REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

(CORAM: A.K. NDUNG'U J.)

PETITION NO. 1 OF 2021

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

AND

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

AND

IN THE MATTER OF

DMO...1ST PETITIONER/ APPLICANT

PROF. RMO...2ND PETITIONER/ APPLICANT

AND

IN THE MATTER OF

1. THE EMBASSY OF THE UNITED STATES OF AMERICA TO KENYA

2. DIRECTOR OF CRIMINAL INVESTIGATIONS

3. REGISTRAR OF MARRIAGES

4. ATTORNEY GENERAL

5. ABDULLAHI MANG'NG'O BWOCHARO

6. WILLIAM OMBUNA OCHARO

7. DAVID OGEGA OCHARO

8. KENNEDY ORINA OCHARO

9. ELIJAH OGOTI OCHARO alias TOM

10. BATHSHEBA MORAA OCHARO

11. TABITHA NYABOKE OCHARO

12. VINCENT MOSETI OCHARO alias DENNIS OBARE alias DADDY

13. CARREN DOMINIC being the representative OF DOMINIC OCHARO (DECEASED)

14. JANE NYABOKE alias JANE ROBINSON

15. DENNIS ISABOKE OCHARO

16. RITA MWANGO alias RITA RHOCK ………................………. INTERESTED PARTIES

RULING

1. On 29th October 2020, the petitioners herein filed chamber summons together with a petition of even date before the High Court in Mombasa. They sought a raft of *ex parte* orders in the Chamber Summons some of which were granted by the court.

2. The orders issued by the court on 29th October 2020 were as follows;

1. That the application dated 29th October 2020 be and is hereby certified as urgent.

2. That the Petitioners/ Applicants to effect service of the said application within 5 days from today.

3. That a temporary injunction be and is hereby issued restraining;

a) The Land Registrar, Nyamira Lands Registry either by himself or through his servants, employees, workers, 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 NYAMIRA/ KITARU/20 pending hearing and determination of the petition filed herein.

b) 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 / B / B / BOBURIA / 942 which was otherwise unlawfully, illegally and fraudulently sub-divided giving rise to all those parcels of land known as NYARIBARI CHACHE / B / B / BOBURIA / 14093 and NYARIBARI CHACHE / B / B / BOBURIA / 14094 pending hearing and determination of the petition filed herein.

c) 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 Patient's Bank Accounts of Number [xxxx] and [xxxx] pending hearing and determination of the petition filed herein.

4. That an order be and is hereby issued appointing a qualified physician from Kenyatta National Hospital to examine the physical and mental status of the patient, JO and 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.

5. That the wife or wives of the patient, JO and his children be served with a hearing notice for 11th November, 2020 when the application dated 29th October, 2020 shall be heard inter-partes.

6. That costs be in the cause.

3. The orders issued by the court prompted, JO (herein “the Subject” for ease of reference only) and 7th, 9th, 12th, 14th, 15th and 16th interested parties (“the applicants”) to file the application dated 19th November 2020which is subject of this ruling. The orders sought in the application are;

1. That the Honourable court be pleased to discharge and or set aside in entirety the interim orders that were given by this court on 29.10.2020 by Lady Justice N. Mwangi;

2. That this Honorable Court be pleased to transfer this matter to be heard by the High Court of Kenya at Kisii;

3. That this Honorable Court be pleased to strike out the entire suit herein as it is scandalous, frivolous, vexatious discloses no reasonable cause of action and it is otherwise an abuse of the process of the court

4. That the costs of this application and the suit be borne by the petitioners.

4. Prayer (2) above and a preliminary objection filed by the petitioners contesting the representation of the Subject and the 7th, 9th, 14th, 15th and 16th interested parties by the firm of Nyang’acha & Associates Advocates and counsel Ezekiel Godia Mudavadi were disposed of in ruling dated 22nd December 2020. The court dismissed the preliminary objection and ordered for transmission of the file from Mombasa to the Kisii High Court registry. It declined to make a finding on the merits of the application which this court is now tasked to determine.

5. When the matter came up for hearing, the petitioners were given an opportunity to file supplementary submissions but they failed to do so. I however note that the parties had already filed their respective submissions on all the issues raised in the application. I will therefore consider their submissions and depositions on the merits of the application as the preliminary issues had already been determined as

indicated above.

6. In his affidavit in support of the application dated 19th November 2020, the Subject complained that the court had issued interim orders without giving him an opportunity to be heard. He averred that the petitioners had not sought interim orders in the chamber summons application and there was therefore no justification for the court to proceed and grant the orders as parties were bound by their own pleadings.

