

UGANDA / JUDGMENT

Abiru v In Re: Dradriga
(Miscellaneous Application No. 0031
of 2017) [2017] UGHCFD 5 (5 May 2017)
[2017] UGHCFD 5

COURT

HC: Family Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Miscellaneous Application No. 0031 of 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS APPLICATION No. 0031 OF 2017

ABIRU PENINAH APPLICANT

VERSUS

In Re DRADRIGA ERIA JAMES RESPONDENT

Before: Hon Justice Stephen Mubiru

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 rule 3 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 sister of the respondent who because of a mental illness affecting his mind, has become incapable of sound decision making and is now under her care and maintenance.

In accordance with Rule 3 (2) of *The Administration of Estates of Persons of Unsound Mind (Procedure) Rules* the application is supported by; an affidavit of kindred and fortune and in lieu of 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, an order of the Magistrate's court at Arua by which the respondent was adjudged a person of unsound mind on 15th March 2017. It is also supported by the affidavit of the applicant.

Although rule 4 (1) of *The Administration of Estates of Persons of Unsound Mind (Procedure) Rules* requires personal service, this requirement was dispensed with within the terms of Rule 4 (2) by court at the hearing of the application. 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.

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***.” 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 at 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 others, 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 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.

On account of the fact that the respondent has been adjudged a person of unsound mind and thereby committed to a mental health facility, it is undisputed that the respondent has some form of mental illness which has caused or contributed to the deterioration of his cognitive functions, to a degree where he is no longer capable of making rational choices or competently manage his own affairs. Based on the clinical evaluation that was submitted to the court below during the proceeding in which he was adjudged a person of unsound mind, detailing the nature, possible duration and reasons why the respondent is unable to manage her own affairs, I find that the respondent is incapable of managing himself and his affairs. It is my settled opinion, having considered the material before me that the respondent suffers from infirmity of mind, of such a character that prevents him from safeguarding his interests. He is no longer capable of making decisions that need to be made in daily life about his personal welfare, financial affairs and medical treatment. His 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 him to abuse, neglect and exploitation. For the applicant to be found a suitable manager of his estate, court should be satisfied that he 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, his personal welfare, and make decisions in the best interests of the respondent and his 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 hearing of the application, I have perused her affidavit in support of the application, I have considered the fact that she is the biological sister of the respondent and that she now cares for him and the respondent is entirely dependent on the applicant in all his 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, his personal welfare, and to make decisions in the best interests of the respondent and his dependants. For that reason, I hereby appoint the applicant, Ms. Abiru Peninah as Manager of the estate of her brother, Mr. Dradriga Eria James (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 his family as are dependent upon him 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 Mr. Dradriga Eria James (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 5th day of May 2017

Stephen Mubiru

Judge.

5th May 2017

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