



REPUBLIC OF KENYA



**Ambwere & 2 others v Ambwere & another (Miscellaneous Cause  
E018 of 2021) [2023] KEHC 625 (KLR) (30 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 625 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS CAUSE E018 OF 2021  
WM MUSYOKA, J  
JANUARY 30, 2023**

**BETWEEN**

**FERIDA KANGE'ETHA AMBWERE ..... 1<sup>ST</sup> PETITIONER  
MILLY RAVIGA KANGAYA ..... 2<sup>ND</sup> PETITIONER  
JOSEPH ARADI AMBWERE ..... 3<sup>RD</sup> PETITIONER**

**AND**

**EBBY INGARDO AMBWERE ..... 1<sup>ST</sup> RESPONDENT  
EBRAHIM O. AMBWERE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This matter was mentioned before me on 16<sup>th</sup> January 2023, in the presence of Mr. Munyambu for Dr. Khaminwa for the petitioners, Mr. Kidiavai for the 1<sup>st</sup> respondent and Mr. Teti for the 2<sup>nd</sup> respondent.
2. Mr. Munyambu informed me that there are 2 applications that pend determination, dated 5<sup>th</sup> November 2021 and 2<sup>nd</sup> August 2022. I was urged that there was great urgency, for maintenance of and medical attention for the 1<sup>st</sup> petitioner.
3. Mr. Kidiavai submitted that the application, dated 15<sup>th</sup> November 2021, was fully heard, that it was before Amin J in November 2021, when directions for filing of written submissions were given and written submissions were duly filed, and that on 8<sup>th</sup> March 2022, the 2<sup>nd</sup> respondent was made available to the court, and was interviewed by the Judge. He submitted that the matter was then reserved for ruling. He stated that what was outstanding was the ruling. He stated that the application dated, 2<sup>nd</sup> August 2022, seeks maintenance for the 1<sup>st</sup> petitioner, and argues that similar prayers were sought in the application dated 15<sup>th</sup> November 2021, making the second application a duplication of the first application. He invited me to dispense with the second application, and give a date for ruling on the application dated 15<sup>th</sup> November 2021.



4. Mr. Teti, for the 2<sup>nd</sup> respondent, associated himself with the submissions by Mr. Kidiavai. He stated that the application dated 15<sup>th</sup> November 2021, was up for hearing and examination of the 2<sup>nd</sup> respondent on 8<sup>th</sup> March 2022. He averred that the second application was meant to reopen what had already been closed.
5. In a rejoinder, Mr. Munyambu said that the application was brought under the Mental Health Act, and the court is supposed to evaluate the mental state of the 2<sup>nd</sup> respondent. He stated that petitioners did not participate in the examination of the 2<sup>nd</sup> respondent, for the respondent proceeded with the matter without granting them an opportunity to participate. He avers that there are new issues raised in the second application, which would assist the court determine the application. He asserted that the 1<sup>st</sup> petitioner was entitled to a fair trial.
6. As it was F. Amin J who had given directions on the disposal of the application dated 15<sup>th</sup> November 2021, and who had seen and interviewed the 2<sup>nd</sup> respondent, I directed that I would first peruse the file before me, before I can give directions one way or the other.
7. I have perused the file. The first application, dated 15<sup>th</sup> November 2021, seeks that the 2<sup>nd</sup> respondent be subjected to medical assessment by a medical officer to assess his mental status, and that the court do conduct an inquiry to determine whether the 2<sup>nd</sup> respondent is suffering from a mental disorder. The other orders are for preservation of the estate and restraining orders, and provision of maintenance for the 1<sup>st</sup> petitioner.
8. That application was placed before me on 30<sup>th</sup> November 2021, under certificate of urgency. I directed that the same be served, and I allocated it a date for its hearing inter partes, being the 7<sup>th</sup> December 2021. On 7<sup>th</sup> December 2021, the matter was placed before F. Amin J, in the presence of Dr Khaminwa and Mr. Kidiavai. The orders made that day were that the subject of the proceedings be joined to the proceedings, as 2<sup>nd</sup> respondent, on the basis of his own application dated 3<sup>rd</sup> December 2021. Directions were then given for filing of responses to the application dated 15<sup>th</sup> November 2021. The matter was in court next on 15<sup>th</sup> November 2021, with Ms. Shimula for Dr Khaminwa and Mr. Kidiavai, present. The directions given that day were that the parties do file and serve written submissions within 21 days, and the matter was fixed for mention on 8<sup>th</sup> March 2022. It was directed that the court would sit in the old court buildings on 8<sup>th</sup> March 2022, to facilitate attendance by the 2<sup>nd</sup> respondent. On 8<sup>th</sup> March 2022, Ms. Gathua and Mr. Kidiavai were present, and the 2<sup>nd</sup> respondent was in attendance. The court interviewed the 2<sup>nd</sup> respondent, and thereafter reserved the application dated 15<sup>th</sup> November 2021 for ruling on 12<sup>th</sup> May 2022.
9. It transpired that F. Amin J retired from the Judiciary before 12<sup>th</sup> May 2022, before the reserved ruling had been delivered, and it would appear that the pendency of the ruling was not brought to the attention of either Otieno J or I. I note that there was no draft ruling left behind by F. Amin J. That would then mean that the matter is still pending ruling.
10. The application dated 2<sup>nd</sup> August 2022, seeks orders for cross-examination of the 2<sup>nd</sup> respondent on his replying affidavit sworn on 10<sup>th</sup> December 2021, for provision of Kshs. 6, 000, 000.00 upkeep for the 1<sup>st</sup> petitioner, and Kshs. 5, 000, 000.00 for the medical needs of the 1<sup>st</sup> petitioner and another Kshs. 5, 000, 000.00 for renovation of the petitioner's house.
11. The second application was placed before me on 10<sup>th</sup> August 2022. I did not certify it urgent, for hearing during the vacation, instead I gave directions for its service, and a date for hearing, on 28<sup>th</sup> September 2022. On 28<sup>th</sup> September 2022, the matter was placed before Otieno J, who gave directions on service of the application and replies, and directed that the file be placed before me on 21<sup>st</sup> November