7. JO also claimed that the interim orders were never served upon the parties within 3 days as provided under Order 40 Rule 3 of the Civil Procedure Rules hence they automatically lapsed and there could be no reason for their continued extension.

8. He further complained that the orders granted under prayer 3 of the application presumed that he was mentally unstable yet the law presumed everyone to be of sound mind unless proven otherwise. He stated that subjecting him to mental examination by a physician would not only violate his right to privacy but would also compromise his dignity. It would also run counter the spirit of Article 57 of the Constitution which guaranteed older members of the society respect and to live in dignity. He asserted that the burden to prove that he was mentally unstable was upon the petitioners and it was not for the court to assist the petitioners gather evidence. He thus urged the court to discharge the interim orders.

9. The patient also urged the court to strike out the application and the suit for being an abuse of court process and for being scandalous, frivolous, vexatious and for disclosing no reasonable cause of action.

10. The 1st petitioner swore an affidavit in response to the application contending that the applicant had not satisfied the grounds provided under the law to warrant the setting aside the orders of the court. He averred that the orders were aimed at protecting the estate of the Subject. He claimed that the persons abusing the Subject were keen on having the orders set aside to enable them proceed with their fraudulent actions of registering powers of attorney, changing bank signatories into their names and subdividing and selling the Subject's properties. He averred that due to his old age which was characterized by infirmity, the patient was susceptible to abuse.

11. The petitioner referred the court to audio and video evidence presented before the court to show that the patient had a poor recollection of events. He averred that the court had a duty to ensure that the patient was protected from any form of abuse hence nothing barred the court from issuing orders aimed at serving the interests of justice. He also deposed that the court was seized with powers to direct that investigations be conducted where there was reason to believe that such investigations were necessary in adjudication and determination of the suit.

12. On the prayer for dismissal of the proceedings, the petitioner averred that there were no compelling reasons to warrant such a draconian recourse.

13. Having considered the parties' depositions and submissions, I find that two main issues arising for determination are;

1. Whether the interim orders issued on 29th October 2020 should be set aside;

2. Whether the Petition should be struck out for being an abuse of court process.

14. The applicants have urged this court to set aside the interim orders issued by the court on 29th October 2020. The court's powers to discharge, vary or set aside *ex parte* orders is provided for under **Order 40 Rule 7**. Although the court has unlimited discretion to exercise powers under this rule I concur with Munyao Sila J. in **Filista Chemaiyo Sosten V Samson Mutai[2012]eKLR** that such an application should not operate as an appeal. In that case, the learned judge rendered himself thus;

> *"I think the discretion under Order 40 Rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is because before issuing the injunction, the court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the court would not have issued the injunction in the first place. However, if the injunction was obtained by concealing facts which if put to the judge in first instance would have affected his judgment on whether or not to give the injunction, then a court can be inclined to vary or vacate the injunction in light of the new facts. So too if the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction."*

15. In the case of ***R v Kensington Income Tax Commissioners, ex p. Princess Edmond de Polignac [1917] 1 KB 486*** which was cited with approval by the Court of Appeal in ***Uhuru Highway Development Limited v Central Bank of Kenya & 2 others CIVIL APPEAL NO. 126 OF 1995 [1995] eKLR*** the court held;

> *"it is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage may have already obtained by him. That is perfectly plain and requires no authority to justify it."*

16. In addition to considering whether full disclosure was made, the court may also take into account the conduct of the party in whose favour the orders were issued in determining whether to interfere with the orders. This was the finding in ***Leah Nyambura Mburu v Barclays Bank Of Kenya Ltd[2012] eKLR*** where Odunga J. held;

> *"However, it is my view that an application under Order 40 rule 7 may be based on the events subsequent to the grant of the*

> *injunction such as the conduct of the applicant which conduct make the sustenance of the injunctive orders unwarranted. This may occur where for example the applicant's subsequent conduct is meant to frustrate the hearing and determination of the suit or where the applicant goes to sleep after the grant of the said injunctive orders. The Court does recognise that injunction is an equitable remedy and the subsequent events may render the continued retention of the injunction unreasonable or unjustifiable."*

17. The grounds upon which this court was urged to set aside the interim orders were that firstly, the orders granted had not been sought; secondly, the interim orders were never served upon the applicants within 3 days as required under Order 40 Rule 4 (3) and thirdly, that the order for appointment of a qualified physician to examine and file a report on the physical and mental status of the Subject was affront to the Subject's constitutional rights and the legal burden on the petitioners to prove that the applicant was mentally unstable.

