



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 265 OF 2017

FORMERLY MERU ELC. 79 OF 2014

N K (SUING AS NEXT FRIEND J K K).....PLAINTIFF/APPLICANT

VERSUS

K N R& 2 OTHERS.....DEFENDANTS

RULING

1. The applicant's advocate states that this application is predicated upon Order **32 Rule 15 of the Civil Procedure Rules**.
2. The application is dated **12.2.2014** and seeks the following orders:
 1. That the honourable court be pleased to make an order requiring one J K K (a person of unsound mind) to undergo psychiatric examination at Embu Provincial General Hospital within fourteen (14) days of this order and the report be filed in court.
 2. That costs of this application be provided for.
3. The application has the following grounds:
 - a. That the applicant filed this suit as a next friend to J K K (a person of unsound mind).
 - b. That there is an affidavit sworn on 29th October, 2012 and a statement by J K K (a person of unsound mind) to the effect that he is of sound mind.
 - c. That inquiry by this court needs to be done to determine whether or not the deponent is of sound mind.
4. The application is supported by the supporting affidavit sworn by the applicant on **12th April, 2014** which states"

I, N K, C/O P. O. BOX 2602-60200, EMBU, within the Republic of Kenya do hereby make oath and state as follows:

1. That I am the plaintiff/applicant herein and hence competent to swear this affidavit.
2. That I filed the suit herein as a next friend to one J K K who is my brother and of unstable mind and suffers from epilepsy.
3. That by reason of unsoundness of mind or mental infirmity he is incapable of protecting his interests when sued or being sued.
4. That recently on 1st October, 2013 the above mentioned recorded a statement and on 29th October, 2012 swore an affidavit to the effect that he is not of unsound mind hence this instant application. (Annexed herein and marked NK 1 & NK2 is a copy of the said affidavit and statement respectively).
5. That it is therefore mete and just that J K K deponent in this case be ordered to attend a psychiatric (sic) for examination at Embu Provincial General Hospital and report be filed in court.
6. That I am also advised by my advocate on record advice I verily belief to be true that inquiry needs to be done by this court to determine whether he is capable of protecting his interest when sued or being sued.

7. That I undertake to meet costs of the psychiatric examination.

8. That all what is deponed to herein is true to the best of my knowledge, information and belief.

5. The application is opposed by the 2nd defendant through his replying affidavit sworn on 26th February, 2014 which states:

I, F K C of P. O. BOX 422 CHOGORIA within the Republic of Kenya do hereby make oath and state as follows:

1. That I am the 2nd defendant herein and therefore competent to swear this affidavit on my own behalf and on behalf of my co-defendants.
2. That I have read and understood the contents of the Notice of Motion dated 12.2.2014 and the supporting affidavit of N K sworn on 12.2.2014 and wish to respond to the same as hereunder.
3. That the application is brought too late in the day in that the inquiry the plaintiff intends to have done ought to have been done before the suit was filed.
4. That the application is fatally defective in that it is supported by an affidavit signed by a person who is not the applicant.
5. That the applicant is an illiterate person whom I know very well and who at all material times has been signing documents by affixing his thumbprint. The applicant is therefore put to strict proof as regards the signing of the supporting affidavit.
6. That the person whom the applicant is seeking to have declared as of unsound mind has sworn affidavit and made a witness statement which is part of the court record and has all along been available to testify in court and there is no need then to compel him to undergo psychiatric examination.
7. That I am advised by my advocates on record which advice I verily believe to be true that an application of this nature ought to have been brought under the provisions of Mental Health Act Cap 248 of the Laws of Kenya and not under the provisions of the Civil Procedure Act and as such the application is bad in law.
8. That from the pleadings I was served with there is nothing to show that the said J K K has ever been diagnosed with a mental illness that would have warranted the filing of the suit herein by the plaintiff/applicant.
9. That I am further advised by my advocates on record which advice I verily believe to be true that if the orders sought for are granted the same would amount to infringing the constitutional rights of J K K who is not a party to this suit or to the application subject matter herein.
10. That I therefore pray that the application herein be dismissed with costs being awarded to myself and my co-defendants.
11. That what is deponed to herein is true to the best of my knowledge, information and belief save where source of information is disclosed.

