence on a balance of probability as required by Section 107-112 of the *Evidence Act* summarized as ‘He who alleges must



prove' to satisfy the Court firstly that the Patient is a person suffering from a mental disorder under the *Mental Health Act* and secondly that the Patient is incapable of managing his/her own affairs as was stated in the case of *In Re CWM (A Person Suffering From Mental Disorder)* [2022] eKLR. See also *Duvvuri Rami Reddi vs Duvvudu Papi Reddi and others* AIR 1963 AP 160 where Venkatesam, J. stated as follows;

- (1) Order XXXII, Rule 15 C. P. C. places persons of unsound mind or persons so adjudged in the same position as minors for purposes of Rules. 1 to 14.
- (2) Order XXXII Rule 15 C. P. C. applies not only to a person adjudged to be of unsound mind, as under the old Code, but also to a person of weak mind.
- (3) 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.
- (4) Mental infirmity may even be due to physical defects, if it renders him incapable of receiving any communication, or of communicating his wishes or thoughts to others.
- (5) Whether a person is of unsound mind or mentally infirm for the purpose of the rule and the extent of the infirmity has to be found by the Court on inquiry.
- (6) Where the question of unsoundness of mind arises not only under Order XXXII, Rule 15 C. P. C. 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.
- (7) 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.
- (8) Of course, the opinion, of a doctor, as is the opinion of any other expert, under Section 45 of the *Evidence Act*, is only a relevant piece of evidence.
- (9) The Court may also compel the attendance of the alleged lunatic before it, and to submit himself for medical examination. If the alleged lunatic 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.
- (10) Where the precaution of judicial enquiry is not observed, the person cannot be declared lunatic, and a guardian cannot be appointed for him.
- (11) When a person is adjudged a lunatic Irregularly and improperly, and notice was not served on him, and a guardian alone was allowed to appear and defend the suit and decree was passed owing to the guardian not putting up a proper defense, the alleged lunatic can treat the decree against him as an ex parte decree, and have it set aside under O. IX Rule 13 C. P. C.

Medical Reports/documents

50. The Medical documents attached to the Petition and referred to during the Petitioners case Medical Report dated 21/3/2019 from Machakos Level 5 Hospital by Dr Musyoka that confirmed that the subject was treated at the Hospital since 2018 and was undergoing speech therapy.



51. The Discharge Summary from the same hospital of 28/3/2018 confirmed admission of the subject from 23/3/2018 – 28/3/2018 and various types of treatment undertaken; Laboratory Report, ECG Report, CT Scan and Prescription and medical receipts of the subject's treatment.

52. The Medical Report by Dr J.B.Mutunga of 3/2/2020 indicated

Diagnosis: Focal Neurological deficit due to Left Frontol -temporal Infarct (lack of blood supply to the frontal Neurological deficit due to Left Frontol -temporal Infarct, lack of blood supply to the Frontol lobe/ temporal region of the brain)

Dr Mutunga confirmed that the subject was admitted at Machakos Level 5 Hospital on 23/3/2018 with inability to talk, headache and loss of memory. Upon investigations he was found to have suffered massive frontal temporal infarct and put on appropriate treatment regime.

Currently, he was/is undergoing speech therapy and brain damage suffered is gradually improving. He is unable to recall recent and past events has incoherent speech.

It was the doctor's opinion he cannot stand in a Court of Law and give credible evidence.

53. On 16/11/2020 Dr. John Mutunga in compliance with Court order provided another medical Report of/on the subject and relied on the following documents;

Documents related on discharge summary from Machakos level 5 hospital

Brain CT Scan report

ID Card for identification.

Current Status

I have examined EWM today 16/11/2020

Findings

Well kempt middle aged man

Has incoherent speech and loss of memory

He is unable to engage in daily family chores and has to rely on his guardians to perform such activities

It is my opinion that he cannot stand in court of law and give credible evidence”

54.Dr. Wachira filed a report dated 27.01.2020 to the effect that

“I have gone through his medical records and wish to state that I and my team managed Mr. EWM between 23rd March 2018 and 28th March 2018 as dated in the discharge summary.

He was managed for a vascular event; a left sided infarct(stroke) of which he had developed sudden loss of speech. There was no indication at any point during the admission that there was underlying mental illness. The condition he was managed for does not amount to psychiatric disease or mental illness

He was to follow up with the speech therapist who would assist with recovery of his speech.”

55. From the legal provisions and the above outlined decisions, and the following principles that emerge, on the first condition, the Petitioner submits that on 14/01/2021 the subject was put in the witness box but could not talk, this was also stated upon cross examination of the interested party however there is no reflection of such an act in the court record of this Court. The only witness who appears to have entered the witness box and was stood down is Dr. John Mutunga on 5.2.2020.



