



**MKT alias MKT & another v VJM (Petition E031 of 2022)
[2024] KEHC 10076 (KLR) (12 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION E031 OF 2022
RN NYAKUNDI, J
AUGUST 12, 2024
IN THE MATTER OF SECTIONS 2, 26 AND 28(1) OF THE
MENTAL HEALTH ACT, CAP 248 OF THE LAWS OF KENYA
AND**

BETWEEN

**MKT ALIAS MKT 1ST APPLICANT
TKK 2ND APPLICANT
AND
VJM RESPONDENT**

RULING

1. By a Notice of Motion dated 2/4/2024 and filed on 23/4/2024 the Applicants seeks the following orders;
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2. That pending the hearing and determination of this application inter-parties and/or further directions of this Court, the Petitioners/Applicants be appointed as Guardians Ad Litem for KKM.
3. That this Honourable Court do conduct a judicial inquiry on KKM in open Court and/or in chambers in order to determine his mental status as provided by Order 32 Rule 15 of the Civil procedure Rules, 2010.



4. That pending the hearing and determination of this application, this Court do direct that KKM be presented to a doctor for examination on his mental status and a report to that effect be filed in Court within such period as this Court may deem fit and expedient.
 5. That this Court do make any such further directions as it may deem expedient in the circumstances of this case.
 6. That costs of this application be in the cause.
2. The application is anchored on 7 substantive grounds and the Affidavit in support worn by the 1st Applicant on the same date.
 3. The 1st Applicant deponed that he and his co-Petitioner moved this Court vide their application dated 14/12/2022 seeking inter-alia to be appointed as Guardians Ad Litem to KKM owing to what they believe to be his mental infirmity, that this Court while dismissing their said application held that they had failed to determine the unsoundness of mind of KKM. According to the Applicants, by reason of being laymen, there is need for the provisions of Order 32 Rule of the Civil Procedure Rules, 2010 to be complied with urgently in the best interest of justice in that; this Court do conduct a judicial inquiry on the mental capacity of KKM as stipulated by Order 32 Rule 15 of the Civil Procedure Rules, 2010 and a medical examination/assessment be conducted on KKM by a medical expert and report to that effect be filed in Court within such period as this Court may deem just and expedient.
 4. The Applicants maintain that KKM stands to suffer loss and damage should the orders they seek not issue as prayed as his estate risks being wasted by 3rd parties at the expense of justice, that mental status of KKM has worsened since they were last before Court hence rendering appropriate orders is necessary in the best interest of justice.
 5. The 1st Applicant further deponed that Eldoret Chief Magistrate's Divorce Cause No.116 of 2022 was heard and concluded ex-parte hence KKM and the Respondent are no longer legally husband and wife as insinuated by this Court, that in the remises it would be in the best interest to have him as his Co-petitioner appointed as Guardian Ad Litem for KKM before his mental capacity/status is established by an expert, that the determination of KKM's mental capacity by a medical expert will have a ripple effect on the petition herein, that the Respondent will not be prejudiced in any way should the orders herein be granted as the mental status of KKM will be established in compliance with the provisions of order 32 Rule 15 of the Civil Procedure Rules, 2010 with finality.

The Response

6. The application is opposed by the Respondent vide her Replying Affidavit dated 17/5/2024.
7. She deponed that the application before Court, is frivolous, vexatious, a malicious afterthought, made in bad and an abuse of Court process and as such ought to be dismissed with costs to her, that the instant Petition is overtaken by events as the same was filed solely to defeat and/or the divorce proceedings against KKM (her ex-husband) but the court has since made a determination in the divorce cause and a decree issued on 23rd November 2023 dissolving the marriage and the circumstances therefore, the Petition is overtaken by events, that the instant application is res judicata as the Petitioner's petition sought the same orders as are being sought in the instant application and this Honourable court vide its ruling delivered on 20th April 2023 dismissed the Petition as, being without merit, an abuse of the court process and waste of the court's time. In the premises therefore, the court instant application is res judicata and ought to be struck out with costs to the Respondent.



