



Ambwere & 2 others v Ambwere & another (Miscellaneous Cause E018 of 2021) [2023] KEHC 2744 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CAUSE E018 OF 2021
WM MUSYOKA, J
MARCH 24, 2023**

BETWEEN

**MRS. FERIDA KANGE'ETHA AMBWERE 1ST PETITIONER
MRK 2ND PETITIONER
JOSEPH ARADI AMBWERE 3RD PETITIONER**

AND

**EBBY INGARDO AMBWERE 1ST RESPONDENT
EBRAHIM O. AMBWERE 2ND RESPONDENT**

RULING

1. This is one of the matters that was inherited from F. Amin, J. It was due for ruling by F. Amin, J on May 12, 2022, which ruling was delayed or arrested by the filing of another application in the intervening period, which I dealt with by way of my ruling of January 30, 2023..
2. The subject of this ruling is the Motion dated 15th November 2021, and by extension, the petition, dated 15th November 2021. The Motion is at the instance of the 1st petitioner. It was brought under certificate of urgency, and seeks a variety of orders: appointment of a physician regarding the mental status of the 2nd respondent, conduct of an inquiry to confirm whether the 2nd respondent is suffering from a mental disorder, preservation of the estate of the 2nd respondent to prevent mishandling of the assets, injunctions to restrain certain actions relating to the estate of the 2nd respondent, access orders, handover of documents of title relating to the estate of the deceased, and a monthly allowance of Kshs. 10, 000, 000.00 for the 1st petitioner.
3. The background, from the grounds on the face of the application, and the affidavit in support, is that the 2nd respondent is elderly, and had been admitted to hospital on account of age-related illnesses. The 1st petitioner and her side of the family accuse the 1st respondent of denying them access to the 2nd



- respondent, and they suspect that the 2nd respondent is suffering from a possible mental disorder, and the 1st respondent was taking advantage of the situation, hence the need for a mental inquiry. Pending the mental inquiry, they would like his estate preserved.
4. The 1st petitioner has attached, to the Motion, a variety of documents, being a certificate of marriage, title deeds and certificates of ownership of land, registration documents for the companies in which the 2nd respondent has an interest, pictures on the quarters allegedly occupied by the 1st petitioner, and pictures of the 2nd respondent in hospital.
 5. The petition gives a history of the business life of the 2nd respondent, complete with a schedule of 23 assets that he owns. It is averred that the 2nd respondent was not enjoying good health, due to advanced age, and that the 1st respondent, who has custody of him, was denying the 1st petitioner and other family members access to him. It is averred that it is suspected that the 2nd respondent was suffering from mental disorder, and is unable to manage his own affairs, and is vulnerable to manipulation by third parties. The 1st petitioner complains that she has been denied access to the 2nd respondent and the property that she had acquired together with him. She also complains that orphans that were previously under the care of the 2nd respondent were left under her care, and they were suffering as the 1st respondent has taken control of the subject. The orders sought in the petition are for appointment of the petitioners as the managers of the affairs of the 2nd respondent and his estate, and any other orders that they court may deem fit.
 6. The first response to the matter was by the 2nd respondent himself, vide a Motion, dated 3rd December 2021. He sought to be joined to the proceedings, as he wanted to be heard, to assist the court make a just and fair decision. He asserted that he was not suffering from any mental disorder as alleged. When the said Motion was placed before F. Amin J, it was allowed, and the 2nd respondent was joined to the proceedings as a respondent.
 7. The 1st respondent filed her response on 15th December 2021, by way of a replying affidavit, sworn on 10th December 2021. She avers that the application and the petition are speculative, as no evidence had been provided of the allegations of mental disorder on the part of the 2nd respondent. She asserts that she was a wife of the 2nd respondent, having married him under customary law. She avers that she had lived with the 2nd respondent for 34 years, and for that entire period he had not suffered from mental illness, and that he had always been running his own affairs without assistance from anyone. She denies having kept him away from other family members, adding that the 2nd respondent had been going to his home at Bendera, Vihiga County, where the 1st petitioner lived. She states that the 2nd respondent was not in a critical condition, save that he suffered from the normal complications associated with old age, which were being managed by doctors. She refers to one of the photographs attached to the Motion, by the 1st petitioner, to say that it depicts the 2nd respondent sitting on a bed without any assistance. She denies managing the affairs of the 2nd respondent.
 8. The 2nd respondent himself swore an affidavit, on 10th December 2021. He avers that the 1st petitioner and the 1st respondent were his wives, but he was separated from the 1st petitioner. He explains that he had built a home for her, and had given her a tea plantation, 13 acres in size. He further explains that he had put up a property for her, which she was renting out and earning an income, for her maintenance. He further explains that he had made available a motor vehicle for her use, and had employed a house maid, a farm manager and a driver to take care of her needs. He explains that the other petitioners were her children, who were married, and had their own homes and families, and who could not claim to have his interest at heart. He says that the petitioners were allowed to see him in hospital, where they took the pictures attached to their affidavit.