18. In response, the petitioners, argued that although the general rule was that no man should be condemned unheard, there was immediate risk in this case that the Subject's estate would be interfered with.

19. As to the assertion by the applicant that the orders had not been served within time, the petitioners stated that the impugned orders had been signed by the Deputy Registrar on 3rd November 2020 and were served on 5th November 2020.

20. The petitioners further asserted that the claim before the court required an inquiry before the main petition could be heard on its merits.They submitted that court was required to question the Subject to determine whether they required protection, then send the Subject to the doctor for a report on their mental infirmity. They were adamant that this did not mean that the court was assisting the petitioner in his case but that the court was ensuring justice was served. Professionals directed by the court to conduct a certain exercise were, in their view, acting as officers of the court and were expected to be impartial in executing their mandates.

21. I agree with the petitioners' argument that while it is ideal for a court to hear each party before granting orders, there are times when the court will exercise its discretion to issue *ex parte* orders. **Order 40 Rule 4** of the **Civil Procedure Rules** empowers the court to grant *ex parte* orders where it is satisfied that the object of granting the injunction would be defeated by delay. Recourse for a party aggrieved by the issuance of *ex parte* orders may be had by applying for a discharge, variance or setting aside of the orders as provided under **Order 40 Rule 7**.

22. The contention by the applicants that the orders granted by the court had not been sought by the petitioners is easily disposed of by a cursory glance at the orders sought in the application dated 29th October 2020. Contrary to the applicants' assertion, the petitioners did seek temporary injunctions in their application, some of which were granted by the court as drawn by the petitioners.

23. The applicants also contend that the interim orders were not served within 3 days as required under **Order 40 Rule 4 (3).** The rule provides;

> *"(3) In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse."*

24. An affidavit of service filed on 10th November 2020 shows that the orders were served upon the land registrar, Nyamira County, the land registrar, Kisii County and the branch manager, Co-operative Bank, Kisii branch within 2 days of being issued. The orders were issued on 3rd November 2020 and served upon the aforementioned individuals on 5thNovember 2020. The affidavit of service is however silent on service upon the applicants.

25. Courts have held that failure to serve ex parte orders as provided under Order 40 Rule 4 (3) automatically extinguishes them.In **Jason Sore Shikuku v Christopher Naibey Chemengu [2018] eKLR** the court held that *ex parte* orders lapsed automatically by effluxion of law three days after they were issued. In **Immaculate Wambia Mungai v Fredrick Mwai Mwihia [2017] eKLR** the court held that, *"the order for injunction issued on 11th February 2016 "automatically" lapsed on 15th February 2016."*

26. However, in **Wanjala Minng Company Limited v National Land Commission & 3 others** the court held that while *ex parte* orders had to be served within 3 days, the spirit of Article 159 of the Constitution and the overriding objectives of the Civil Procedure Act required that the court take into account the circumstances of each case.

27. Other than the Subject who was the target of the *ex parte* orders, all the interested parties including the applicants had not been enjoined to the suit when the impugned orders were issued. The petitioners cannot therefore be faulted for failing to serve the orders upon interested parties who were not parties to the suit at the time the orders were issued.

28. That brings me to the third aspect of the first issue which is whether this court should set aside the order for appointment of a qualified physician to examine and file a report on the physical and mental status of the Subject. The applicants argue that this order was an affront to the Subject's constitutional right to privacy and dignity and the legal burden on the petitioners to prove that the applicant was mentally unstable.

29. The applicants relied on the case of ***In Re Estate of CH MISC. CIVIL CASE NO. 42 of 2016 [2017] eKLR*** where the court held as follows;

> *"In the matter of Gerison Kirima [2009] eKLR where the Court considered the definition of a person suffering from a mental disorder and concluded that: "the petitioner while bringing in a petition for orders under Section 26 of the Act has to show the court by providing medical reports to substantiate the averment made in the petition. The petitioner, when he comes before the Court, has*

to show prima facie that the person against whom the orders are sought is a person suffering from mental disorder so as to be incapable of coping the ordinary demands of life and the orders sought is for the welfare of the person concerned.

This satisfaction by the court has to be based on the medical reports annexed to the petition. I humbly agree that the court as per the provisions of the Act has no jurisdiction to enter into the arena of dispute so as to assist either party to substantiate their respective claims". The case of Re. S. (F. G.) (Mental patient) [1973] 1WLR where the court held that the orders sought can only be granted after a judge considering the medical evidence in support thereof. That no medical evidence was furnished by the petitioner's with their petition and therefore no reasonable cause has been laid to warrant a plenary hearing regarding the mental status of the applicant and to violate her constitutional rights and the case of Grace Wanjiru Munyinyi & Another vs Gideon Githunguri & 5 Others [2011] eKLR, where the court held that, "there is always a presumption that every person is of sound mind until the contrary is proved and the onus of proof is on the person who alleges the contrary……it is a very serious thing to say of and concerning a person, that such a person of unsound mind or suffers mental disorder. The law presumes that very person is mentally sound, unless and until he is proved mentally disordered."

