



**FSE v Abdeel Enterprises Limited & 10 others (Commercial Suit E336 of 2024)  
[2025] KEHC 11445 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11445 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT E336 OF 2024**

**PM MULWA, J  
JULY 31, 2025**

**BETWEEN**

**FSE ..... PLAINTIFF**

**AND**

**ABDEEL ENTERPRISES LIMITED ..... 1<sup>ST</sup> DEFENDANT  
PARVIZ HAIDERLI NATHOO ..... 2<sup>ND</sup> DEFENDANT  
NAZLIN AMINMOHAMED NATHOO ..... 3<sup>RD</sup> DEFENDANT  
AMYNAZ AMINMOHAMED NATHOO ..... 4<sup>TH</sup> DEFENDANT  
ZUHER M. LADAK ..... 5<sup>TH</sup> DEFENDANT  
ANJARWALLA & KHANNA (ALN KENYA) ..... 6<sup>TH</sup> DEFENDANT  
ALI BADRUDIN ALIBHAI PUNJANI ..... 7<sup>TH</sup> DEFENDANT  
DIAMOND TRUST BANK (K) LIMITED ..... 8<sup>TH</sup> DEFENDANT  
HABIB BANK LIMITED KENYA ..... 9<sup>TH</sup> DEFENDANT  
ABDEEL INVESTMENTS LIMITED ..... 10<sup>TH</sup> DEFENDANT  
NAHEED MUSA ..... 11<sup>TH</sup> DEFENDANT**

**RULING**

1. This Court is tasked with determining the Notice of Motion application dated 25<sup>th</sup> September 2024, filed by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendants [“the Applicants”]. The application seeks several orders, including the Plaintiff’s mental assessment, a declaration of her incapacity to institute legal proceedings, and the dismissal or striking out of the suit. In the alternative, the Applicants seek an order



for the Plaintiff to deposit security for costs. The application is anchored on Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 32 Rule 15[1][b], [c], and [d], Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, the *Mental Health Act* [Cap 248], and the inherent jurisdiction of the Court.

2. The application is premised on the grounds of the face of the it and supported by the affidavit of Nazlin Amin Mohamed Nathoo, sworn on 25<sup>th</sup> September 2024. The allegations are that the Plaintiff is of unsound mind and incapable of comprehending or participating meaningfully in legal proceedings due to a diagnosis of Major Depressive Disorder. The Plaintiff contests these claims, asserting her capacity to participate in the proceedings and challenging the evidence relied upon by the Applicants.

## **Background**

3. The Applicants assert that the Plaintiff is of unsound mind, having been diagnosed with Major Depressive Disorder, and that this condition has rendered her incapable of understanding or participating in legal proceedings. They rely on a medical report dated 30<sup>th</sup> September 2023 and on the fact that the Plaintiff's daughter has, in two separate Environment and Land Court matters, acted under a Power of Attorney allegedly issued due to the Plaintiff's mental incapacity. She asserts personal and long-standing knowledge of the Plaintiff's condition through familial relations, cohabitation, and caregiving, and maintains that the Plaintiff has, for an extended period, lacked the requisite mental capacity to comprehend and participate in legal proceedings.
4. The Plaintiff, in response, denies that her mental health condition has impaired her legal capacity. She admits to suffering depression following personal loss, but maintains that this has not rendered her legally incompetent. She refutes the characterization by the 3<sup>rd</sup> Defendant of her as being "mad," "psycho," or "crazy," and terms such depictions as offensive, unfounded, and intended to stigmatize her condition. She avers that the suit is properly before the Court and challenges the legality and admissibility of the medical report relied upon by the Applicants. The Plaintiff attributes the deterioration of her emotional well-being in part to the conduct of the 3<sup>rd</sup> Defendant, whom she accuses of unlawfully and fraudulently assuming ownership and control of her business and properties. She avers there is no justification for leave to deposit security for costs and urged the court to disallow the prayer.
5. The parties filed and highlighted their respective submissions. The Plaintiff's submissions are dated 7<sup>th</sup> February 2025. The 3<sup>rd</sup> Defendant's submissions are also dated 7<sup>th</sup> February 2025.

## **Issues for Determination**

6. I have considered the pleading the issues for determination are:
  - i. Whether the Plaintiff lacks mental capacity to prosecute this suit and should undergo a mental assessment;
  - ii. Whether the suit should be struck out or dismissed for want of legal capacity;
  - iii. In the alternative, whether the Plaintiff should deposit security for costs.

## **Whether the Plaintiff lacks mental capacity to prosecute this suit and should undergo a mental assessment**

7. On the first issue, the Applicants argue that the Plaintiff has been diagnosed with Major Depressive Disorder, rendering her incapable of comprehending and participating in these proceedings. They rely on a medical report dated 30<sup>th</sup> September 2023 and the Plaintiff's prior reliance on a Power of Attorney issued to her daughter in related matters. The Applicants invoke Order 32 Rule 15 of the



Civil Procedure Rules, which permits the Court to assess a party's mental capacity where there is reasonable doubt.