6. J K K who is alleged to be of unsound mind seems to have filed an affidavit sworn on 29th October, 2012 which is annexed to the defendants' joint submissions and which states:

I, J K K of P. O. BOX 422 CHOGORIA within the Republic of Kenya do hereby make oath and state as follows:

1. That I am a Kenyan citizen of sound mind and a holder of Identity Card No.3306948.
2. That I know the parties in Embu HCC No. 58/2011 the plaintiff being my own brother and the 1st and 3rd defendants being persons I sold my land parcels number MWIMBI/KIRARO/[Particulars Withheld] to.
3. The 2nd defendant, I have learnt bought the land from the 3rd defendant.
4. That I sold the said parcels of land to the said persons voluntarily and without any coercion.
5. That I am currently living on my land parcel number KARINGANI/NDAGANI/[Particulars Withheld] which I bought on 20.12.2010 upon selling my said other parcels of land. A copy of my title deed is annexed hereto and marked "JKI".
6. That my brother the plaintiff in the said suit has no basis interfering with the 1st and 2nd defendants occupation of land parcels number MWIMBI/KIRARO/[Particulars Withheld] as the said defendants are the legal owners of the said land.
7. That I am ready to attend court if required to show the court that the allegations by the plaintiff that are (sic) of unsound mind are false.
8. That what is deponed to herein is true to the best of my knowledge, information and belief, save where source of

information has been disclosed.

7. This application was canvassed by way of written submissions.

8. I have carefully considered the pleadings, the authorities and the submissions proffered by the parties in support of their diametrically incongruent assertions. At the outset, I opine that giving orders to facilitate the questioning of a citizen's unsoundness of mind is a weighty matter which should not be taken lightly.

9. Order 32 rule 15 of the Civil Procedure Rules states 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 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.”

10. The authorities cited in this application are relevant in their facts and circumstances. However, no one case is congruent to another to a degree of mathematical certitude.

11. Our Judicial system is an adversarial one. In contradistinction to the civil system which is the system largely applicable in main land Europe, where judicial officers can take the role of ferreting out evidence, our system deprecates the idea that courts can be used by the litigants to assist them in ferreting out evidence that they intend to rely upon to prove or disprove their assertions.

12. I find that granting the orders sought by the applicant will put the court in an invidious position. Simply put, a court of law cannot be seen to be assisting one of the litigants to obtain evidence to be used against the opposite party or parties.

13. Regarding order 32 rule 15 of the Civil Procedure Rules which this application is said to be predicated upon, it applies in two circumstances as follows:

a. where a person has been adjudged to be of unsound mind.

b. where a person who though not so adjudged has been 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.

14. Regarding circumstance (a) in paragraph 13, the court cannot adjudge a person as being of unsound mind. It is the duty of the litigant or the person who alleges that to be the case to provide apposite evidence to the court.

15. As for circumstance (b) in paragraph 13 hereof, it is pellucid that the issue as to whether J K K, by reason of unsoundness of mind or mental infirmity, is incapable of protecting his interests when he is suing or being sued, remains undetermined at this interlocutory stage. It is necessary for this issue to be escalated to the hearing of the suit. Indeed, it is not clear if J K K, at this stage, is suing or being sued.

16. In the circumstances, this application is dismissed.

17. It is noted that this suit was filed on 2nd June, 2011. This is almost 7 years ago. It should have been heard and determined many years ago. The fact that the parties have not been keen in prosecuting the suit is veritably demonstrated by the fact that the plaintiff's written submissions dated 10th November, 2017 were filed on 18th November, 2017. The defendants' written submissions dated 28th November, 2017 were filed on 4th December, 2017. Thus, the parties took almost 4 years to canvass this application. This is a situation that attracts utmost deprecation and deserved opprobrium from this court.

18. To facilitate expeditious hearing and determination of this suit, it is ordered as follows:

a. The plaintiff should fully comply with Order 11 of the Civil Procedure Rules within 21 days of today.

b. The defendants should fully comply with order 11 of the Civil Procedure Rules within 21 days after receipt of the plaintiff's compliance documents BUT should the plaintiff not comply or serve the defendants with compliance documents within the stipulated time, NEVERTHELESS the defendants should fully comply with Order 11 of the Civil Procedure Rules within 21 days after expiry of the period granted to the plaintiff for compliance purposes.

c. Parties will take directions from the court on **15th May, 2018**.

19. For avoidance of doubt, and to recapitulate, this application is dismissed.

20. Costs shall be in the cause.

21. It is so ordered.

Delivered in open court at Chuka this 19th day of March, 2018 in the presence of:

CA: Ndegwa

N K – plaintiff

Manjau for defendants

P.M. NJORGE

JUDGE