



MAA v YMAD; AMA & 4 others (Interested Parties) (Miscellaneous Application 13 of 2021) [2023] KEHC 21470 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 13 OF 2021**

**G MUTAI, J
JULY 28, 2023**

BETWEEN

MAA APPLICANT

AND

YMAD RESPONDENT

AND

AMA INTERESTED PARTY

ASA INTERESTED PARTY

MOM INTERESTED PARTY

OMA INTERESTED PARTY

MSM INTERESTED PARTY

RULING

1. The Applicant/Respondent was appointed by this honourable Court as the guardian-ad-litem of YMAD on May 27, 2022. The order to that effect was issued on October 3, 2022. The order appointed her as the manager of his estate 'on condition that she shall have no right unless with the Court's authority to alienate, sale, dispose or transfer any immovable assets of the patient.' She was vested with the authority to 'sue, prosecute or defend any suit filed by the estate or against the subject, or the estate.
2. The said orders were issued pursuant to an Amended Originating summons dated March 7, 2022 vide which the Applicant/Respondent sought the following orders: -
 1. That the Court finds that the Respondent YMAD is incapable of protecting his interest with regard to his affairs due to a depressive illness after the conduct of a judicial inquiry;
 2. That the applicant MAA be appointed as the Respondent, YMAD's guardian ad litem; and



3. That the Applicant do manage all the affairs of the Respondent Y M A D.
3. The Applicant submitted that the said Y M A D suffered from a depressive illness which had rendered him unable to protect his interests. She therefore sought to be appointed as his guardian ad litem so that she could represent him and protect his estate in her capacity as his wife. In support of the Amended Originating Summons the Applicant/Respondent annexed a report prepared by Dr Omar J Aly, a psychiatrist with in surgery in Mombasa Trade Centre and a Reply to Petition and Statement filed in Kadhi Court Succession Cause No XXX of 2019 between AMA, HSA, MOM, OMA and MSM against YMAD and SAO.
4. Upon her appointment the Applicant/Respondent registered a restriction against Plot No 128/II/MN, which parcel of land is registered in the name of SBA and AB HBD as the executors of the will of ABABD (deceased). The restriction states that: -
 - ' restriction under section 7 of the [Land Registration Act](#), No 3 of 2012. Order dated May 27, 2022 in the High Court of Kenya at Mombasa Family Division Miscellaneous Application No E013 of 2021 (OS) ordering MAA to be appointed as Manager and Guardian to YMAD (patient) with no right to alienate, sell, dispose or transfer any immovable assets of patient, with authority to sue, prosecute and defend suits against the subject of the estate.'
5. Possession and control of Plot No XXX/II/MN was the subject of the cause before the Kadhi's Court between the Interested Parties, on the one hand, and the patient and another individual, on the other hand.
6. On the February 2, 2023 the Interested Parties/Applicant filed the Notice of Motion application dated February 2, 2023 vide which they sought the following orders: -
 1. Spent;
 2. That the honourable court be pleased to enjoin the Interested Parties/Applicants in this matter for the sole purposes of revocation of such entry vide the Land Registrar-Mombasa, of the orders granted by the honorable court which entry has been made in all that title in respect of Plot Number XXX/II/MN which property has absolutely no bearing either in ownership/or otherwise proprietorship in the names and ownership of YMAD pending the hearing of this application interpartes;
 3. That the honourable Court be pleased to issue an order in the nature of revocation of the entry of the orders issued by the honourable Court which entry has been taken out and made and entered into title by the Land Registrar- Mombasa County which property has absolutely no ownership, proprietorship and/or otherwise legally belonging to YMAD;
 4. That the honourable Court be pleased to issue such further orders in the interest of justice; and
 5. That the costs of this application be provided.
7. The applicants aver that the registration of the restriction by the Applicant/Respondent has strongly prejudiced them. They state that Plot No XXX/II/MN does not belong YM.A.D and that consequent to issuance of the orders she had occupied the suit premises and has excluded the heirs, beneficiaries and dependants of the estate of SBA & HBD alias ABABD (deceased).' The Applicant thus prayed that 'it is in the large interest of justice that the honourable Court does issue the orders sought herewith.'
8. The Interested Party/Applicant annexed to their application a copy of the title, a search showing that the restriction had been registered, the orders of the Kadhi Court vide which MSM was appointed



as the Interim Administrator of the remaining assets of the estate of the deceased person pending distribution, Memorandum of Appearance and Reply to the Petition (both filed by the Respondent) and photographs supposedly showing that the suit premises had been invaded by the Applicant/ Respondent.

