

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(Land Division)**

**MISCELLANEOUS APPLICATION NO. 316 OF 2014**  
**(Arising from Civil Suit No. 24 of 2014)**

**THOMAS A. K. MAKUMBI**

**(through Next Friend, PATRICK  
MAKUMBI) ..... APPLICANT**

**VERSUS**

**JOSEPHINE KATUMBA .....  
RESPONDENT**

**BEFORE: Hon. Lady Justice Monica K. Mugenyi**

**RULING**

The applicant, Mr. Thomas Makumbi, is a 97 year old male adult and the registered proprietor of numerous properties in and around Kampala. In 2003 he granted the respondent Powers of Attorney to manage his properties on his behalf. It is the applicant's contention that to date the respondent has not provided the applicant with an account of how she has executed her responsibilities in that regard. The applicant, therefore, instituted **Civil Suit No. 24 of 2014** through his son and Next Friend, Patrick Makumbi, that essentially seeks an account of the respondent's management of his properties. Pending the hearing of the said suit, the applicant filed the present application seeking to secure the said account. The application is similarly instituted through the applicant's Next Friend and is premised on Order 20 rules 1 and 2 of the Civil Procedure Rules (CPR), as well as Order 32 rule 15 thereof.

At the hearing of the application the applicant was represented by Mr. Didas Nkurunziza and the respondent, by Mr. Edmund Wakida. Mr.

Nkurunziza argued that the import of Order 20 rule 1 of the CPR was that where a plaintiff sought relief involving the taking of an account, court may order the respondent to file interim accounts pending the disposal of the suit. Learned counsel referred this court to the case of **National Bank of Kenya vs. Pipeplastic Samkolit (K) Ltd & Another (2002) 2 EA 503** (CA, K) in support of his case. Mr. Nkurunziza disputed the respondent's allegations of adverse interests between the applicant and his Next Friend and, making reference to a medical report attached to the affidavit in rejoinder, contended that mental infirmity that rendered a person incapable of looking after his/ her own interests need not necessarily be unsoundness of mind. It was learned counsel's argument that the appended medical report duly established the applicant's mental state for purposes of the instant application.

Conversely, Mr. Wakida opposed the application on the following grounds. First, learned counsel argued that there was a proviso to the grant of the order prescribed under Order 20 rule 1 of the CPR. It was counsel's contention that where, as in the present case, the defence raised a preliminary question, an order for an account should not be made. Mr. Wakida argued that there was a preliminary question of insanity to be determined in the present application, but such insanity had not been established or adjudged by the court as required by Order 32 of the CPR. Learned counsel referred this court to the case of **Mohammed Yaqub vs. Nazir Ahmad & Others (1920) 58 Indian Cases 617** for guidance on the procedure for judicial inquiry into a litigant's mental state. Counsel did also refer this court to the case of **Mytheen Kunju Abdul Salam vs. Mohammed Kasim Ismail & Others (1992) AIR Ker 257** in support of this ground of objection. Mr. Wakida further took issue with the application for including an averment of breach of trust by the respondent without providing particulars thereof; and maintained that the Next Friend did have adverse interests to those of the applicant as, in his view, illustrated by a previous suit instituted by the applicant against the Next Friend and his wife, **Thomas Aligawesa Kabunga Makumbi vs. Patrick Makumbi & Ethel Makumbi Civil Suit No. 55 of 1997.**

In a brief reply, Mr. Nkurunziza contended that the respondent had not discharged the onus upon her of satisfying court that there were preliminary questions to be tried as provided under Order 20 rule 1 of the CPR. It was his contention that the applicant was entitled to accountability from the respondent on the management of his properties; was unable to seek such accountability owing to advanced age and mental infirmity, hence

the recourse to a Next Friend under Order 32 rule 15 of the CPR; and any inquiry into the applicant's mental state had been discharged by the medical report attached to the Next Friend's affidavit in rejoinder.