30. The court further held;

"*I hold the same view as Justice Rawal[In The Matter of Gerishon Kamau Kirima] that for a petitioner to file a petition under the mental Health Act it is necessary that from the onset a medical report on the mental status of the alleged patient has to be attached. In this matter no medical report has been attached. One would then ask what is the petitioners' foundation in filing the petition. The petitioners in the petition have not sought to have her medically examined. They have averred that the applicant is a patient within the meaning of Section 2 of the Mental Health Act. Cap 286. For a party to come under section 2 there has to be a report on the mental status of the patient or some concrete evidence of her behaviour which would suggest that the person is mentally ill."*

31. The court in the case of ***In The Matter of The Mental Health Act Cap 248 of The Laws of Kenya &In The Matter of Gerishon Kamau Kirima Election Petition 36 OF 2009 (sic) [2009] eKLR***referred to by the court in the above authority further held;

"*As per general practice evolved, the petition under Section 26 of the Act is made ex-parte and I do find that the court shall be very wary of making an order which can go to the extent of deprivation of a person's liberty and property. I hope this precedent shall embalm a principle of safeguarding the rights of persons whatever their status are in the society."*

32. The petition before this court is for orders that the court appoint the petitioners as guardians of the affairs of JO with power to sign and file court documents and enter into deed and for appointment of the petitioners as managers of the estate of JO in accordance with the Mental Health Act ("the Act")

33. A petition for custody, management and guardianship is made pursuant to **Section 26** of the **Mental Health Act ("the Act").** Section 26 (1) of the Act empowers the court to make orders for the management of the estate of any person suffering from mental disorder; and for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.

34. An inquiry made under Section 26 (3) would enable the court to make an informed decision on whether it should grant orders for maintenance and management of the estate of the person against whom the orders are sought and whether it should issue custodial orders. The sub section provides;

"*(3) Whereupon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder."*

35. The court in ***In the matter of Gerison Kirima (supra)*** held that a petitioner seeking orders under Section 26 of the Act had to annex to his petition, a medical report showing that the person against whom the orders were sought was a person suffering from mental disorder to be entitled to the orders sought in the petition. In ***In Re Estate of CH (supra)*** the court held that for a party to claim that the person against whom the orders were sought was a patient, they had to present a report on the mental status of the patient or some tangible evidence of the person's behaviour which would suggest that the person was mentally ill.

36. The petitioners in this case did not annex a medical report to their petition. By their application dated 29th October 2020, they sought to have JO examined by a qualified physician to ascertain his mental and physical status. The petitioners annexed to their application a copy of JOs National Identification Card which showed that he was 95 years of age. They also attached a copy of an agreement for sale of NYARIBARI CHACHE / B / B / BOBURIA / 8872 executed JO in support of their claim that there was an attempt by certain people to waste the Subject's estate. They also referred the court to audio and video evidence in support of their claim that the Subject had a poor recollection of events.

37. For their part, the applicants annexed to their application dated 19th November 2020 an un-commissioned copy of a medical report from Galaxy Medicare Centre which indicated that the Subject was of sound mind and satisfactory physical condition but needed care due to his frail nature and age.

38. In the case of ***In Re Simon Peter Karanja Kiarie [2006] EKLR*** where there were counter accusations on the mental stability of the parties, the court ordered the parties to attach medical reports to confirm their mental status.

39. The law presumes that very person is mentally sound, unless and until he is proved mentally disordered. In this case, both sides have made compelling depositions for and against JOs mental illness. I cannot turn a blind eye on the claims made by the petitioners that JOs estate is in danger of being wasted and the fact there was no response to these assertions by the applicants.

40. As discussed elsewhere in this ruling, an inquiry into the mental soundness of an individual where there is reason to suggest that a person against whom orders for custody, management and guardianship is being sought can be made as provided under section 26 (3) of the Act. Further, under **Section 28** of the Act, the court is empowered to make any orders befitting the circumstances in a petition brought under the Act.

