



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

FAMILY MISCELLANEOUS PETITION NO.1 OF 2021

IN THE MATTER OF THE MENTAL HEALTH CAP. 248 LAWS OF KENYA

AND

IN THE MATTER OF A PETITION FOR ORDERS OF CUSTODY, MANAGEMENT & GUARDIANSHIP RELATING TO JO (PATIENT).

AND

IN THE MATTER OF:

DMO.....1ST PETITIONER/APPLICANT

PROF. RMO...2ND PETITIONER/APPLICANT

RULING

1. DMO & Prof. RMO, the applicants herein, moved the court by way of Chamber summons dated 29th October, 2020 under sections 1A, 1B & 3A of the Civil Procedure Act & under sections 27, 28 & 29 of the Mental Health Act, CAP. 248 Laws of Kenya. They are seeking the following orders:

a. The application be certified urgent and the same be heard ex-parte and the hearing and determination of the petition filed herein be expedited.

b. The honourable court be pleased to issue a temporary injunction restraining;

i. The Land Registrar, Nyamira Lands Registry either by himself or through his servants, employees, workers, assigns and/or any other person whatsoever from causing any transactions whatsoever in the form of subdivision, transfer and/or power of attorney to be registered on all that parcel of land known as Nyamira Kitaru/xx pending hearing and determination of the petition filed herein.

ii. The Land Registrar, Kisii Lands Registry either by himself or through his servants, employees, workers, assigns and/or any other person whatsoever from causing any transaction whatsoever in the form of sub division, transfer and/or power of attorney to be registered on all that parcel of land known as Nyaribari Chache/x/x/ Boburia/xxxx And Nyaribari Chache /x/x/Boburia/xxxx pending hearing and determination of the petition filed herein.

iii. The Branch Manager, Co-operative Bank, Kisii Branch either by himself or through his servants, employees, workers, assigns and/or any other person whatsoever from causing any changes and/or changing the signatories to the patients bank accounts of Number **016Bxxxxxxxx** and **0110xxxxxxxx** pending hearing and determination of the petition filed herein.

iv. The Registrar General of marriages either by himself or through his servants ,employees, workers, assigns and/or any other person whatsoever be stopped from issuing any marriage certificate with regards to the marriage between the patient herein JO and any other person whatsoever pending hearing and determination of the petition filed herein.

v. The honourable court be pleased to issue an order appointing a qualified physician from Kenyatta National Hospital to examine the physical and mental status of the patient JO and to conduct a medical evaluation regarding the patient JO's

ability to make sound judgment and file a report with this honourable court and that the said physician be granted unfettered access to the patient JO.

c. The honourable court be pleased to issue a mandatory order, compelling the administrative department, and/or the custodian of hospital patients records at Nyangena Hospital, Kisii; Oasis Hospital, Kisii and Galaxy Hospital, Kisii and /or treatment records to issue certified copies of the said medical and /or treatment records to the appointed physician for purposes of conducting a physical and mental evaluation on the patient JO.

d. The honourable court be pleased to issue a mandatory order compelling the registrar general of marriages and the United of States Embassy in Kenya to provide this Honourable Court with the marriage records relating to JN of National Identification Number **xxxxx** alias JR in Kenya and in the United States of America respectively.

e. the honourable court be pleased to issue an order directing the office of the Director of Criminal Investigations to investigate the illegalities preceding the subdivision, selling and transfer of the properties comprising and /or that comprised the estate of the patient JO; as well as the preparation and execution of the power of attorney allegedly signed by the patient JO and/or any other illegal and /or unlawful commissions thereof charged and prosecuted in a court of law.

f. The Petitioners be granted temporal guardianship of one JO and management of his estate pending hearing and determination of the Petition filed herein.

g. Costs of the medical evaluation be paid from the patient, JO's bank accounts held at **CO-OPERATIVE BANK**, at Kisii under account numbers **0110xxxxxxxxx** and/or **016Bxxxxxxxxx**.

