

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
MISCELLANEOUS CIVIL APPLICATION No. 0001 OF 2016

ASERU JOYCE AJJU	APPLICANT
VERSUS		
ANJOYO AGNES (a patient)	RESPONDENT

RULING

This is an application by chamber summons *ex parte*, under section 2 of the *Administration of Estates of Persons of Unsound Mind Act*, Cap 155 and rules 3 (2) (a) of *The Administration of Estates of Persons of Unsound Mind (Procedure) Rules*, SI 155 – 1. The applicant seeks an order appointing her as manager of the estate of the respondent, on grounds that she is the biological mother of the respondent who because of a mental illness affecting her mind, has become incapable of sound decision making and is now under her care and maintenance.

Rule 3 (2) of the same rules requires applications of this nature to have the following supporting documents; an affidavit of kindred and fortune in Form A in the First Schedule to the Rules, a certificate in Form B in the First Schedule to the Rules, by the superintendent of the mental hospital where the person of unsound mind is a patient, or where the patient is not in a mental hospital, an affidavit by a medical practitioner stating that he or she has personally examined that person and that the person is still of unsound mind.

The instant application is supported by the affidavit of the applicant who is the biological mother of the respondent, whose contents in my view satisfy the requirements of an affidavit of kindred and fortune prescribed as Form A to the First Schedule of the Rules. It was initially accompanied by the supplementary affidavit of a medical practitioner dated 14th July 2016, attaching medical treatment notes from 25th November 2015 to 2nd February 2016 and a medical report dated 24th November 2015, which in my view was not sufficiently contemporaneous with the present application. I therefore directed counsel for the applicant to produce a more recent report which was presented by way of an additional supplementary affidavit of the same doctor dated 18th

August 2016 re-attaching medical treatment notes from 25th November 2015 to 2nd February 2016 and an updated medical report dated 24th September 2016 confirming that he has personally examined and treated the respondent for a period of over one year and three months and that she suffers from Unipolar Depression (associated with suicidal tendency). Although on medication, she suffers from relapses to the extent that she cannot concentrate and make wise decisions for herself.

Although the respondent was not admitted in a mental hospital, considering the unsatisfactory nature of the initial supplementary affidavit of the medical practitioner that was submitted in support of the application, whose contents were only improved upon by the production later of an additional supplementary affidavit by the same medical practitioner, I considered it prudent to conduct an inquiry as would be done by a magistrate for purposes of issuance of a Reception Order under section 4 or 5 of the *Mental Treatment Act*, Cap 279 such as would eventually lead to the issuance of a medical certificate (Form B to the rules) required by rule 3 (2) (c) of *The Administration of Estates of Persons of Unsound Mind (Procedure) Rules* which envisages that the patient should have been adjudged to be a person of unsound mind by the time an application of this nature is made. This is because section 1 of *The Administration of Estates of Persons of Unsound Mind Act* defines a person of unsound mind to mean, “...any person adjudged to be of unsound mind under section 4 of the *Mental Treatment Act* or any person detained under section 113 or 117 of the Magistrates Courts Act.”

Secondly, Rule 4 (1) of *The Administration of Estates of Persons of Unsound Mind (Procedure) Rules* requires personal service to have been made on the respondent and there was no order on record within the terms of Rule 4 (2) by the Registrar to the effect that service on the respondent had been dispensed with. There was no affidavit of service as is required by Rule 7 (1). Other than dismiss the application for this procedural flaw but rather for purposes of administering substantive justice and to enable the court wholly and effectually determine the issues brought before it in the application, I ordered that the respondent be produced in court for purposes of an inquiry to establish whether by reason of unsoundness of mind or mental infirmity, she is incapable of protecting her interests.