41. It has not been demonstrated that the petitioners failed to make full disclosure in seeking the orders sought to be set aside or that their conduct subsequent to the grant of the injunction makes the sustenance of the injunctive orders unwarranted. Additionally, the foregoing analysis of the first issue leads me to me to the conclusion that there was good ground to issue the *ex parte* orders, consequently the prayer to set aside the interim orders given by the court on 29th October 2020 is unmerited. It is worth of note that the power to set aside is not an appellate one and this court has no power to set aside the orders made herein on the basis that they were wrong.

42. On the second issue, the applicants argued that according to the Act, a person seeking orders under Section 26 had to demonstrate that the patient was sick and deserved care. It was submitted that in this case, no medical reports had been availed to show that the applicant was mentally ill and as such the petition did not disclose any cause of action and was fit for dismissal. The applicants relied on the case of ***In Re Estate of CH (supra)***in support of their submissions.

43. The petitioners on the other hand argued that striking out of proceedings was a serious matter which was only resorted to if the cause filed was hopeless or intended to abuse the court process. They submitted that the matter before the court was merited and ought to be heard and determined to finality.

44. **Order 2 Rule 15 (1)** of the **Civil Procedure Rules 2010** provides that:

> "(1) at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
>
> a) It discloses no reasonable cause of action or defence in law; or
>
> b) It is scandalous, frivolous or vexatious; or
>
> c) It may prejudice, embarrass or delay the fair trial of the action; or
>
> d) It is otherwise an abuse of the process of the court;
>
> And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

45. It is now settled that the power to strike out under Order 2 Rule 15 (1) above is to be exercised sparingly. A court is required to consider all facts but should not embark on the merits of the case as that would prejudice a fair hearing of the matter. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. That said, it would be unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. A plaintiff is entitled to pursue his claim however improbable his chances of success unless it can be shown shortly and conclusively that the plaintiff's claim is bound to fail or the suit is otherwise an abuse of the process of the court (See ***D.T. Dobie & Company (Kenya) Ltd –v- Muchina (1982)KLR, Kivanga Estates Limited v National Bank of Kenya Limited Civil Appeal No. 217 of 2015 [2017] eKLR and Yaya Towers Limited –v- Trade Bank Limited (In liquidation) (2000)eKLR***)

46. In ***D .T. Dobie & Company (Kenya) Ltd –v- Muchina (supra)*** Madan JA held;

> "*If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.*"

47. Striking out of a suit is a draconian step. Following the dictum of Madan JA above, I am of the considered view that the application to strike out the petition is premature without evidence on assertions made on the patient being presented before this court. The applicants' contention that the petition does not disclose a reasonable cause of action is untenable as the petitioners have demonstrated "a mere semblance of a cause of action" and the petition should be allowed to proceed in the interest of the welfare of the Subject and protection of his estate.

48. The special circumstances present in an application like the one before Court have not escaped the attention of this Court. Contrary to a 'normal' suit where a claim would ordinarily be one by a claimant against a specific respondent(s), an application under **S 26** of the **Mental Health Act** aims at protecting a person suffering from mental disorder and further the protection of his estate. Once sufficient evidence is adduced to demonstrate mental incapacity on the part of the subject person, the court would, pursuant to **Section 26(1)** of the **Act** make orders for guardianship of such person by any near relative or by any other suitable person while at the same time making orders for the management of his estate.

49. Where the mental status is contested, like in the instant suit, and in the interest of the subject person, the Court in my view is duty bound to inquire into the mental status of the patient under S 26(3) to enable an informed decision on whether it should grant the orders sought or not.

In so doing, the Court will be wary to keep the partisan interests of the contesting parties at bay while focusing on available evidence for or against the assertion of mental incapacity. Medical evidence would, certainly, rank high up in making the necessary determination.

50. As the inquiry is made, it would be of utmost necessity that the subject person and his estate is protected and preserved and conservatory orders become apt. I need to add that such inquiry must be expedited to avoid any prejudice on the subject person.

51. As a parting shot, I think it behoves on this Court to remind the antagonists that the outcome of the litigation herein is not for their interests but for the welfare of the subject person and his estate.

52. On the material before Court I am satisfied that the conservatory orders issued in this matter are necessary in the interim for the welfare of the subject and protection of the subject's estate pending a hearing of the case. I find too that the case merits full hearing.

53. The upshot is that the application dated 19th November 2020 is dismissed. The Orders of the Court dated 29th October 2020 issued under paragraph 3 and 4 are hereby extended. This matter shall be listed down for hearing on a priority basis.

DATED, SIGNED AND DELIVERED AT KISII THIS 30TH DAY OF JUNE 2021.

A. K. NDUNG'U

JUDGE