2. The application was premised on the following grounds:

a. That the 1st and 2nd petitioners herein are the grandchild and son of the patient herein JO respectively.

b. That the patient herein is an elderly man being over 95 years old and sickly whose physical and mental conditions is deteriorating having suffered a stroke sometime back.

b. That the patient is in an appalling health state to such an extent as to be incapable of managing his affairs and is incapable of managing himself.

d. That there are individuals who have taken advantage of the condition of the patient to waste, sell plunder and transfer ownership of properties comprising the estate of the patient.

e. That the patient has been caused to sign an unlimited power of attorney donating powers and his rights to all his properties and his own person to his alleged third wife who they had divorced with in the year 1978. The said third wife remarried soon thereafter and sired a son out of the said marriage and after a while she moved to the United States of America where it is reasonably believed that she contracted another marriage. She has now resurfaced with claims that she is the sole and only surviving wife to the patient and she started making plans of legalizing the marriage through unscrupulous means.

f. That there are plans to have the power of attorney registered and to have the properties of the patient sub divided and ownership thereof transferred to other persons and the titles thereof be used to obtain loans from banks; not to mention the patients business that has been run into waste and several properties that have since been sold and money obtained thereof squandered by third parties.

g. That during a meeting held on the 22nd of October 2020 at the District Commissioner's office at Borabu District whereupon the illegalities preceding the selling, transfer of the patients properties and the execution of the said power of attorney were raised and all the family members cautioned the District Commissioner against rubber-stamping any dubious decisions presented to them as the true wishes and actions of the patient. The individuals behind the legalities mentioned hereinabove are giving money to government officials in charge of jurisdiction where the estate of the patient is situate and/or controlled from in view of justifying the illegalities orchestrated to defraud the patient who is an unknowing party of the happenings surrounding him currently.

h. That the said plans, intended to defraud the patient are being orchestrated by the alleged patient's third wife and her children in conjunction with the patients last born son who wasted the patient's estate by mismanagement of the patient businesses to their ultimate closure, and making money withdrawals from the patient's account to the tune of millions, as well as unlawfully selling of the patient's properties. After fizzling out the patient estate, the said son entered into numerous debts that had him arrested and charged not to mention the civil suits pending before court. He skipped court on numerous occasion and arrest warrants have since been issued against him. In order to evade the criminal charges facing him in Kenya and the suits in the civil courts, the said alleged third wife and her children promised to help them get close to the patient like he did so as to manipulate him and have all the properties transferred into their names, which they successfully did in an incomprehensible and miraculous manner given the fact that the said son had allegedly committed crimes in the United States of America ,10 years ago and/or thereabout and fled to Kenya where he came to swindle the patient's business and properties.

i. That the only explanation on the sudden return of the alleged third wife to Kenya and the patients last born son who had fled to the United States of America is a pact entered into between the two whereby the alleged third wife was to help the Patients last born son flee to the Unites States of America and in return, he will help them gain access and sell all the properties belonging to the patient with the help of the patient grandchild who is allegedly taking care of the patient in rented house, otherwise leased in the name of the said last born son, at Kisii town making sure the patient does not go to his matrimonial home at [Particulars Withheld] settlement scheme being all that parcel of land Nyamira/Kitaru/xx of approximate 25 acres.

j. That unless the orders sought herein are granted, the patient will suffer irreparable harm.

3. The respondents curiously did not respond to the application. Instead, they filed another application dated 19th November, 2020.

4. I have however noted that JO, the subject of the petition filed a response to the effect that he is mentally stable. He attached a medical document from Kisii Galaxy Medicare Centre and which was signed by Dr. Ongeru N. Angwenyi. The doctor remarked that on overall impression of the patient that:

He is of sound mind and satisfactory physical condition but needs care due to frail nature and age.

5. There is another conflicting medical opinion by Dr. Violet C.A. Okech –Helu. This is what she opined:

Mr. J is an elderly male who has features of moderate dementia complicated by a stroke. He has a diminished capacity to make legal decisions over the administration of his estate and healthcare.

6. Confronted by the two contrasting medical opinions, I find that I cannot be in a position to make orders under sections 27, 28 & 29 of the Mental Health Act. Since this matter was transferred to this court owing on the special relationship between the presiding judge and the maker of one of the reports, the matter can be taken back to Kisii High Court since the issue of the report has been dealt with.

7. This is a family matter and in order to keep it within reasonable degree of decorum, each party will meet own costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF FEBRUARY, 2022

KIARIE WAWERU KIARIE

JUDGE