



**DOO ((Person of unsound mind Suing through next friend JOO)) v Foam Mattresses Limited
(Civil Appeal E045 of 2021) [2023] KEHC 1715 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E045 OF 2021
FA OCHIENG, J
FEBRUARY 28, 2023**

BETWEEN

**DOO (PERSON OF UNSOUND MIND SUING THROUGH NEXT FRIEND
JOO) APPELLANT
(PERSON OF UNSOUND MIND SUING THROUGH NEXT FRIEND JOO)**

AND

FOAM MATTRESSES LIMITED RESPONDENT

*(An appeal against the Ruling and Order of Hon. Beryl M. A. Omollo,
RM delivered on 14/4/2021 in Kisumu CMCC No. 463 of 2019)*

JUDGMENT

1. This appeal arises from the decision which the learned trial Magistrate delivered on a Preliminary Objection. The said preliminary objection was couched in the following manner:
 1. That the plaintiff has not been adjudged, or it has not been shown, that the plaintiff been adjudged as a person of unsound mind under the *Mental Health Act*, neither has been found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting his interests when suing or being sued as anticipated under Order 32 Rule 15 of the *Civil Procedure Rules*.
 2. That in any event, the alleged Next Friend has not been appointed, neither has it been shown, that the alleged Next Friend has been appointed, to act as Guardian or Manager of the estate of the person alleged to be of unsound mind.
 3. That in the premises the alleged Next Friend lacks *locus standi* or legal capacity to commence and/or prosecute these proceedings on behalf of the person alleged to be of unsound mind.



4. That consequent to the foregoing the Plaintiff is fatally defective and the suit bad in law in so far as the action is purported to be brought through a Next Friend and/or on behalf of a person of unsound mind.”
2. Having given due consideration to the preliminary objection, the learned trial Magistrate held that it was merited.
3. The suit herein was instituted by DOO, who was described as a person of unsound mind. In the said circumstances, the suit was instituted through his Next Friend, JOO.
4. In its Defence, the respondent averred that DOO had not been adjudged to be of unsound mind, in accordance with Rule 15 of Order 32 of the Civil Procedure Rules. For that reason, the respondent asserted that the plaintiff lacked capacity, in law, to prosecute the suit.
5. As the respondent has pointed out, the issue about whether or not a person has capacity to sue is a matter of law, which can therefore be the foundation for a preliminary objection.
6. The respondent asserted that, pursuant to the provisions of Order 2 Rule 10 of the *Civil Procedure Rules, 2010*, the plaintiff was obliged to specify the particulars upon which he based his contention concerning the condition of mind of his brother.
7. A look at paragraph 5 of the plaintiff reveals the “particulars of the person of unsound mind’s injuries”.
8. It was asserted that the injuries which DOO sustained included “severe head injury on the occipital region”; and “Mental illness”.
9. Notwithstanding those particulars, the appellant does not challenge the respondent’s contention regarding the absence of an adjudication about the mental capacity of D.
10. Pursuant to Order 32 Rule 15 a person may either be adjudged to be of unsound mind, or if he had not yet been so adjudged, he may have been found to be incapable of protecting his interests when suing or being sued: the said finding would have to be made by a court, on inquiry, by reason of unsoundness of mind or mental infirmity.
11. As far as the respondent was concerned, the unsoundness of mind is a legal term resulting from a judicial determination or finding.
12. In the case of *Balakrishnan vs N. B. Balachandran & Another*, which was cited by the respondent, the court held as follows;

Experience has shown the danger of holding a man to be a lunatic on a mere enquiry by a Lay Judge, in Court, unsupported by the opinions of experts trained in such matters.”
13. The Court was of the considered view that a better way of ascertaining whether or not a person was a lunatic was through a certificate issued by a competent doctor, who had kept the said person under observation for a couple of days.
14. I therefore share the view expressed by the respondent herein; that:

I cannot understand how a lunatic or his guardian or the latter’s advocate can admit that he is a lunatic or deny that he is a lunatic.”
15. It would also follow that the defendant or his advocate would not be suited in determining whether or not the plaintiff was of unsound mind.