9. Directions were given, by F. Amin J, for the 2nd respondent to be availed for interview by the court. He was availed on 8th March 2022, in the presence of Ms. Gathua for the petitioners and Mr. Kidiavai for the respondents. The court recorded that the 2nd respondent understood the application. The court noted that the 2nd respondent was coherent. He said that he was doing his work, and the same was going well. He stated that the petitioners lived at Bendera, and used to visit him. He said that he was himself born at Bendera. He said he came to court by car, but admitted that he could be forgetful at times. He correctly identified the 1st respondent as his wife, who he married in 1986, and officially in 1994.
10. Directions had been given on 15th December 2021. Both sides have filed their respective written submissions, which I have read through, and noted the arguments made.
11. The proceedings herein are premised on sections 26, 27 and 28 of the *Mental Health Act*, cap 248, Laws of Kenya. The preamble to the Act states that the Act is intended “to amend and consolidate the law relating to the care of persons who are suffering from mental disorder or mental subnormality with mental disorder; for the custody of their persons and the management of their estates; for the management and control of mental hospitals ; and connected purposes.”
12. From the preamble to the *Mental Health Act*, it should be clear that the law is intended to be invoked for the purpose of the welfare of persons suffering from mental disability. It is about setting up mental infrastructure for the purpose of caring for such persons. The Act sets up a board for mental health, and makes provision for establishment of mental hospitals. There is provision for dealing with patients who offer themselves voluntarily for treatment, and also for those who are unwilling or unable to voluntarily present themselves in hospital for treatment. There are also provisions for admission, discharge and transfer of patients suffering from mental disorder.
13. Part XII of the *Mental Health Act* covers the powers of the court with respect to persons suffering from mental disorder and the management of their affairs. Under section 26 of the Act, the court may order management of the estate of such a person and for guardianship of any such person. Inquiry is provided for under section 26(3), and management may be ordered where it is established that the person is suffering from mental disorder, to such an extent of being unable to manage his own affairs. It would also apply where the person is able to manage himself, is not dangerous to others, or is unlikely to act in a manner offensive to public decency. In such cases, the court may, in its discretion, make orders on the management of his estate, inclusive of the maintenance of the mental patient, and members of his family who are dependent on him.
14. The law is not explicit on what the inquiry may entail. The starting point could be with the court having the person produced in court, for it to have a general view of his person, in terms of grooming and presentation, and to interview him to assess his intellectual capacity, before deciding whether it would be necessary to subject him to a medical process. The court did that on 8th March 2022. The 2nd respondent attended court, and the court interviewed him. The notes by the Judge indicate that the 2nd respondent understood the application that had been placed in court. He said he was still working. He was described as coherent by the court. He said he was born at Bendera, and that was where the petitioners lived, and that the petitioners used to visit him. He said that he was aware that he was in court, and had come to court by car. He conceded that he was at times forgetful. He identified the 1st respondent as his wife. From that interaction, it is quite clear that the 2nd respondent was not a person who was not in control of his faculties, or who was unaware of his surrounding, so as to be said to be unable to manage his affairs. I am not persuaded that there would be need for him to be subjected to mental assessment.



15. The duty and burden were on the petitioners to present material from which the court can determine whether there was any basis for the court to order a mental inquiry. These proceedings should be on the mental health of the 2nd respondent. One would have expected that the petitioners would have had some medical record of his mental state. In the affidavit, sworn in support of the Motion, the 1st petitioner appears to be more concerned about the property of the 2nd respondent, rather than on his mental or physical welfare. She has attached a thick bundle of documents on the assets owned by the 2nd respondent. There is not a single document on the mental status of the 2nd respondent. Indeed, going through the Motion and the petition, I get the impression that these proceedings are more about the property of the 2nd respondent, and less about his mental health, or his welfare. They are more about the interests of the 1st petitioner, rather than those of the 2nd respondent, as seen from the pictures said to be about her quarters, and her prayer for a whopping Kshs. 10, 000, 000.00 monthly upkeep.
16. Rather than attach a medical document, whether a medical report or treatment notes, the 1st petitioner has attached photographs of the 2nd respondent in hospital. It is true that a picture can say more than a thousand words. 2 of the photographs show the 2nd respondent in bed. There is little to read from them, save that they show a patient resting in bed, and there is no way of telling that he had mental health problems, and that he was an invalid who could not manage himself or his affairs. The third photograph shows the 2nd respondent seated, wearing hospital gear. He is sitting alone, without any help from anyone. I would agree with the 1st respondent, that this photograph does not depict him as helpless and needy, but as a person who is in control of himself. The pictures attached to the affidavit of the 1st respondent depict the 2nd respondent as a well-groomed gentleman, who is standing upright, without anyone supporting him, or anything propping him up. He does not appear to me to be a person who has lost it, and who needs to be managed.
17. Although the petitioners allege that they were denied access to the 2nd respondent when he was in hospital, I find it curious that they managed to take photographs of him resting on his hospital bed, as well of him seated. That suggests that contrary to their assertions, there was access, and freedom to interact with the 2nd respondent in hospital.
18. I find no merit at all in the Motion and the petition, both dated 15th November 2021, to warrant a mental health inquiry conducted on the 2nd respondent. He has his constitutional right to privacy, and not to be subjected to invasive medical examinations, fueled only by speculation and conjecture. Consequently, I do hereby dismiss the said Motion and petition. As the parties are members of the same family, there shall be no order as to costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 24th DAY OF March 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 1st respondent.

Mr. Teti, instructed by Teti & Company, Advocates for the 2nd respondent.

