



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG’U, J

PETITION NO. 47 OF 2011

SOSPETER NYAKUNDI NYANGA’U..... PETITIONER

VERSUS

SAMUEL MOTANYA JECONIAH.....APPLICANT

RULING

1. Before Court is the application dated 16/7/2019 in which Samuel Motanya Jeconiah (Applicant) seeks orders;

a. Spent

b. That the court be pleased to remove Sospeter Nyakundi Nyang’au as the manager of the Estate of Adams Oseko and in his place appoint Samuel Motanya Jeconiah.

c. That costs of this application be borne by the petitioner.

2. The grounds are listed in support of the application viz;

1. Adams Oseko suffers from mental disorder and/or infirmity and by orders made on 29th July 2011 the petitioner was appointed and/or constituted the manager of his state and vested and conferred with the mandate to manage and/or takeover of all his assets, properties and/or liabilities.

2. The petitioner fraudulently charged all that property known as LR No. KISII MUNICIPALITY/BLOCK III/407 registered in the joint names of the petitioner and the said Adams Oseko to EcoBank Limited, to secure a personal loan in the sum of Kshs. 2,200,000/= which he failed to repay.

3. The said bank realized the security and sold the said property by way of public auction on or about 19th November 2013 and the purchaser is now threatening to take possession of the property by evicting Adams Oseko and his family who are in occupation.

4. The petitioner has failed and or neglected to discharge his duties in accordance with terms of his appointment and through his fraudulent activities the Estate of Adams Oseko risks being deprived of its interest and/or rights over the property.

5. The petitioner had mismanaged the power and/or authority granted by this honourable court and it is now necessary that the appointment if the petitioner as the manager of the estate of Adams Oseko be revoked and the applicant be constituted as the Manager of the said estate.

3. The application is further supported by affidavit of the applicant sworn on the 16/7/2019.

4. The application is opposed and Sospeter Nyakundi Nyanga’u (respondent) has in a replying affidavit averred that at the time he made the application to be appointed manager of the estate of Adams Oseko, he disclosed that he intended to charge the property, the subject matter of these proceedings.

5. He urges that he disclosed all material facts to the court which considered the application on merit and granted orders sought. He asserts that he took the loan of Sh 2,200,000 but the failure to pay arose from breach of a contract he had with St. Elizabeth Girls’ Secondary School amounting to Ksh. 15,918,619.50 who refused to pay him Sh 4,565,655.52.

6. Had he been paid, his intention was to develop land known as Kisii Municipality/Block III/407 and also to maintain Adams Oseko. He adds that he has been catering for the medical expenses of Adams Oseko and it is therefore not true that he never used the proceeds of the loan for the benefit of Adams Oseko.
7. He acknowledged that he property was sold by Eco Bank Ltd in exercise of its statutory power of sale but states that the said power was exercised unlawfully.
8. He concludes that he verily believes that he is not conflicted.
9. The application was disposed off by way of written submissions.
10. I have had occasion to consider the application, the supporting grounds/affidavit as well as the replying affidavit.
11. Of determination is whether the respondent remains a fit person to continue being the manager of the Estate of Adams Oseko and if in the negative whether Samuel Motanya Jeconiah should be appointed in his place.

12. **Section 34** of the **Mental Health Act** provides;

“Section 34 (1) The court may, for any sufficient cause, remove any manager or guardian appointed by it under this Part and may appoint any other fit person in his place; and may make such order as it considers necessary to ensure that the person removed transfers the property under his care, and of which he was manager, to his successor and accounts to the successor for all money received or disbursed by him in connection with the property.

(2) The court may also, for any sufficient cause, remove the guardian of a person appointed by it and appoint any other fit person in his place.

13. The position of a manager appointed by the court under **S 26** of the **Mental Health Act** is a fiduciary one.

In **re VML [2015] eKLR** the court held;

“Section 26 which has been quoted herein before and Section 29 of the Act suggest that one of the reasons why it may be necessary to dispose of the property of a person suffering from a mental disorder is to apply the proceeds thereof for the maintenance of the patient

This order is informed by the provisions of subsection (4) of section 27 which states;

(4) For the purposes of this Act and the Penal Code (Cap.63), a manager shall be deemed to be a trustee under any other law for the time being in force

This provision of the law creates a trust relationship between the petitioners and VML and thus the property vested in them in the circumstances of this petition can only be held on behalf of and for the benefit of the cestui que trust who in this case is VML.”

14. In our instant suit, the respondent was appointed a manager of the affairs of the estate of Adams Oseko. He sought permission to secure a loan through charging LR No. Kisii Municipality/Block III/407 registered in his name jointly with Adams Oseko to Eco Bank.
15. The respondent has attempted to show that he entered into a contract with St. Elizabeth Girls' Secondary School valued at Sh 15,918,619.50. he avers that the school failed to pay him Sh 4,565,655.52.
16. No iota of evidence of how the Sh 2,200,000 loan was applied is given. As a trustee, the respondent was duty bound to account to the estate of Adams Oseko on the use of the loan proceeds. There is no indication of how much out of the contract sum of Kshs 15,918,619.50 was ever paid to the respondent (if at all) and neither, most importantly, is there any evidence of the application of the said loan for the benefit of Adams Oseko.
17. As it were, the trustee got into borrowing contract with Eco Bank. He defaulted in payment of the loan. The bank proceeded to realize the security thus exposing the **cestui que trust** to great prejudice.
18. Above all, in all these dealings the respondent has failed to give an account of how he applied the monies in the business venture and his assertion that he has been catering for medical needs of Adams Oseko is a hollow statement bereft of any evidence.
19. In the circumstances of this case, I note that there is sufficient cause to remove the respondent as a manager of the estate of Adams Oseko. He has breached the fiduciary duty bestowed on him. His continued role as the manager of the estate of Adams Oseko is no longer tenable.
20. I find the application herein meritable. I allow the notice of motion dated 6/7/2019 in terms of prayer 2. The respondent is to bear the costs of this application.

Dated, signed and delivered at Kisii this 26th day of February, 2020.

A. K. NDUNG'U

JUDGE