9. In her Replying Affidavit sworn on March 21, 2023 and filed on March 3, 2023 the Applicant/ Respondent deposed that the Interested Parties/ Applicants had not met the threshold for grant of the orders they were seeking. She referred to the illness suffered by her husband and the finding by this Court. She contended that her husband was in occupation of the suit premises and therefore that it was necessary for her as his manager to defend his interest. Regarding the judgment in Kadhi Succession Cause No XXX of 2019; Estate of the late SBA, ABHD alias DBABD she confirmed that it had indeed been entered without the participation of YMAD. She averred that she intends to set aside the said judgment. If the orders sought herein are granted, the Applicant/Respondent averred, she will be unable to defend the interests of her husband. She further averred that the Interested Parties/ Applicants have not demonstrated what prejudice they will suffer if the orders sought are granted. She accused the Interested Parties/Applicants of seeking to take advantage of YMAD inability to defend his interests to deprive him of his interests.
10. The 5th Interested Party/Applicant filed a Supplementary Affidavit sworn on May 4, 2023 and filed in Court on May 9, 2023. In the said affidavit MSM deposed that the Applicant/Respondent had misused the orders issued by this Court to lodge several suits in relation to Plot No XXX/II/MN. This, he deposed, was done to deny the beneficiaries of the estate of the deceased their rightful shares. He further deposed that the orders obtained by the Applicant/Respondent have the effect of preventing the distribution of the estate. It was thus urged that I allow the instant application.
11. Parties filed their Written Submissions. That of the Interested Parties/Applicants is dated May 5, 2023 and was filed on May 9, 2023. The submissions of the Applicant/Respondent are dated May 29, 2023.

Submissions by the Interested Parties/Applicants

12. The Interested Parties/Applicants submitted that Plot No XXX/II/MN belongs to SBA and HBD alias ABABD (deceased). The said property is subject of the Kadhi Succession Cause No XXX of 2019. A judgment was delivered by the Honourable Principal Kadhi Habib Salim Vumbi vide which the said Court noted as follows:-

' ... the Petitioners categorically state that the instant petition specifically relates to Plot No XXX/II/MN situated at Mwandoni. Their main misgiving is that the said property which belonged to the deceased is yet to be administered and the Respondents herein without proper administration are conferring proprietary interest to themselves in total exclusion to the Petitioners herein ... in the same vein failure by the Respondents to adduce any evidence meant that the evidence by the Petitioners against the Respondents was uncontroverted and therefore unchallenged ...'
13. Relying on *[Petition No 23 of 2013; Teachers Service Commission versus the Kenya National Union of Teachers & 2 Others](#)* the Interested Parties/Applicants submitted that Court orders are not meant to be cosmetic and must be complied with strictly. It was thus argued that the Applicant/Respondent had misapplied the orders of this Court to register a restriction whose effect was to distort the title document, damage it, and to deny the rightful heirs their share of the estate. The Interested Parties/



Applicants referred to the case of [Wachira Karani v Bildad Wachira \[2016\]eKLR](#) where it was held that:-

' the fundamental duty of the Court is to do justice between the parties ... The Court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the Court are off a wide scope and ambit.'

14. The Respondents/Applicants submitted that nowhere in the judgment of this Court was Plot No 128/II/MN mentioned. The Court was thus requested to issue the orders sought.

Submissions of the Applicant/Respondent

15. The Applicant/Respondent submitted that the application ought to be dismissed. It was submitted that the YMAD was diagnosed with depressive illness. Pursuant to a judicial inquiry he was found incapable of protecting his interests and as a result, the Applicant/Respondent was appointed as his Manager /Guardian ad litem.
16. The Applicant/Respondent further submitted that it isn't in contention that the Respondent has been managing Plot No XXX/II/MN. Thus to defend the interest of the said YMAD it was necessary to register a restriction. The Applicant/Respondent argued that if the orders sought are granted she will not be able to safeguard the interests of Yahya MA Damnan, who has a claim to the subject parcel of land 'but was unable to give his version of events as thus was condemned unheard.' The Applicant/Respondent stated that the Interested Parties/Applicants would not be prejudiced by the denial of their application. She thus prayed that the application be dismissed.

Analysis of the Facts and the Law

17. The instant cause is brought under section 26 and 28 of the [Mental Health Act](#) and Order 32 Rule 15 of the [Civil Procedure Rules](#), 2010. Pursuant to the judicial inquiry which was conducted the Court. The court, vide a judgment delivered on May 27, 2023 found as follows in paragraphs 16 and 17 of the said judgment:-

' 16. In view of his established mental conditions I am persuaded to believe that the Petitioner has established to the satisfaction of this Court that the party herein is a person suffering from mental disorder in accordance with the [Mental Health Act](#). In the circumstances his interest and that of his estate can be taken care of by the appointment of a guardian ad litem as well as a manager to take charge of his welfare and manage his estate.