56. In the circumstances, this Court cannot be said to have undertaken an inquiry to ascertain the mental capacity of the subject to conduct his affairs and make decisions on his wellbeing and more so as is relevant in this matter to stand /defend any Court proceedings. This Court, in the absence of examination of the subject by/in Court/Chambers and provide a record of questions and answers cannot arrive at a conclusion of whether the subject is of unsound mind or mentally infirm or not without seeing him and interrogating him.
57. As regards medical evidence, there are three medical reports on record, 2 by Dr Mutunga 1 by Dr Wachira both admitted by Consent by parties /directions of the Court of 3/11/2020.

Litigation Skills for South African Lawyers by Chris Marnewick SC pg 237 states;

“An expert is a person who by virtue of his or her qualifications, experience or research or combination of all of them is able to give relevant evidence in the nature of information and opinions not generally available to the public....

Judges draw inferences from facts that are proved in the case before them. Expert witnesses are used to explain subject's outside the Court's normal experience and to express opinions on inferences to be drawn from those facts.”

Republic Vs. Lanfear 1968 1 ALL ER 683 where DIPLOCK, L. J. gave the correct English position in regard to doctors' evidence thus:

“... Our view is that the evidence of a doctor, whether he be a police surgeon or anyone else, should be accepted, unless the doctor himself shows that it ought not to be, as the evidence of a professional man giving independent expert evidence with the sole desire of assisting the court.”

58. The medical reports are pertinent to the determination of the issue at hand. From the medical reports, the subject has been examined, admitted in hospital subjected to tests and treatment at different intervals but has not been adjudged to have any mental illness. Secondly, the Reports differ in long term prognosis, the Reports seem to confirm the subject's medical condition at the time of examination and treatment, more of status or progress medical Reports but not conclusive on the subject's medical condition; that is whether there is opportunity of improvement and full recovery with possibility of regaining full memory and ability to take/make independent decisions or continued decline of mental ability.
59. This Court noted from the record; cross examination of PW1 intended /proposed Legal Guardian; that the subject was not examined/treated by a Psychiatrist to conclusively determine his mental capacity arising out of the head/brain impact.
60. His condition however falls under the provisions of Order 32 Rule 15 [CPR](#) 2010 which covers 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. [MMM v A M K](#) [2016] eKLR *supra* the multi- pronged approach of conduct of a judicial inquiry Order 32 Rule 15 [CPR](#) 2010 have not been met yet in the instant matter; examination of the subject by/in Court on infirmity or physical defects that renders him incapable of receiving communication and/or communicating, the extent of the infirmity and question of unsoundness of mind and for that purpose the Court should seek medical opinion and/or medical expert evidence. The medical reports on record are concise on the subject's condition at the time of examination and not into the future. The opinions also differ as to whether the subject is of unsound mind as prescribed under the [Mental Health Act](#).



61. From the totality of the evidence on record and keeping in mind the mental status of the subject is contested by the interested party, the orders sought from/in the Petition cannot be granted at this stage, it is premature until the remaining steps are complied with.

Disposition

59. Accordingly, I find that since no inquiry has been conducted, the orders sought at this stage are premature and if granted at this stage, the same will offend the clear provisions of Order 32 Rule 15 of the *Civil Procedure Rules* 2010.
60. I however find that the interests of justice will not by dismissal of the Petition. Accordingly in the interests of justice and to enable the court to wholly and effectively determine the issue, and fully satisfy the requirements of Order 32 Rule 15 of the *Civil Procedure Rules* 2010, I hereby grant the following orders:-
1. That the subject EWM shall be produced in court for the purposes of an inquiry by the Court (Chambers) for examination and the Court to establish whether by reason of unsoundness of mind or mental infirmity, he is incapable of protecting his interests.
 2. That, in the meantime, a current medical report by Psychiatrist at Machakos Level 5 Hospital shall be availed and/or the Psychiatrist to testify as to the subject's mental condition.
 3. That pursuant to the above order, the parties herein are directed to undertake the said judicial examination/inquiry and avail medical Psychiatrist's Report within 90 days from date of delivery of Judgment.
 4. No orders as to costs.

DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 9TH FEBRUARY, 2023 (PHYSICAL/VIRTUAL CONFERENCE).

M. W. MUIGAI

JUDGE

In the presence of:

No appearance for the Petitioner

No appearance for the Respondent

Mr. Gitonga for the interested party

Patrick/Geoffrey- Court Assistant(s)

