



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

PETITION NO. 9 OF 2010

IN THE MATTER OF SECTION 28 OF THE

MENTAL HEALTH ACT, CAP 248

AND

IN THE MATTER OF ORDER 32 RULE 15 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF JBK

VNK.....1ST PETITIONER

EMK.....2ND PETITIONER

RGK (Suing as next friend).....3RD PETITIONER

VERSUS

LMK.....1ST RESPONDENT

HWM.....2ND RESPONDENT

RULING

1. The applicants VNK, EMK and RGK are children of the Ward JBK. On 5th March 2015 vide **High Court Misc. Petition No. 31 of 2015** they were appointed as managers and guardians of the Ward. They filed the petition herein dated 16th January 2019 seeking a declaration that the 1st and 2nd respondents were not and have never been married to the ward; an order that the respondents do cease and desist from asserting that they are wives of the ward; declaration that the respondents have violated the Ward's rights under **Articles 27 and 28** of the Constitution of Kenya; damages for violation of the Ward's rights; as against the 1st respondent, an order for possession of the Runda house; an order for compensation for the 1st respondent's continued occupation of the Runda house; costs of the petition; and any other reliefs the court may deem fit.

2. The 1st respondent filed the instant Preliminary Objection dated 30th October 2020 on grounds that;

- a) the court has no jurisdiction to grant the prayers sought;
- b) that the petitioners have no legal capacity on behalf of the Ward to ventilate the matters subject of the petition;
- c) that the orders sought in the petition are outside the mandate of guardians and managers under the **Mental Health Act**; and
- d) that the petition is therefore incompetent and a non-starter.

3. It was the 1st respondent's submission that the Family Division lacked the jurisdiction to hear and determine the matters on grounds that recovery of possession, compensation, the use and occupation of and title to land, and the occupation of the Runda house are matters for the Environment and Land Court; from the petition it was shown that the 1st respondent lived in the Runda house since 1998 for 22 years and according to **section 7 of the Limitations of Actions Act** an action could not be brought by a person to recover land after the end of twelve years. Consequently, the claim was time barred and the court lacked jurisdiction to deal with it. Further, that the Family Division exists to hear disputes between and among family members. In this case, the petitioners' position is that the respondents were not the wives of the ward but sought reliefs from the Family Court. They sought the dismissal of the petition.

4. In the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** Justice Nyarangi of the Court of Appeal stated as follows:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

5. The court in its ruling delivered on 24th September 2019 determined that it had the jurisdiction to hear and determine the issues raised in this petition. It determined that the issues whether or not the respondents were the wives of the Ward, and whether or not they can be called into the management and guardianship of the estate of the Ward were properly before this court. The decision has not been reviewed and/or set aside.

6. **Section 7 of the Civil Procedure Act** bars the court from hearing and determining a matter that has previously been heard and determined on merits by a competent court between the same parties or parties under whom they or any of them claim **(I.E.B.C. –v- Maina Kiai & 5 Others [2017]eKLR**. The rule serves the aim of bringing finality to litigation and affords parties closure from being vexed, haunted and hounded by issues and suits that have already been determined by a competent court.

7. I reiterate that this court has the jurisdiction to deal with all the matters raised by the petition. Consequently, the Preliminary Objection is not merited, and is dismissed with costs.

DATED and DELIVERED electronically at NAIROBI this 15TH day of FEBRUARY 2021

A.O. MUCHELULE

JUDGE