The need to conduct an inquiry into the mental state of the patient before making orders of this nature is further explained in the Indian case of *Moohammad Yaqub v Nazir Ahmad and others*, 1920 58 Ind Cas 617 as follows' -

When a person is alleged to be insanethere ought to be a careful and thorough preliminary enquiry and the Judge ought to satisfy himself that there is a real ground for an inquisition. It is impossible to lay down any hard and fast rule, but in the first place it is essential that the person making the application should support it ordinarily by affidavit or by tendering himself for examination to the Judge on oath in support of the allegations in his application. The learned Judge would naturally want to know what relationship existed, what previous association had existed between the applicant and the alleged insane person, how long the illness was supposed to have lasted, why no previous steps had been taken and what were the present symptoms and actual causes which had induced the applicant to make the application as and when he did.an application of this kind ought to be supported by some medical evidence in the nature of a certificate of some doctor, lady or otherwise, who has had a reasonable opportunity of seeing the condition of the alleged invalid. If no medical evidence is forthcoming of more recent date than eight years before the application, so much the worse for the applicant. In many cases, and we think that this case is probably one, it would be very desirable that the Judge should seek some personal interview with the alleged insane, not with a view to forming a final opinion as to her real condition but to satisfy himself in the ordinary way, in which a layman can do, that there is a real ground for supposing that there is something abnormal in her mental condition which might bring her within the Lunacy Act. Of course it cannot be done without the consent of the personshe would probably have no objection to comingto Court and sitting in the Judge's Chamber where the Judge could have some rational conversation with her if possible.

The importance of such an inquiry was further underlined in *Ranjit Kumar Ghose v. Secretary, Indian Psychoanalytical Society AIR 1963 Calcutta 261*, where the court decided as follows; -

In many cases, and we think that this case is probably one, it would be very desirable that the Judge should seek some personal interview with the alleged insane, not with a view to forming a final opinion as to her real condition, but to satisfy himself in the ordinary way, in which a layman can do, that there is a real ground for supposing that there is something abnormal in her mental condition which might bring her within the Lunacy Act.....the enquiry which is contemplatedinto the alleged mental infirmity is a judicial enquiry with notice to the allegedly insane person and any order passed against an allegedly insane person without such an enquiry will vitiate the order to the extent of making the same a nullity. The court should of its

own motion conduct an enquiry in accordance with the provisions that section before accepting the application. it was obligatory that the court conducted an enquiry as to whether the petitioner had become incapable due to any mental infirmity of protecting his interest

The rationale for this inquiry was explained in *Balakrishnan v. Balachandran*, (1956) 1 Mad LJ 459 as follows;

[This is] intended to ensure that no man is adjudged a lunatic without proper enquiry, and that the Court should hold a judicial inquiry and it may seek the assistance of medical experts. if the precaution of a judicial inquiry is not observed, a man cannot be declared to be a lunatic (or unfit to protect his interests), and a guardian appointed for him on that basis. That procedure involves a judicial inquiry which consists normally of two parts: (1) questioning the lunatic (or the person in question) by the Judge himself in open court, or in chambers, in order to see whether he is really a lunatic and of unsound mind (or unfit to protect his interests), and (2) as the Court is generally presided over only by a layman, to send the alleged lunatic to a doctor for report about his mental condition after keeping him under observation for some days. The affected individual's mental status must be determined by a medical doctor or by the court upon inquiry. The plaintiff was never presented to the court for inquiry into his mental status nor was any evidence presented to demonstrate that the plaintiff had been adjudged to be of unsound mind and incapable of protecting his own interests.

I was further persuaded in coming to that position by the decision *In the Matter of the Estate of Kiggundu James (Person of unsound mind) H.C. Misc Cause 18 of 2015* where the court was of the opinion that the import of *The Administration of Estates of Persons of Unsound Mind Act* and the rules made under it is that a person must first be adjudged to be a person of unsound mind by a magistrate's court under section 4 of the *Mental Treatment Act* or must be a person detained under sections 113 or 117 of the *Magistrates Courts Act* before the High Court can determine the suitability of the applicant to manage the estate of such person. The High Court would thus rely on the findings of such magistrate's court that a person is of unsound mind, or that the person was detained under the *Magistrates Courts Act*, before appointing a suitable manager for that person's estate.