2022. I did not sit here at Kakamega on the due date, as I was handling an election petition at Bungoma, hence the mention on 16<sup>th</sup> January 2023.

12. Let me start by stating that the issue about the application dated 15<sup>th</sup> November 2021 is a closed chapter. F. Amin J directed the filing of written submissions, which was done, and the Judge thereafter heard from the 2<sup>nd</sup> respondent, in an interview on 8<sup>th</sup> March 2022, and reserved the matter for ruling. By then the second application had not been filed. We cannot go back on that. The application was heard, and the only thing outstanding is the ruling. A ruling ought to be prepared and delivered on the application dated 15<sup>th</sup> November 2021, and I see no reason why that determination should be delayed. It was submitted that the petitioners did not participate in the proceedings of 8<sup>th</sup> March 2022. That is not borne by the record, as a Ms. Shimula is reflected as having appeared for them. It was implied that they did not question the 2<sup>nd</sup> respondent, but in proceedings of this nature, the appearance by the subject before the court is not for cross-examination, but rather solely for an interview by the court, for it to get a general sense of the mental status of the subject.
13. On the application dated 2<sup>nd</sup> August 2022, I will say that it was filed after the court had reserved a ruling on the earlier application, and, therefore, there can be no basis for delaying the determination of the earlier application in order to determine it together with the second application. Secondly, the orders sought in the second application, can only be dealt with after determination of the first application. Proceedings under the Mental Health Act are designed to determine whether the subject is capable of managing his own affairs, principally on basis of mental infirmity, and if it is determined that he is not able to, then someone is appointed to manage the subject and his affairs. Thirdly, it is only after the subject has been adjudged to be mentally incapable of managing his affairs, and an administrator or manager of his affairs is appointed, that an application along the lines of that dated 2<sup>nd</sup> August 2022 can be filed and entertained. Fourthly, the focus is on the management of the subject and his personal affairs, and with a view to taking care of his welfare, and it is not about his affairs being managed for the benefit or welfare of others. Fifthly, there is a prayer for cross-examination of the 2<sup>nd</sup> respondent on his affidavit of 10<sup>th</sup> December 2021. That affidavit was in reply to the application dated 15<sup>th</sup> November 2021, which has been heard and is pending ruling, and, therefore, that prayer has been overtaken by events. Sixthly, and finally, the principal prayers in the second application are on maintenance for the 1<sup>st</sup> petitioner, yet similar prayers have been made in the first application.
14. Clearly, therefore, the second application is premature, and there can be no basis for entertaining it before the application dated 15<sup>th</sup> November 2021 has been considered and determined, or even determining it or simultaneously with it. Indeed, what it seeks is already prayed for in the application pending ruling. I agree with the respondents; the second application is a duplication of the first application on the matter of maintenance. The second application is clearly filed in abuse of court process, and there would be no need to deal with it as the issues it raises are also the subject of the application pending ruling. The second application shall be dispensed with, in fact the best way to deal with it should be to strike it out altogether, which I hereby do.
15. The directions that I shall give in the circumstances are that I shall determine the application dated 15<sup>th</sup> November 2021, on a date I shall give at the delivery of this ruling.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 30<sup>TH</sup> DAY OF JANUARY 2023**

**WM MUSYOKA**

**JUDGE**

Erick Zalo, Court Assistant



Mr. Munyambu, instructed by Khaminwa & Khaminwa and Wamalwa & Echesa Company, Advocates for the petitioners.

Mr. Kidiavai, instructed by Kidiavai & Company, Advocates for the 1<sup>st</sup> respondent.

Mr. Teti, instructed by Teti & Company, Advocates for the 2<sup>nd</sup> respondent.

