



REPUBLIC OF KENYA



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**ZNM v RMM & Six others (Petition E013 of 2023)
[2023] KEHC 27207 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E013 OF 2023
EM MURIITHI, J
DECEMBER 18, 2023**

BETWEEN

ZNM PETITIONER

AND

RMM & SIX OTHERS RESPONDENT

RULING

Application

1. This is a ruling on two applications by M-AKM and RMM, said to represent four of the Interested Parties in the Petition, filed in Court 13/10/2023 and 21/11/2023, respectively, as follows.

First application

2. By the Notice of Motion dated 13/10/2023, brought under order 51 rule 1 and order 45 rule 1 of the *Civil Procedure Rules*, the applicants seek review of the orders of the court herein in the Judgment dated and specific reliefs as follows:
 - “ 1. That the Judgement of the Honourable Justice Edward M. Murithi made on the 6th October, 2023 be reviewed and varied and the appointment of the Three (3) Managers be reviewed and the name of MDM who has since declined his appointment as a Joint manager be replaced with the name of RMM as a joint manager to represent the four (4) interested parties/ Applicants in managing and protecting the assets of their father.
 2. That the costs of this application be provided for.
 3. That such further and other relief be granted as this court deems fit and expedient in the circumstances.”



3. The application was supported by a supporting affidavit of the two of the Interested Parties M-AKM and RMM of 13/10/2023 and based on grounds set out in the application as follows:

“Grounds:-

1. That on 6th October, 2023, the Hon. Justice Edward M. Murithi issued orders in appointing three (3) managers, namely, ZNM, her children Dr. EDKM, and Mr. MDM to act as the joint managers of their father's assets.
 2. That one of the managers, MDM has since declined the appointment made vide the said Judgement by detailing a fact that was not in this Honourable Court knowledge that he did not possess the necessary experience to perform the duties of a manager and further it was against his father's wishes and advise to carry on the functions of a manager.
 3. That upon delivery of the said judgement in court on 6th October, 2023, the said MDM informed this Honourable Court of his decision to decline the appointment and the reasons thereto.
 4. That that the assets and investments of our father including fixed deposits held at HFC Bank remain uncertain and the Court is called upon to put in place experienced managers and who can work together to undertake those investment decisions and report to the family.
 5. That it is fair and balanced to have this Honourable Court appoint RMM as a joint manager to represent the four interested parties interests considering the rest of the Siblings supporting the Petitioner appointed one EDKM as a joint manager and the Court agreed with them. That actually in the Applicant's Affidavit evidence all the interested parties had consented and nominated RMM to be appointed as their choice of a joint manager.
 6. Your Honour, no undue prejudice will be occasioned to the Respondents if the orders prayed for are granted and it is reasonable, fair and in the interests of justice in all the circumstances of this suit that the orders prayed for are granted.
 7. That this application has been made without unreasonable and/ or undue delay.”
4. The application was opposed by the Petitioner by a Replying affidavit sworn on 14/11/2023 in terms principally as follows:

- “3. That it is unfortunate that the orders issued by the court on 6th October, 2023 have not been implemented owing to obstruction by the interested parties.
4. That immediately after delivery of the court's judgment MM expressed his unwillingness to take up his duties as a co-manager of the property of the subject herein at the prompting of Robert Matumbl.
5. That MM having declined to take up the said appointment I believe that it is only appropriate that the same be rescinded.
6. That I believe that R is not suitable for appointment of a co-manager of the property owing to his conduct and attitude towards me and his father.



7. That I believe that there are no new compelling grounds advanced in support of the appointment of Robert as a co-manager.
8. That I believe that the honourable court must have considered the best interests of the subject in failing to appoint R a co-manager.
9. That I reiterate that Robert has been a stumbling block to the smooth management of the health and other affairs of my husband.
10. That since my husband became unable to manage his affairs I have encountered numerous obstacles placed by the interested parties on providing him with adequate care.
11. That my husband requires urgent costly medical attention which his unutilized financial resources can afford him were it not for intransigence by the interested parties.
12. That I have always prudently managed our resources and there is absolutely no reason why I would pilferage the same at my husband's hour of need.
13. That as R is staking a claim to his father's estate on account of hospital bills allegedly incurred on his behalf he is not a proper person to be appointed as a co-manager.
14. That further, as I stated in court on 27th September, 2023, Robert is not trustworthy as he has completely failed to account for a sum of Ksh.2.7 Million that he was entrusted with for my husband's medical trip to India in the year 2022 and his subsequent treatment locally.
15. That R and our other two sons have colluded to effectively deny us access to our family vehicle, a Toyota Prado, thereby constraining me to hire taxis for my husband's numerous visits to hospital and in running our errands.
16. That our sons have frustrated payment of rent by our tenants and leasing of part of our premises known as Town City Lodge to willing tenants.
17. That Robert wrongfully continues to withhold original title deeds for the parcels of land registered in my husband's name, our two passports, marriage certificate and the subject's national identity card.
18. That I believe that the appointment of numerous co-managers of the property of my husband is unlikely to work for his benefit and do pray that the same be reconsidered by the court.
19. That MM having declined his appointment I would pray that I and Dr. Emily Dolly Mworibe be retained as co-managers of the property of the subject.
20. That we undertake to faithfully manage the property and in accordance with the directions given by the honourable court.
21. That any further delay in the management of the property of the subject will be prejudicial to his well-being.