Order 20 rule 1 of the CPR provides as follows:

**“Where a plaint prays for an account, or where the relief sought in the plaint involves the taking of an account, then, if the defendant either fails to appear or does not after appearance, by affidavit or otherwise, satisfy the court that there is some preliminary question to be tried, an order for proper accounts, with all necessary inquiries and directions in similar cases, shall immediately be made.”**

Rule 2 (1) of the same Order provides:

**“An application for an order under rule 1 of this Order shall be by summons in chambers, and be supported by an affidavit, when necessary, filed on behalf of the plaintiff, stating concisely the grounds of his or her claim to an account.”**

In the present case the plaint does pray for an account by the respondent of how the applicant's properties have been managed by her to date, and the plaintiff therein thereafter filed the present application. It was argued at the hearing thereof that the applicant sought an interim account pending the hearing of the substantive suit. However, this approach does not appear to be supported by any legal provisions. The sum effect of Order 20 rules 1 and 2(1) of the CPR is that where a plaint prays for an account and the plaintiff subsequently makes an application for such account, an order for *proper* accounts shall *immediately* be made by the court. It makes no reference whatsoever to interim accounts. As quite rightly argued by learned counsel for the respondent the only restriction to the grant of this relief by the court is where the defendant duly enters appearance and, having so appeared, satisfies court that there is a preliminary question to be tried.

In the instant case the respondent did file a defence in the substantive suit in which she pleaded, *inter alia*, that **Civil Suit No. 24 of 2014** was incurably defective in so far as the plaintiff therein (and present applicant) was neither a minor nor had he been adjudged insane so as to necessitate the filing of the said suit through a Next Friend. She reiterated this in her affidavit in reply to the present application, and did also aver that there was

need to have this court establish the existence of the properties delineated in paragraph 4(a) of the plaint and purportedly owned by the applicant; the validity of the applicant's proprietary interest therein, as well as the assumption by herself of responsibility therefor.

In my considered view, a preliminary question for purposes of Order 20 rule 1 of the CPR would be any question of law that has been pleaded by the defence or raised by way of affidavit that begs resolution before the relief sought by the plaintiff, of provision of an account, may be granted. If the defence has not raised such a question, the court is mandated to immediately grant the prayer for an account without recourse to the merits of the substantive suit. However, if a preliminary question has been raised such order would await the determination of the questions of law, as well as the merits of the substantive at trial.

In the present application, whereas the respondent raised the question of the verification of the properties in respect of which she was granted powers of attorney, this court was not addressed on the same at the hearing of the application. Mr. Wakida restricted himself to the applicant's alleged insanity as the sole preliminary question to be tried in this matter. In any event, the properties in issue for purposes of the accountability sought herein are a question of fact that would be established by the power of attorney held by the respondent. Although she admitted to being the donee of a power of attorney by the applicant, the respondent opted not to furnish the said instrument in court either as an attachment to her written statement of defence or as an attachment to her affidavit in reply. It would seem to me that it is such pattern of non-disclosure by her that this application and, indeed, the substantive suit seek to address. Be that as it may, the respondent's bone of contention in terms of the purported preliminary question is whether or not the Next Friend herein is properly before this court, given that the applicant had not been adjudged to be insane as provided by Order 32 of the CPR and the Next Friend allegedly had adverse interests to the said applicant's interests.

Order 32 of the CPR makes provision for suits by or against minors or persons of unsound mind. Order 32 rule 1 provides that suits by minors shall be instituted by the 'Next Friend' of a minor pursuant to written authority by such Next Friend for that purpose. Order 32 rule 4(1) prescribes as persons competent to serve as Next Friend any adult of sound mind whose interests are not adverse to those of the minor, and who is not a defendant in the matter for which he acts as Next Friend. Order 32 rule

15 renders the foregoing rules applicable **‘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 interest when suing or being sued.’** In the present case written authority by Mr. Patrick Makumbi, the Next Friend herein, was duly appended to the plaint as Annexure ‘A’. The said Next Friend is a male adult, whose mental state is not in issue herein. However, it was the respondent’s contention that the Next Friend has adverse interests to the applicant’s.