Lastly, Uganda is a signatory to the *United Nations Convention on the Rights of Persons with Disabilities, 2007*. Article 1 defines people with disabilities to “include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” Article 12 of the Convention, favours the presumption of legal capacity as the mechanism through which the self-determination of people with disabilities is given legal recognition. It serves a dual purpose, guaranteeing the legal recognition of people with disabilities and their decisions, and ensuring access to support in order to exercise their legal capacity. The right to legal capacity seeks to redress the historic lack of legal recognition provided to many people with disabilities, particularly people with intellectual disabilities and people with psycho-social (mental health) disabilities. It requires States to take the lead in moving away from restriction and denial of the decision-making rights of people with disabilities (‘substituted decision-making’) towards ensuring their autonomy in all areas of life and the right to access support in exercising this (‘supported decision-making’). The latter places the individual concerned at the centre of the decision-making process. The court therefore had to determine whether the respondent is a person in respect of whom a substituted decision-making rather than a supported decision-making arrangement ought to be made. For that reason, decisions made on behalf of a person who lacks capacity must be done, or made, in his / her best interests.

To come to a proper decision, the court proceeded on the understanding that the spirit behind Rule 4 (1) of *The Administration of Estates of Persons of Unsound Mind (Procedure) Rules* requiring personal service to have been made on the respondent is that a person must be assumed to have capacity unless it is established that he / she lacks capacity. Therefore, a person is not to be treated as unable to make a decision unless all practicable steps to help him / her to do so have been taken without success and a person is not to be treated as unable to make a decision merely because he / she makes an unwise decision. Before grant of the application, court had to consider whether the purpose for which it was needed could be as effectively achieved in a way that is less restrictive of the respondent’s rights and freedom of action.

When the respondent was produced in chambers on 10th October 2016, it was not possible to question her or have any rational conversation with her since it was apparent that she had no

sense of awareness of her surroundings. She appeared to be disoriented and behaved like a person sedated, seemingly half asleep and non-responsive to questions throughout the proceedings. The court was therefore unable to examine or form any view from direct questioning of the respondent about her state of mind or other mental, cognitive or physical capabilities. She clearly had no rational understanding of the proceedings. All representations of her state of mind and physical capabilities were therefore entirely through her mother, the applicant.

Since the respondent was under the care of the applicant, the court proceeded to examine the applicant in lieu of the respondent. As a person who had a previous experience of the respondent, her general constitution and habit of mind, she was in my view qualified from the evidential point of view possibly more than anybody else to provide the necessary facts and express a reliable opinion, where necessary, during the competency evaluation. The approach taken during the inquiry was to interrogate the function-based capacity of the respondent (i.e. ability to make specific decisions at specific points in time relating to her needs, interests and welfare), since mental competence is context specific. This was done by asking questions directed at establishing whether the respondent's condition / incapacity was fluctuant and of a temporary nature or not, her cognitive functioning based on normal daily occurrences and observations of a lay person around her living environment, her ability to communicate her thoughts, wishes feelings and decisions; her past and present wishes and feelings to the extent they could be discerned, her ability to engage in the ordinary domestic chores, personal hygiene and care, ability to recognize and respond to her children and other close relatives, ability to show expressions of concern about the welfare of her children, her own life, her current condition, future plans, her ability to make decisions regarding her welfare, interests, and so on.

A person is deemed to be of unsound mind for purposes of these proceedings if he or she is afflicted by a total or partial defect of reason or the perturbation thereof, to such a degree that he or she is incapable of managing himself or herself or his or her affairs. This is the standard suggested in *Whysall v Whysall* [1960] P. 52 where Phillimore J, expressed the following opinion as to the degree of insanity which had to be found: "If a practical test of the degree is required, I think it is to be found in the phrase "incapable of managing himself and his

affairs” and that the test of ability to manage affairs is that to be required of the reasonable man. The elderly gentleman who is no longer capable of dealing with the problems of a “take-over bid” is not, in my judgment, to be condemned on that account as “of unsound mind”.