22. That I urge the court to reject the application and appoint me and Dr. EDKM the sole manager of the property of my husband.”
5. The applicants then filed a detailed further affidavit sworn on 16/22/2023 in response to the Petitioner’s Replying Affidavit principally discrediting the petitioner as a suitable manager on account of her advanced age and alleging dishonesty on the part of the other co-manager EDK.

Second application

6. The Notice of Motion dated 21/11/23 expressed to be brought under article 35(1) of the *Constitution*, sections 68(1) and 69 of the *Evidence Act*, sections 1, 1A, 3A, (a) of the *Civil Procedure Act*, the same applicants MAKM and RMM sought an order for accounts in specific terms as follows:

- “ 1. That this Application be certified as urgent and be heard ex-parte in the first instance.
2. That pending hearing and determination of the suit herein, a freezing injunction to issue restraining the Petitioners by themselves, their servants, agents and/or employees from removing from this jurisdiction, disposing of, mortgaging (and/or further mortgaging), charging (and/or further charging), assigning, diminishing, transferring, disposing, alienating, operating, pledging and/ or otherwise interfering and/ or dealing in any manner with any of the funds held in various bank accounts namely; ABSA Bank, account number xxxx, Housing Finance numbers; xxxx, xxxx, xxxx, xxxx and Equity Bank account numbers; xxxx and xxxx.
3. That pending hearing and determination of this suit an order to issue compelling the Petitioners to furnish the Applicant's Advocates a complete set and/or list of: -
- a. Bank account statements from ABSA Account, Equity Account and Housing Finance accounts in respect of the above accounts indicating how the funds were utilized and/or used for the period between January, 2021 to date.
- b. Rental collections from Madaraka Estate Plot Number M/F 20 whose rental collection is Kes. 75, 000/= per month.
- c. Rental Collection from Tom Mboya Street Plot No. BII /xxx whose rental collection of Kes.120,000/= per Month.
- d. All Account for the rental collection for the last Three (3) years from January 2021 to date.
- e. Audited report of the rental accounts by a certified Auditor held by ABSA, Equity and Housing Finance Bank.
4. That the costs of this application be provided for.
5. That such further and other relief be granted as this court deems fit and expedient in the circumstances.”



7. The application for injunction and accounts was based on grounds set out in the applications as follows:

“Grounds: -

1. That on 6th October, 2023, the Honourable Justice Edward M. Muriithi issued orders in appointing three (3) managers, namely, ZNM, her children Dr. EDKM, and Mr. MDM to act as the property managers for the subject's assets of the Applicant's father.
2. That despite one of the Manager by the name MDM publicly declined the appointment by the Court thereof, the petitioner has moved with speed and submitted the names to the bank for purposes of withdrawing money on the charade that the Court has given her mandate to transact the bank accounts and unless this court intervenes, the Petitioner will mismanage the estate of their father and it is in the interest of justice that the court do allow the prayers sought herewith.
3. That the Petitioners have been managing the Accounts previously and they cannot account for the same and of late they have hurriedly rushed to extract the Decree and forwarded the same to the bank on allegation that they are now the legitimate Managers of the estate of the Applicants father.
4. That to safeguard the estate of the Applicants Father, this Honourable Court need to grant the prayers as sought so as to enable proper accountability for the estate of the Applicants Father Estate.
5. That this application has been made without unreasonable and/or undue delay.”

8. In response to the application of 21/11/2023, the Petitioner filed a replying affidavit sworn on 23/11/2023 as follows:

- “2. That I have read and understood the contents of the application dated 21st November, 2023 and it is in reply thereto that I swear this affidavit.
3. That I believe that the filing of the said application is yet another attempt by the interested parties to derail finalization of this matter.
4. That RMM has lived true to his vow that he made to me during our last court appearance that this matter will never end and that he will employ his financial muscle to keep me in court.
5. That granting the orders sought would defeat the purpose for which this petition was brought.
6. That I reiterate that the applicants are not interested in the welfare of their father and are only out to ensure that we are starved of funds to cater for his maintenance.
7. That if the applicants had the best interests of their father at heart they would have readily co-operated in facilitating access to his resources.