16. If that be the position, I find that the respondent's contention, that the plaintiff lacked capacity to prosecute the claim is not founded upon any verifiable fact.
17. On the other hand, the respondent submitted that JOO had proceeded to pronounce himself as the Next Friend of his brother D, without any lawful basis.
18. The question that arises is;

How did the respondent know that there was no lawful basis for the appellant's contention, concerning the mental status of D?"
19. That question is vital when it is considered that the trial court had been called upon to determine a preliminary objection.
20. In the celebrated decision of *Mukisa Biscuit Company Limited vs West End Distributors Limited* [1969] E.A 696, the Court emphasised that a preliminary objection is in the nature of what used to be a demurrer. The court went on to say that a preliminary objection;

... raises a pure point of law which is argued on the assumption that all the facts as pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."
21. In this case, the plaintiff had asserted, in his pleadings, that he was a person of unsound mind. Therefore, any preliminary objection could only be argued on the assumption that D was a person of unsound mind.
22. As the respondent was challenging the said pleadings, by terming the same as a mere assumption, it follows that the court would have to determine a question of fact.
23. Whilst the respondent had concluded that the Next Friend has pronounced himself as such without any lawful basis, the appellant told this Court that there are medical documents which a doctor issued after the doctor had examined D; and had determined that D was a person of unsound mind.
24. In the case of *Dr. Joseph Kimani Wanjama vs Tech Pro Systems Ltd & Another*, ELC No. 176 of 2017, Bor J. held as follows:

The court agrees with the finding of Mativo J. that for the Court to find that the plaintiff is incapable of protecting his interest, the court is required to hold an enquiry as provided under Order 32 Rule 15 of the Civil Procedure Rules, by examining the plaintiff and considering medical evidence on his mental capacity. Since no inquiry has been conducted, the suit cannot stand as it is. It is dismissed with costs to the Defendant and the Interested Party."
25. I do share the view that the issue about the mental capacity of a plaintiff (or a defendant) who is said to lack the requisite mental capacity, cannot be a matter of an assumption. It must be verified.
26. As was held by Hon Lady Justice Bor, (above), the enquiry about the ability of the plaintiff to protect his interests should be done by examining the plaintiff, and also by giving due consideration to the medical evidence on his mental capacity.
27. By making a determination that the appellant herein lacked mental capacity to institute the suit, or to prosecute the said suit, the trial court erred because it did not give an opportunity to the appellant to put forward the medical evidence which he allegedly has.



28. The learned trial Magistrate had expressed herself as follows, in the ruling which is the subject of this appeal;

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.”

29. Based upon that finding, the trial court ought to have set in motion the process of conducting the requisite judicial inquiry.

30. As no such inquiry was conducted, I find that the trial court erred by making a premature conclusion, that would shut out the plaintiff. In my considered opinion, the most appropriate directions which the trial court should have given were that there would be a stay of any further proceedings until the mental capacity of the appellant was determined.

31. Therefore, to the extent that the trial court shut out the appellant’s case, I find that the court erred.

32. The learned trial Magistrate was alive to the correct legal position, as can be seen from the emerging principles which she set out in her ruling, as follows;

- (iii) 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 unsoundness of mind or mental infirmity, he is incapable of protecting his interests in the suit.
- (iv) 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.
- (v) Whether a person is of unsound mind or mentally infirm, for the purpose of the rule, and in the event of infirmity, has to be found by the court on inquiry.”

33. Having so directed, the trial court ought to have gone through the process of the judicial inquiry.

34. Accordingly, there is merit in the appeal. I therefore allow the appeal, as the conclusion should not have been made on a preliminary objection, when no judicial inquiry had been conducted to determine whether or not the plaintiff was a person of unsound mind.

35. The costs of the appeal are awarded to the appellant.

36. Meanwhile, the costs of the preliminary objection shall abide the outcome of the judicial inquiry. If the inquiry reveals that D was a person of unsound mind, the respondent will pay to the appellant herein, the costs of the objection. But if the inquiry reveals that D was not a person of unsound mind, the appellant herein will pay the costs of the preliminary objection.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF FEBRUARY, 2023.

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FRED A. OCHIENG
JUDGE

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