17. Accordingly the Applicant/Petitioner is hereby appointed as a guardian to the subject (patient) as well as a manager of his estate on condition that she shall have no right unless with the Court's authority to alienate, sell, dispose of transfer any immovable assets of the patient. She shall also have authority to sue, prosecute or defend any suit filed by the estate or against the subject of the estate.'

18. Both parties herein agree that there is a Succession cause before the Kadhi Court Mombasa, being Kadhi Court Succession Cause XXX of 2019 between the Interested Parties/Applicants (as Petitioners therein) and Yahya MA Damnan as the Respondent. The subject of the said succession cause is Plot No XXX/II/MN. The Respondent in the said cause contends that he has a proprietary interest in the same having developed it. The Interested Parties/Applicants on the other hand argue that it belongs



to the estate of said Said Bin Awadh & Haymid Bin Damnan alias Awadh Bin Ahmed Bin Damnan (deceased) and should therefore be shared out to his beneficiaries.

19. I have considered the application dated February 3, 2023. It would appear to me that I am asked to make determinations on 2 questions: -

1. Whether I should admit the Applicants as Interested Parties; and
2. Whether the registration of the restriction by the Applicant/Respondent was unlawful, and if so, whether the same should be removed.

20. In respect of the first issue I note that there is already a judgment in this matter. That judgment wasn't appealed against. It has also not been set aside or otherwise reviewed. The effect of a judgment is that it determines with finality a matter before Court. Is it possible at this point to admit the applicants as interested parties? I am afraid not. Once the Court rendered its decision. It became functus officio. The Court in *Kwetu Savings and Credit Cooperation Society Ltd v James Muiya & 12 others [2018] eKLR* stated that:-

' the common thread that runs through the above legal provisions is that there must be a pending suit so as to allow enjoinder of a party and if not the Court is functus officio.

The functus officio principle was conclusively dealt with by the Court of Appeal in *Telkom Kenya Ltd v John Ochanda [2014]eKLR* where Githinji Karanja & Kiage JJAs observed that 'functus officio is an enduring principle of law that prevents the reopening of a matter before a Court that rendered the final decision therein ...

The rule applies only after the formal judgment has been drawn up issued and entered and was subject to two exceptions: -

1. Where there had been a slip in drawing it up; and
2. Where there was an error in expressing the manifest intention of the Court.'

21. In my view none of the 2 exceptions apply in this matter. this Court expressed itself with finality. I therefore find and hold that it is not possible at this point to enjoin the Applicants to this matter. That, in my view, is enough to dispose of the application in entirety as without joinder they are unable to canvass the other orders they seek. I shall nevertheless consider the same for clarity.

22. This Court appointed the Applicant/Respondent as the Manager/Guardian ad litem of YMAD. The following facts appear not to be in contestation: -

1. YMAD is in occupation of Plot No XXX/II/MN;
2. The said Plot is the subject of proceedings before the Kadhi Court between the Applicants and YMAD;
3. The proceedings before the Kadhi proceeded, at least in part, in the absence of the said YMAD and a decision was made. the Applicant is the wife of the said YMAD;
4. The Court appointed the Applicant/Respondent as the Manager/Guardian ad litem of the said YMAD with power to manage his estate on 'condition that she shall have no right unless with Court's authority to alienate, sell, dispose or transfer any immovable assets of the patient.' She was also given authority to 'sue, prosecute or defend any suit filed by the estate or against the subject or the estate.'



23. In my view the registration of the restriction is a proper exercise of the authority she was given by the Court. Restriction does not entitle her to alienate or sell or dispose of or transfer Plot No XXX/II/MN; it merely prevents dealings with the said title until the restriction is removed. In view of the decision of the Kadhi Court, made in the absence of YMAD, which absence appears to have been caused by his illness, placing a restriction on the said plot would appear to me to be a reasonable thing to do.
24. I do not agree with the rather lofty arguments of the Applicants that the registration of the restriction in question disenfranchises them. The restriction in fact preserves the estate as the contest between the parties hereto is heard and concluded by the Courts.
25. The upshot of the foregoing is that I find no merit in the Notice of Motion application dated February 2, 2023. The same is dismissed. As the parties are related I do not think that ordering payment of costs will promote harmony. Each party will therefore bear own costs.

Orders accordingly.

DELIVERED, DATED, AND SIGNED AT MOMBASA THIS 28TH DAY OF JULY 2023 VIA MICROSOFT TEAMS

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GREGORY MUTAI

JUDGE

In the presence of:-

Mr. George Egunza for the Applicants

No appearance for the Applicant/Respondent

Mr. Arthur Ranyundo – Court Assistant