8. The Plaintiff admits to suffering from depression but denies that this condition has impaired her legal capacity. She challenges the legality and admissibility of the medical report relied upon by the Applicants, arguing that it was procured without her consent and in violation of her rights.
9. Section 107 of the Evidence Act [Cap 80 Laws of Kenya] places the burden of proof on the Applicants to demonstrate that the Plaintiff's mental state renders her incapable of participating in these proceedings. The Court notes that mental health conditions, including depression, do not automatically equate to legal incapacity. The standard for determining incapacity is whether the individual is unable to understand the nature of the proceedings or to give instructions to their legal representatives.
10. The Court in *M.M.M. v J.N.M.* [2015] eKLR held that:

“Where there is a credible and cogent allegation of mental incapacity, the Court has a duty to inquire into the matter before proceeding, in order to safeguard the rights of the alleged person of unsound mind.”
11. The Mental Health Act [Cap 248], Section 26[1][a], allows the Court to make orders concerning the management of the affairs of persons with mental illness where such person is incapable of managing their affairs. However, such a determination can only be made upon credible evidence, preferably from an independent medical practitioner appointed by the Court or agreed upon by the parties.
12. In the present case, the report relied on by the Applicants is a private document dated 30<sup>th</sup> September 2023. It has not been verified on oath by the maker nor subjected to cross-examination. The Plaintiff disputes its authenticity and accuses the Applicants of weaponizing her condition to defeat her claim. The Court notes that no formal adjudication of incapacity has been made. Moreover, the Plaintiff has not objected to undergoing a mental assessment, which is a reasonable step to resolve the question of capacity conclusively and fairly. This court had in its ruling allowed the Plaintiff to undergo through a mental assessment at Mathari Hospital, after the applicants disputed the previous medical report.
13. The Court is alive to the distinction between mental illness and legal incapacity. A diagnosis of depression or even a chronic mental condition does not, ipso facto, amount to legal incapacity. As held in *Republic v District Magistrate's Court Nairobi & Another Ex Parte Wairimu* [1969] EA 406, legal capacity depends on the individual's ability to understand the nature and consequences of legal proceedings.
14. Consequently, I am not persuaded that the material presented meets the threshold for the Court to compel a mental assessment of the Plaintiff. That said, to balance the right to access justice and the need to protect vulnerable litigants, I find it prudent to order a preliminary and independent mental capacity evaluation under Court supervision.
15. In the absence of a court-sanctioned medical evaluation, this Court cannot declare the Plaintiff to be a person of unsound mind within the meaning of Order 32 Rule 15 or Section 26 of the Mental Health Act. As emphasized in *Re G [an Adult]: Mental Capacity* [2020] EWCA Civ 1746, capacity is issue-specific, and legal incapacitation must be demonstrated with reliable and objective evidence.
16. Until such assessment is undertaken and the findings brought before this Court, the Plaintiff retains the legal standing to prosecute her claim.



### **On whether the suit should be dismissed or struck out**

12. Striking out a suit is a drastic measure that should only be employed in the clearest of cases. In *DT Dobie & Company [Kenya] Ltd v Muchina* KLR 1, the Court of Appeal emphasized that striking out a suit is a drastic remedy that should only be granted where the defect is incurable and the suit is unsustainable:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action...”

17. The Plaintiff has raised serious allegations against the 3<sup>rd</sup> Defendant, including claims of fraud and unlawful assumption of control over her business and properties. These allegations warrant a full hearing on the merits. The Applicants have not demonstrated that the suit is so hopeless or defective as to justify its dismissal or striking out at this stage.

### **On deposit of security for costs**

18. The power to order security for costs is discretionary and must be exercised judiciously. Under Order 26 Rule 1 of the *Civil Procedure Rules*. It is usually exercised where it is shown that the Plaintiff is unlikely to be able to pay the Defendant’s costs if unsuccessful. The Applicant bears the burden of demonstrating this.

19. The Applicants have not provided sufficient evidence to justify an order for security for costs. The Plaintiff’s financial position and the merits of her case remain unclear at this stage. Ordering security for costs would risk denying the Plaintiff access to justice and undermining her right to a fair hearing under Article 50 of the *Constitution of Kenya*, 2010. This court finds that the mere fact of filing suit, even if the Plaintiff has a medical history, does not justify imposing a security for costs

20. In the result, and for the reasons set out above, the Notice of Motion dated 25<sup>th</sup> September 2024 is disposed of as follows:

- i. The prayer for a declaration that the Plaintiff lacks capacity is declined.
- ii. The prayer for dismissal or striking out of the suit is declined.
- iii. The prayer for security for costs is declined.
- iv. The court directs that an independent mental assessment of the Plaintiff be conducted at Mathari National Teaching and Referral Hospital. The report shall be filed under seal and made available to the Court. The cost of the mental assessment, if any, to be borne equally by the Plaintiff, on the one hand and the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendants on the other hand.
- v. Costs of the application shall be in the cause.

21. It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI**

**THIS 31<sup>ST</sup> DAY OF JULY 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Mr. Hans Oichoe for Plaintiff



Mr. Nyamu for 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup> & 11<sup>th</sup> Defendants

Mr. Mbugua for 3<sup>rd</sup> Defendant

Mr. Sebayinga for 5<sup>th</sup> Defendant

Court Assistant: Carlos