8. She further deponed that was married to KKM and lived together as husband and wife since the year 2008, that prior to being married to the said KKM she worked as his sister's house help and that his mother the late PM died in the year 2006. According to the Respondent, the fact that she rose from a lowly position to be his wife displeased some members of his family who were determined to frustrate the marriage, that the said KKM studied in the United States of America between the year 1999 to 2006 and unfortunately he fell unwell and was diagnosed with a brain tumour in the year 1999 and he underwent a successful surgery in Avera McKenna Hospital and fully recovered before coming back home in the year 2006, that prior to getting married to KKM, they courted for two years and thereafter sought the blessings of their parents when he proposed to marry her and his uncles came to her home in Chepterit, Nandi, for show-up and sought my parents' consent to have her married to their son KM and that her father indicated that he had no objection and the family of my husband came for engagement and dowry negotiations at their Cheptiret home on 8th August 2008, that the two families agreed on dowry of four heads of cattle which the M family paid and thereafter the family prepared a wedding ceremony for them which they solemnized at AIC Mosombor on 12th September 2008 presided by Rev. Samson Kipruto Samoei and that the wedding was witnessed by many guests who attended the church service and their reception party at St. John the Baptist Pastoral Centre grounds and that their best couple in the wedding ceremony were Mr. and Mrs. Stephen Meli. The Respondent maintained that her marriage to her former husband was consensual and fully blessed by their parents and both of them had the physical and mental capacity to contract the marriage, that at no point during the marriage negotiations or the actual celebration/solemnization did any issue arise as to dispel the fact of KKM's mental capacity to enter into the said marriage and that no documentation or medical record was ever produced then, nor has any been produced in the instant application to show that the said KKM suffers from any form of mental illness or that he is under any mental incapacity as to affect his decision making faculties.
9. The Respondent reiterated that the instant application is res judicata as the issues raised herein were conclusively determined by the court vide its ruling issued on 20th April 2023, furthermore, the court having found that his ex-husband was not suffering from any mental incapacity and the issue of "worsening" of this mental condition does not arise, that the court had already found that no cogent evidence had been produced to disprove the said KKM's sanity and it therefore follows that the present application is founded on misapprehensions and falsehood on the part of the Applicants, that when she got married to her husband in 2008 they settled in their matrimonial home in Kapseret and were blessed with their first born child NJM on 18th December 2020, that during all this time, KKM was entering into contracts with various persons for the purchase and sale of various assets and as such it is utterly malicious and in bad faith for the Applicants herein to purport that the said KKM suffered mental incapacity, that at the time when she got married to her husband she was single with two children namely DKB and JJB and that her husband offered to adopt the children as children of the marriage and they agreed so and lived with the said children whom her husband fondly referred to as his children and that in the year 2005 they were blessed with another child: AKM on 26th October 2015 and MJM was born to us on 12th November 2019, that husband named all their children by giving the surname B after his own middle name or M his own surname which was his father's name, that all their children were born in hospital and in the birth notification cards her husband gave out his name and identity card and thereafter processed birth certificates for all the children, that after they got married in the year 2008 to her husband advised her to amend her names as they appear in the national identity card to reflect his surname M that she accepted and was issued with a national identity card bearing her new name VJM.
10. The Respondent contended that her husband is of sound mind and has never suffered any mental disorder or infirmity as is being purported by the Applicants herein and that this is a malicious ploy by



the Applicants to curtail the ends of justice and the same should not be entertained by this Honourable Court, that husband is intelligent and made most of the decisions for the family since they became husband and wife and she has never countermanded his decisions and have rarely disagreed with his suggestions on any issue since he is of sound mind, intelligent, wise and provided good leadership to the family as the head of the family, however some family members who were jealous of her started driving a wedge between them on several occasions culminating in their marriage getting turbulent in the year 2018.

11. The Respondent is shocked and perturbed by the allegations by the Petitioners alleging that her husband is of unsound mind. According to the Respondent it is clear that the allegations are well orchestrated in a malicious scheme to disinherit her and defraud her husband and her family of their matrimonial property, that the Petitioners are the step nephews of her husband, in that their fathers are her husband's step brothers, that husband had two brothers who are now deceased, the late EKM and the late ACM and that the Petitioners are not the children of my husband's brothers and hence are not her husband's nephews as they allege, that the Petitioners are children of her husband's step-brothers the late JT and the late SK respectively and as such they are distant relatives to husband.
12. She maintained that the Petitioners lack legal capacity to bring this petition by dint of section 26(1) (b) of the [Mental Health Act](#) as they are not near relatives of my husband, most importantly my husband is a man of sound mind and good health and the provisions of the [Mental Health Act](#) do not apply to him. She added that a person suffering from a mental disorder means a person who has been found to be suffering under the [Mental Health Act](#) and includes a person diagnosed as a psychopathic person with mental illness and person suffering from mental impairment due to alcoholic or substance abuse, that since the definition above does not describe her husband the application before court is fatally defective, incompetent and legally untenable, a medical procedure involving the brain does not amount to a mental disorder within the meaning of section 2 of the [Mental Health Act](#), that since her husband has never been diagnosed with a mental condition, nor treated for any medical condition he is not considered as a person suffering from mental disorder and as such the [Mental Health Act](#) does not apply to him, that the Petitioners lack legal capacity to agitate this application as her husband is a person of sound mind and the Petitioners are not near relatives of my husband, that a guardianship order can only be issued in respect of a person suffering from mental disorder and not in respect of a person of sound mind and in any event only in respect of a situation where the person suffering from a mental disorder is incapable of managing his affairs and is dangerous to himself or to others, that before a person is found to be suffering from a mental disorder, an inquiry is ordered and that inquiry finds that the person to whom the inquiry relates is suffering from mental disorder and that no basis has been laid for such inquiry. She reiterated that the Petitioners have not produced any medical report diagnosing her ex-husband of any mental disorder neither have they disclosed the nature of the mental disorder, the hospitals that he has attended and the treatment given. She added that Petitioners are actuated by malice against me and a selfish desire to defraud her and her husband of our properties, further that the Petitioners have not been any close to their family but have suddenly emerged from nowhere in a quest to quench their appetite for our matrimonial property, that her ex-husband has been operating his own bank accounts since we got married in the year 2008, furthermore they operate a joint bank account number 011091XXXXXX00 at Cooperative Bank, Eldoret Branch and have been jointly making withdrawals since he is a man of sound mind and that the Petitioners' prayer seeking that they be authorized to withdraw funds from my husband's bank account No. 01116XXXXXX00 is suspicious, malicious and fraudulent as her ex-husband's mental disorder has not been disclosed neither have they shown the discharge summary and medical bill/invoice issued by St. Luke's Hospital and that Petitioners are clearly looking for an opportunity to defraud her husband and her of their family resources, that her ex-husband has the requisite capacity to operate his bank accounts as he has