In *Re Cathcart* [1892] 1 Ch. 466 at page 471, Lindley LJ, made the following observations as to the nature of inquiry that ought to be made into the alleged insanity of a person, which may or may not be of interest and of relevance to the present proceedings:

Unless a person’s insanity is so marked and of such a nature that he is not able to manage himself and his affairs, he ought not to be found lunatic; and unless there is considerable evidence of his inability, no inquiry ought to be set on foot. “Inability to manage either himself or his affairs” is inability to manage both,Whether a scientific expert would say that no person can be of unsound mind and still be capable of managing himself or his affairs, I do not know; but the Legislature has proceeded upon the assumption that a person may possibly be of unsound mind and may yet be capable of managing himself and his affairs. Hence the importance of attending to this matter in addition to the first. Assuming that there are grounds for supposing a person to be insane, and to be incapable of managing himself or his affairs, it does not follow that there is any occasion to institute proceedings by inquisition against him. It is necessary to consider his position, and what management is wanted in his particular case, and whether his friends and relatives are bestowing such care and management as are required. A person who is insane, but who is living a home and is carefully and judiciously looked after may well be left alone; whilst an insane person in a different position, even if harmless to himself and other, may require protection which can only be afforded through the medium of an inquiry. A very difficult question arises, especially in the early stages of insanity, when medical supervision and treatment will be probably lead to recovery, and when its absence may result in permanent illness. What ought to be done in such case. If the patient cannot be brought to see the necessity for, and will not submit to, temporary supervision and enforced quiet and removal from all those excitements and surroundings which aggravate his illness? In such a case – a very common one – it cannot be said that an inquiry is necessarily improper; it may be essential if the progress of the disease is to be stopped. In considering the reasonableness of taking hostile legal proceedings against an alleged lunatic, it is very material to ascertain whether he could or couldn’t be brought to realize his own position and submit himself to the care of others.

The applicant must provide some cogent evidence, tending to prove that a person is mentally unsound. Once the court is so satisfied then it can go on to ahead to consider whether the

applicant has also provided cogent evidence, tending to prove that a person is incapable of managing herself and her affairs. No doubt such considerations may be simultaneous but the court should consider them separately, bearing in mind that it is always for the applicant to prove her case on a balance of probabilities. Such a determination is important so that others may not be in a position to take advantage of the Respondent. It is only when satisfied that the two limbs are satisfied that the court would be justified to make an order appointing a manager of the estate of the respondent.

From that inquiry, the court established that the respondent is a 41 year old graduate, a mother of four children, the youngest of whom is four years old and the eldest a 13 year old. Her last place of employment was at Adjumani where she worked with a non-governmental organization. She was at one time married but separated from her husband. The mental problem she is now laboring under developed about two years ago as a result of which she is on medication which tends to weaken her soon after each dose. She cannot concentrate for long on any task and barely recognizes her own children. She is incapable of even the simplest tasks as feeding herself and personal hygiene. As a result she is entirely dependent on the applicant for personal grooming and the basic needs of life. She does not write nor read anything anymore. She has lost the ability to express her wishes and plans and the applicant needs to discern her needs by reading her moods, physical condition and appearance.

The combined effect of the supplementary affidavits of Dr. Droti Alfred, a Senior Psychiatric Clinical Officer at Arua Regional Referral Hospital is to the effect that he diagnosed the respondent's condition on 24th November 2015 when she was taken to him at the hospital, as Unipolar Depression. The condition causes an abnormal depressed mood, loss of all interest, loss of appetite, abnormal weight loss, abnormal insomnia, abnormal poor concentration or indecisiveness and suicidal tendencies. Although on treatment, it is not possible to tell when she will return to her normal self, if at all. She is now on anti-depressant drugs.

Although this court did not have the opportunity to examine the respondent since her condition was not amenable to any form of examination, it has had to, and is content, to rely on the expert medical evidence presented before it and the examination conducted of the applicant in lieu

thereof. From that evidence, it is undisputed that the respondent has some form of mental illness which has caused or contributed to the deterioration of her cognitive functions, to a degree where she is can no longer capable of making rational choices or competently manage her own affairs. Based on the clinical evaluation of Dr. Droti Alfred, detailing the nature, possible duration and reasons why the respondent is unable to manage her own affairs, I find that because of Unipolar Depression, the respondent is incapable of managing herself and her affairs.