8. That owing to intransigence on the part of the applicants all the subject's fixed deposits hitherto held by the Housing Finance Company lie unutilized to the detriment of his estate.
9. That since the applicants have expressed their unwillingness and inability to work with their siblings in the management of the property of my husband I pray that the court do review the order for appointment of trustees.
10. That any continued delay in accessing funds for treatment of my husband will be detrimental to his health.
11. That it is my resolve to prudently manage our resources in the best interests of the welfare of my husband as I have always done.
12. That the demands for accounts is misplaced and made in bad faith.
13. That the applicants very well know that my husband was ably running his affairs until the beginning of this year and the demand for an account for the period extending from January, 2021 is clearly off the mark.
14. That it is evident that the applicants are only interested in the assets of my husband for their selfish gain and do not care whether his health deteriorates or not.
15. That I have undertaken to give an honest account to the honourable court.
16. That it is my desire to have part of the funds held by the Housing Finance Company utilized in providing for my husband and a substantial part thereof invested for the benefit of his estate.
17. That the applicants have frustrated collection of rent and leasing of some of the property and cannot be heard to seek for accounts.
18. That the applicants wrongly blame me for procedurally presenting the decree issued by the court to Housing Finance Company.”

9. The court has considered the submissions made before the court by counsel for the parties on their respective contentions.

Determination

Application for Injunction and Accounts

10. It is convenient to start with the later application for injunction and accounts because it is premised on an assumed pending suit. It is a misconception of the matter before the court as no suit is pending hearing and determination.
11. The Petition in this case was brought pursuant to sections 26, 27, 28 and 29 of the *Mental Health Act* cap 248 of the Law of Kenya seeking specific reliefs in the Petition dated 22/8/2023 as follows:

“Reasons Wherefore the petitioner prays that;-

1. This Honourable court be pleased to declare Julius Mworla as a person suffering senile dementia, a mental disorder, and therefore of making any independent decisions.



2. The petitioner be appointed the guardian of JM.
 3. The petitioner be appointed the manager of the estate of JM with the power and authority to;
 - i. Manage all the fixed deposit accounts held by JM with the Housing Finance Corporation, Meru branch.
 - ii. Execute any instruments for lease or tenancy of any immovable property of JM.
 - iii. File and defend any suits on behalf of the estate of JM.
 - iv. Pay all his debts ascertained to be due.
 - v. Discharge any encumbrances on his property.
 - vi. Pay for all his medical expenses and maintenance.
 - vii. Meet the costs of any inquiry and if any costs incurred by order or the authority of this Honourable court.
 - viii. Do everything or anything that appertains the interest of his estate.
 4. There be liberty to apply generally.”
12. The Court’s Judgment of 6/10/2023 conclusively dealt with the prayers of the Petition in terms as follows:

“Orders

23. Accordingly, for the reasons set out above, the Court makes the following orders:
 1. The Petitioner’s petition and Notice of Motion dated 1/3/2023 is allowed in the terms set out below.
 2. The Court appoints the applicant ZNM as the sole guardian of the subject in terms of section 26 (b) of the *Mental Health Act* with powers to execute, on his behalf all legal documents and court process, whether as plaintiff, defendant or interested party, and give any necessary consents required of, and falling on, the subject.
 3. The Court appoints three (3) managers, namely, the applicant, ZNM, her children Dr. EDKM and Mr. MDM to act as the property managers for the subject’s assets in terms of section 26 (a) of the *Mental Health Act*.
 4. The managers appointed in No. 3 above shall, in accordance with section 33 of the Mental Health Act, within six (6) months from today and annually, respectively, render an inventory of assets and an account of dealings therewith to the Court, the Public Trustee and the parties herein being a full and accurate inventory of assets



and account of their dealings with the estate of the subject herein for further orders, as appropriate.

5. Liberty to apply for all the parties to the Petition.
6. There shall be no order as to costs and each party shall bear its own costs.

Order accordingly.”