This court has carefully considered the available pleadings and consent judgment in the case of **Thomas Aligawesa Kabunga Makumbi vs. Patrick Makumbi & Ethel Makumbi Civil Suit No. 55 of 1997**, cited as proof of the Next Friend’s adverse interests. The plaintiff in that case (who is the present applicant) sued the present Next Friend, Patrick Makumbi (first defendant), and his wife, Ethel Makumbi (second defendant), for the recovery of property he had given to the first defendant, but which was subsequently registered in the names of both defendants. It is pleaded in paragraph 3 of the second defendant’s written statement of defence in that matter that following her petition for separation, the present applicant and the Next Friend *connived* to dispossess her of the property that was at the time jointly owned by herself and her husband, Patrick Makumbi. In an ensuing consent judgment, Patrick Makumbi agreed to compensate Ethel Makumbi for her interest in the said property. This court is unable to deduce adverse interests between the present applicant and the Next Friend in that matter. Clearly, the second defendant therein was firm enough in her view that they were working in agreement to deprive her of property she held jointly with the Next Friend, that she made a specific pleading to that effect. That suit *per se* is not sufficient reason to deduce contrary interests between them for purposes of this application. I, therefore, find no proof of any adverse interests between the present applicant and Patrick Makumbi for purposes of the latter acting as the former’s Next Friend.

The question is whether there was need for such Next Friend in the first place, that is whether the applicant had either been adjudged to be of unsound mind or, though not so adjudged, had been found by the court on inquiry by reason of unsoundness of mind or mental infirmity, to be incapable of protecting his interests. There is no evidence on record that the applicant has ever been adjudged to be of unsound mind. Certainly he has not been so adjudged by this court. The issue then would be whether

he has been found by this court, on inquiry, to be incapable of protecting his interests owing to unsoundness of mind or mental infirmity.

I must state from the onset that there is a distinction between unsoundness of mind and mental infirmity. The Mental Treatment Act, Cap. 279 defines a person of unsound mind as '**an idiot or a person suffering from mental derangement.**' See section 1(f). Mr. Wakida referred this court to two authorities from India in support of his argument that the court had not conducted an inquiry into the applicant's mental state so as to determine whether or not suing through a Next Friend was justified. In both cases afore-cited the matters under consideration therein were brought under India's Lunacy Act, section 3(5) of which reportedly defines a lunatic as '**an idiot or person of unsound mind.**' To my mind, the terms 'lunatic' and 'unsoundness of mind' appear to mean one and the same thing. In the case of **Mytheen Kunju Abdul Salam vs. Mohammed Kasim Ismail & Others** (supra) the court drew a distinction between lunacy or unsoundness of mind and weakness of mind or senility following old age, before granting the appeal on the premise that the appellant therein had a history of insanity that necessitated an inquisition.

The question of insanity, lunacy or unsoundness of mind did not arise in the instant application. The matter before this court is an application through a Next Friend on account of mental infirmity occasioned by old age. The Mental Treatment Act makes provision for the adjudication of persons of unsound mind. Section 2 thereof specifically provides for an inquiry into such persons' state of mind. The Act is silent on the need for an inquiry with regard to persons of mere mental infirmity such as is the case presently. Therefore, I would interpret Order 32 rule 15 to mean that there is no need for an inquiry as provided under the Mental Treatment Act in order to invoke the applicability of rules 1 to 4 of the said Order to persons with mental infirmity. I would agree with Mr. Nkurunziza that medical evidence would be sufficient to establish such mental infirmity. In the instant case, such medical evidence is to be found in the medical report that was appended to the affidavit in rejoinder as Annexure 'A'. This evidence is not disputed by the respondent who did, in paragraph 4 of her plaint **in Civil Suit No. 332 of 2007 - Josephine Katumba vs. Margaret Kyegombe**, make specific pleadings as to the applicant's mental state.

In the result, I am satisfied that the Next Friend herein is properly before this court, and there is no preliminary question to be tried in this matter. I

do, therefore, grant the application for a proper account with the following directions and orders.

1. The respondent shall immediately produce before the Deputy Registrar, Land Division the Power of Attorney instrument executed in her favour by the applicant.
2. The respondent shall, within 2 weeks from the date hereof, furnish the applicant with an account of her management of the properties enlisted in the said Power of Attorney.
3. Costs of this application to the applicant.

I so order.

**Monica K. Mugenyi**  
**Judge**

**23<sup>rd</sup> June, 2014**