I have conducted the twofold procedure of an inquiry and consideration of the available medial evidence. All the evidence combined in my view tends to prove that the respondent is mentally unsound and is incapable of managing herself and her affairs. This was confirmed in the affidavit of the applicant, the supplementary affidavits of Dr. Droti Alfred, and her total inability to respond to questions put to her during the inquiry. It is my settled opinion that having considered the lay and expert evidence of mental unsoundness and incapability regarding the respondent in managing herself and her affairs, that the respondent suffers from infirmity of mind, of such a character that prevents her from safeguarding his interests. She is no longer capable of making decisions that need to be made in daily life about her personal welfare, financial affairs and medical treatment. Her mental capacity requires substituted decision-making rather than a supported decision-making arrangement. For that reason the applicant has proved on the balance of probabilities that it is necessary to appoint a manager of the respondent's estate.

The next question is whether the applicant is a fit and proper person to be so appointed manager. The respondent's condition of impaired or diminished mental capacity exposes her to abuse, neglect and exploitation. For the applicant to be found a suitable manager of her estate, court should be satisfied that she is capable of preventing the potential abuse, neglect and exploitation of the respondent. She should be capable of taking control over the respondent's real and personal estate, her personal welfare, and make decisions in the best interests of the respondent and her dependants. She should be an adult of sound mind and her interests should not be adverse to those of the respondent, in the estate for which she proposes to act as manager.

Section 2 of *The Administration of Estates of Persons of Unsound Mind Act*, empowers court to appoint, among several classes of people, a relative of a person of unsound mind to be the

manager of the estate of such person. I had the opportunity of observing the applicant in court during the inquiry into the respondent's state of mind, I have perused her affidavit in support of the application, I have considered the fact that she is the biological mother of the respondent and that she now cares for her and the respondent is entirely dependent on the applicant in all her humanly needs. I am unable to find any adverse interests between the applicant and the respondent. I have no reason to doubt the applicant's ability to prevent the potential abuse, neglect and exploitation of the respondent, take control over the respondent's real and personal estate, her personal welfare, and to make decisions in the best interests of the respondent and her dependants. For that reason, I hereby appoint the applicant, Ms. Aseru Joyce Ajju as Manager of the estate of her daughter, Ms. Anjoyo Agnes (a person of unsound mind).

However, the court is further empowered to make such orders as it may think fit for the management of the estate of respondent, including proper provision for her maintenance and for the maintenance of such members of her family as are dependent upon her for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder. Furthermore, rule 9 (1) of *The Administration of Estates of Persons of Unsound Mind (Procedures) Rules* requires every manager appointed to give a bond to the court, with or without sureties, unless the court directs otherwise. The bond is in essence security given by the manager for due administration of the patient's estate. The applicant should, in the circumstances execute a non-cash bond of Uganda shillings 5,000,000/= (five million) for the due administration of the respondent's estate. This bond will be without sureties.

In the execution of her obligations, the applicant shall not without special, express permission of this court, mortgage, charge, or transfer by sale, gift, surrender, exchange or otherwise, any immovable property of which the estate may consist, or lease any such property for a term exceeding 5 years or invest any funds belonging to the estate of which she is manager in any company or undertaking in which she herself has a direct personal interest, nor purchase immovable property, without the prior consent of the court.

I further order the manager to file in this court within three (3) months from today an inventory of the property belonging to Ms. Anjoyo Agnes (a person of unsound mind) and of all such sums of money, goods, and effects as she will receive on account of the estate together with a

statement of all the debts due from and credits due to Ms. Anjoyo Agnes (a person of unsound mind). The manager shall annually, within the month of January, furnish this court with an account showing the sums received and disbursed on account of the estate and the balance remaining in her hands. Unless otherwise subsequently expressly ordered by this court the manager herein appointed shall serve gratuitously. The costs of this application are not to be charged to the estate of the respondent, otherwise there is no order as to the costs of this application.

Delivered at Arua this 13th day of October 2016

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Stephen Mubiru
Judge.