23. There is, therefore, no suit pending hearing before the court that could offer substratum for the application for injunction and accounts sought by Notice of Motion dated 21/11/2023. The relief by order for accounts made in the Judgment of 6/10/2023 was in the strict terms of and in accordance with the relevant provisions of *Mental Health Act* cited in the Judgment.
24. Moreover, the applicant have clearly no locus standi to sue for injunction and accounts not being the owners of any property subject of the suit. As held in the Judgment of this court herein, the Court holds the position that children cannot demand the gifting to themselves in any manner of the property belonging to their parent(s), as counseled by *Mary Wahito Mbugua v Peter Mbugua Njubigu & 5 others* [1995] eKLR.
25. There being no pending suit for hearing and determination, the application for an order for account dated 21/11/2023 is misconceived and it cannot be granted.
26. Most importantly, the applicants have, with respect, not properly invoked the right to access to information under article 35 of the *Constitution*, having not demonstrated the constitutional right or fundamental freedom that they seek to exercise or protect and for that purpose require an account from their petitioner mother over her dealings with the private property of the subject herein. See article 35(1) (b) of the *Constitution*.

Application for review of Judgment

27. It is clear to the Court that the parties before the Court who are the mother and her children are bitterly divided over the matter of management of the property of the subject herein, who is husband to the applicant and father of the children, for whom the applicant/wife has been appointed sole guardian for purposes of the *Mental Health Act*.
28. The Court by its Judgment herein appointed as managers the wife and two of her children, in the interests of good husbandry of the assets of the subject over which the wife may have spousal interest.
29. There is sufficient reason for review within the meaning of section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules* to justify a review of the Court order on appointment of managers. On account of one of the three manager renouncing his appointment, the order for appointment of managers must be reviewed.
30. However, as the person who is the legal owner of the property is not able to take care of his business on account of mental health, the Court has agreed to have the wife who might have a spousal interest in her share of the matrimonial property joined by two of her children in the management of the property and business affairs assets of the invalid subject.
31. Due to obvious differences played out earlier in court at the hearing of the application for appointment of guardian and managers, the court appointed the initial two children to join their mother based on her expressed discomfort and inability to work with one RM, and one of them now having renounced



his appointment, the Court shall on the same reasoning appoint another to replace him and act as co-manager with the remaining co-managers mother and sister.

32. In the interest of inclusion of all factions of the family in the management of the Subjects property, the Court would allow the person appointed by the one faction from which a co-manager has renounced his appointment to propose another person. Such person fronted the faction is the same RMM, the eldest son of the subject and the applicant. The Court has noted the intimation by the applicant that she did not wish to act with her said son as co-manager, and the counter-accusations between the mother and her said son R of previous mismanagement of the funds of the Subject's property.
33. However, to promote inclusion of the said faction of the family in the management of the property and business affairs, the Court takes the view that it is important to appoint the said R as one of the two children co-managers to join the applicant/wife of the subject in the management of the subject's property and business affairs.
34. Being cognizant of the bitter acrimony and rivalry between the two factions of the Subject's family the Court must direct that the decisions of the managers shall be by consensus, that is to say, with the agreement of all three (3) co-managers, to be signified in writing, where and as necessary. By this order, the court earnestly hopes that the family members will be brought together by the need to achieve a common consensual position in the utilization of the Subject's wealth on his health as well as its investment for future income, and hopefully re-establish the bonds of filial relationship and trust between them. The Court grants liberty to apply in the event of failure of such agreement, and as necessary.

Orders

35. Accordingly, for reasons set out above, the Court makes the following orders:
 1. The application for accounts dated 21/11/2023 is dismissed.
 2. The court order issued upon the Judgment of 6th October 2023 appointing the applicant, ZNM, her children Dr. EDKM and Mr. MDM to act as the property managers for the subject's assets in terms of section 26 (a) of the Mental Health Act, is set aside.
 3. All the other terms of the Order of the Court made on 6th October 2023 remain unaltered, save that the reference to managers in the Order will be to the managers appointed hereinbelow.
 4. The Court now appoints the applicant herein, ZNM and her children Dr. EDKM and RMM as co-managers of the property and business affairs of the Subject herein for purposes of section 26 (a) of the *Mental Health Act*.
 5. The authority of the Managers shall be exercised by consensus of all the co-managers, and Notby majority thereof.
 6. In the event of lack of consensus, any party shall be at liberty to apply to court for approval for any proposed dealing with the property of the subject or directions on the process towards achieving such consensus, as the case may be.
 7. For the avoidance of doubt, there shall be no dealing with the property of the Subject or any income therefrom or any business transactions on the assets of the Subject herein save with consensus of the co-managers or order of the Court in lieu.
36. As this is purely a family dispute involving children and their mother, there shall be no order as to costs.
Order accordingly.



DATED AND DELIVERED ON THIS 18TH DAY OF DECEMBER, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Gatari Ringera, Advocate for the Applicant.

Mr. Mbaabu Mutuma, Advocate for the Respondents.