been doing over the years, that in the year her husband and she opened a joint account to receive and manage rental income in respect of our rental units in Jerusalem estate in Kimumu.

13. She maintained that her ex-husband has the legal capacity to file and defend suits against him as he has been doing over the years and that he also has the requisite legal capacity to enter into contracts and agreements as he has been doing over the year, that Petitioners have not laid any basis for their appointment as legal guardians of the said KKM as they have not brought forward any medical reports or any proof whatsoever to substantiate their allegation that the named KKM suffers from mental incapacity, that the Petitioners being distant relatives who have ulterior motives and there being no basis laid for the petition and the application, the application ought to be dismissed with costs, that it is evident that this petition and application has been generated in response to the petition for divorce filed in Eldoret Chief Magistrate Court Divorce Case No. 116 of 2022 which was rightly determined by the honourable court and a Decree Nissi issued on 21st November 2023, that the Petitioners are disingenuous by alleging that her husband's previous medical condition diagnosed as cancer of the brain which was successfully treated in 1999 amounts to a mental health condition and that the Petitioners' outrageous allegations are actuated by malice, falsehood and greed, that nothing is further from the truth than the allegation that her husband was assessed and found to suffer from mental disability or infirmity, that firstly, the Petitioners have not produced any medical report and assessment report to support the outrageous claim, secondly registration with the National Council for Persons with Disabilities is not prima facie proof of disability in the absence of medical assessment report, thirdly the disability card is suspicious as it is issued from Turbo Sub-County yet my husband is a resident of Kapseret Sub-County and that the Petitioners' Petition is bereft of any legal and factual foundation and ought to be dismissed with costs.
14. On 19/6/2024, parties were directed to file their respective submissions but at the time of writing this ruling no submissions were on record.

Analysis and Determination

15. I have considered this application and the Affidavit in support of the same as well as the response and I find that the only issue for determination is whether the orders being sought are capable of being issued.
16. Part XII of the *Mental Health Act*, Cap 248 Laws of Kenya provides for judicial power over persons and estates of persons who are shown to be suffering from mental disorder and/or incapacity.
17. Section 2 of the Act defines "person suffering from mental disorder" as follows:-

"person suffering from mental disorder" means a person who has been found to be so suffering under this Act and includes a person diagnosed as psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse."
18. Section 26 provides for custody, management and guardianship
 - 1) The Court may make orders-
 - a) For the management of the estate of any person suffering from mental disorder; and
 - b) For the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.
 - 2) Where there is no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate of the guardian of any such person.



- 3) Where upon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his 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.
19. In this case, the Applicants are requesting to be appointed as Guardian Ad Litem for KKM. They are also asking the Court to conduct a judicial inquiry on KKM in order to assess his mental status. Additionally, they are seeking a directive from the Court for KKM to undergo a mental status examination by a doctor, and for a report on the examination to be filed in Court. Nevertheless, the Respondent has contested this current request on the basis that the Applicants do not have the legal standing in this matter. She argued that the Applicants are not immediate relatives and are step-nephews of the aforementioned KKM, therefore lacking locus standi.
20. In the case of Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, the Court held that :-
- “Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others ..Vs.. City Council of Nairobi (1982) KAR 229, the Court also held that;-
- “the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.
21. A claim that one has no locus standi therefore challenges a party’s right to be heard before a court and if a determination is made in the affirmative then this issue has the capability of disposing of the suit. A claim that a party lacks locus standi therefore is a pure point of law and one that needs to be raised and determined at the earliest.
22. Having made a determination that the issue of locus standi is a pure point of law, there is need to determine whether the plaintiff has a right to be heard before this court. From the pleadings before this Court, it is without a doubt that the Applicants herein lack the locus standi to seek the orders being sought in the instant application. As observed in my ruling dated 20/4/2023, the Applicant being step-nephews to the said KKM cannot be considered near relatives for purposes of this application, further the said KKM has not been proved to lack capacity . At this juncture the Court cannot on its own motion order that the said KKM be subjected to mental assessment whereas the nothing to warrant granting such orders. It must be remembered that Court orders are never issued in vacuum, they must be capable of enforcement.
23. Based on the foregoing, it is my finding that the Applicants as no locus standi to bring the suit herein.
24. In the end, it is my finding that the Applicants’ Application dated 2/4/2024 lacks merits and is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT ELDRET THIS 12TH DAY OF AUGUST 2024.

In the Presence of

M/s Chebet Advocate



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R.NYAKUNDI

JUDGE

